Global Investigations Review

The Practitioner's Guide to Global Investigations

Second Edition

Editors
Judith Seddon, Clifford Chance
Eleanor Davison, Fountain Court Chambers
Christopher J Morvillo, Clifford Chance
Michael Bowes QC, Outer Temple Chambers
Luke Tolaini, Clifford Chance

2018

The Practitioner's Guide to Global Investigations

Second Edition

Editors:

Judith Seddon

Eleanor Davison

Christopher J Morvillo

Michael Bowes QC

Luke Tolaini

GIR

Global Investigations Review

Publisher
David Samuels

Senior Co-Publishing Business Development Manager
George Ingledew

Project Manager
Edward Perugia

Editorial Coordinator
Iain Wilson

Head of Production
Adam Myers

Senior Production Editor
Simon Busby

Copy-editor
Jonathan Allen

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.globalinvestigationsreview.com

ISBN 978-1-912377-34-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

ALLEN & OVERY LLP

ANAGNOSTOPOULOS

ARCHER & ANGEL

BAKER McKENZIE LLP

BANQUE LOMBARD ODIER & CO LTD

BARCLAYS BANK PLC

BCL SOLICITORS LLP

BDO USA, LLP

BROWN RUDNICK LLP

BRUNSWICK GROUP LLP

CADWALADER, WICKERSHAM & TAFT LLP

CLIFFORD CHANCE

CLOTH FAIR CHAMBERS

CORKER BINNING

DEBEVOISE & PLIMPTON LLP

DECHERT LLP

DREW & NAPIER LLC

FOUNTAIN COURT CHAMBERS

FOX WILLIAMS LLP

FRESHFIELDS BRUCKHAUS DERINGER

GIBSON, DUNN & CRUTCHER LLP

GOODWIN

HERBERT SMITH FREEHILLS

HOGAN LOVELLS

KINGSLEY NAPLEY LLP

KNOETZL

MATHESON

NAVACELLE

NOKIA CORPORATION

NORTON ROSE FULBRIGHT

OUTER TEMPLE CHAMBERS

PINSENT MASONS LLP

PROSKAUER ROSE LLP

QUINN EMANUEL URQUHART & SULLIVAN, LLP

RICHARDS KIBBE & ORBE LLP

ROPES & GRAY LLP

RUSSELL McVEAGH

SCHELLENBERG WITTMER LTD

SIMMONS & SIMMONS LLP

SKADDEN, ARPS, SLATE, MEAGHER & FLOM (UK) LLP

SOFUNDE OSAKWE OGUNDIPE & BELGORE

SULLIVAN & CROMWELL LLP

WILLKIE FARR & GALLAGHER (UK) LLP

WILMER CUTLER PICKERING HALE AND DORR LLP

Publisher's Note

The Practitioner's Guide to Global Investigations is published by Global Investigations Review (www.globalinvestigationsreview.com) – a news and analysis service for lawyers and related professionals who specialise in cross-border white-collar crime.

The guide was suggested by the editors to fill a gap in the literature – namely, how does one conduct such an investigation, and what should one have in mind at various times?

It will be published annually as a single volume and is also available online, as an e-book and in PDF format.

The volume

This book is in two parts.

Part I takes the reader through the issues and risks faced at every stage in the life cycle of a serious corporate investigation, from the discovery of a potential problem through its exploration (either by the company itself, a law firm or government officials) all the way to final resolution – be that in a regulatory proceeding, a criminal hearing, civil litigation, an employment tribunal, a trial in the court of public opinion, or, just occasionally, inside the company's own four walls. As such it uses the position in the two most active jurisdictions for investigations of corporate misfeasance – the United States and the United Kingdom – to illustrate the approach and thought processes of those who are at the cutting edge of this work, on the basis that others can learn much from their approach, and there is a read-across to the position elsewhere.

Part I is then complemented by Part II's granular look at the detail of various jurisdictions, highlighting among other things where they vary from the norm.

Online

The guide is available to subscribers at www.globalinvestigationsreview.com. Containing the most up-to-date versions of the chapters in Part I of the guide, the website also allows visitors to quickly compare answers to questions in Part II across all the jurisdictions covered.

The publisher would like to thank the editors for their exceptional energy and vision in putting this project together. Together we welcome any comments or suggestions from readers on how to improve it. Please write to us at:
co-publishing@globalinvestigationsreview.com.

Contents

PART II
GLOBAL INVESTIGATIONS AROUND THE WORLD

Preface

The history of the global investigation

Over the past decade, the number and profile of multi-agency, multi-jurisdictional regulatory and criminal investigations have risen exponentially. Naturally, this global phenomenon exposes corporations and their employees to greater risk of potentially hostile encounters with foreign law enforcement authorities and regulators than ever before. This is partly owing to the continued globalisation of commerce, as well as the increasing enthusiasm of some prosecutors to use expansive theories of corporate criminal liability to extract exorbitant penalties against corporations as a deterrent, and public pressure to hold individuals accountable for the misconduct. The globalisation of corporate law enforcement, of course, has also spawned greater coordination between law enforcement agencies domestically and across borders. As a result, the pace and complexity of cross-border corporate investigations has markedly increased and created an environment in which the potential consequences, both direct and collateral, for individuals and businesses are of unprecedented magnitude.

The guide

To aid practitioners faced with the myriad and often unexpected challenges of navigating a cross-border investigation, this book brings together for the first time the perspectives of leading experts from across the globe.

The chapters that follow in Part I of the guide cover in depth the broad spectrum of the law, practice and procedure applicable to cross-border investigations in both the United Kingdom and United States. Part I tracks the development of a serious allegation (whether originating from an internal or external source) through its stages of development, considering the key risks and challenges as matters progress; it provides expert insight into the fact-gathering stage, document preservation and collection, witness interviews, and the complexities of cross-border privilege issues; and it discusses strategies to successfully resolve cross-border probes and manage corporate reputation throughout an investigation.

In Part II of the book, local experts from national jurisdictions respond to a common set of questions designed to identify the local nuances of law and practice that practitioners may encounter in responding to a cross-border investigation.

In the first edition we signalled our intention to update and expand both parts of the book as the law and practice evolved. For this second edition we have revised the chapters to reflect recent developments. In the United Kingdom, some eagerly awaited English court decisions have raised significant legal privilege implications, and new corporate offences related to tax evasion have been introduced. In the United States, despite a new administration, the FCPA's enhanced enforcement project – the Pilot Program – has been extended. We have also included substantive chapters covering extraterritoriality considerations from both the US and UK perspectives. Further, Part II now covers 16 jurisdictions, including China and Nigeria, and we expect subsequent editions to have an even broader jurisdictional scope.

The Practitioner's Guide to Global Investigations has been designed for external and in-house legal counsel; compliance officers and accounting practitioners who wish to benchmark their own practice against that of leaders in the fields; and prosecutors, regulators and advisers operating in this complex environment.

Acknowledgements

The Editors gratefully acknowledge the insightful contributions of the following lawyers from Clifford Chance: Chris Stott, Zoe Osborne and Oliver Pegden in London; Megan Farrell, Jayla Jones, Delphine Miller, Amy Montour and Mary Jane Yoon in New York; and Hena Schommer and Michelle Williams in Washington, DC.

The Editors would also especially like to thank Clifford Chance lawyers Tara McGrath (who went above and beyond to bring this book together) and Kaitlyn Ferguson for their significant contributions.

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini
November 2017
London and New York

Part I

Global Investigations in the United Kingdom and the United States

1

Introduction

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC and Luke Tolaini[1]

As an introduction to Part I of the guide, this chapter addresses UK and US law regarding two critical concepts that a corporate facing an investigation in either or both jurisdictions will need to consider at the outset: corporate criminal liability and double jeopardy. This chapter also sets forth in summary the priorities and challenges corporations face at each stage of an investigation – topics that are explored in more detail in the chapters that follow.

Bases of corporate criminal liability 1.1

When corporate misconduct that potentially implicates multiple jurisdictions is uncovered, a critical preliminary question is: what is the test, in each jurisdiction, for corporate criminal liability? Not all countries have corporate criminal liability, but for those jurisdictions that do, it typically rests on the premise that the acts of certain employees can be attributed to the corporation. However, the category of employees that can trigger corporate liability differs between jurisdictions – in some jurisdictions, it is limited to those with management responsibilities, whereas in others the category of employees who can trigger corporate liability is much broader. Generally speaking, the act triggering corporate liability must occur within the scope of the employee's employment activities. The act must also generally be done in the interest of, or for the benefit of, the corporation. The difference between theories of liability across jurisdictions inevitably poses challenges and complicates a company's strategy for dealing with a global investigation, and in some instances can determine the outcome.

1 Judith Seddon, Christopher J Morvillo and Luke Tolaini are partners at Clifford Chance; Eleanor Davison is a barrister at Fountain Court Chambers; and Michael Bowes QC is a barrister at Outer Temple Chambers.

1.1.1 Corporate criminal liability in the United Kingdom

In the United Kingdom, there are two main techniques to attribute to a corporate the acts and states of minds of the individuals it employs.

The first is by use of the 'identification principle' whereby, subject to some limited exceptions, a corporate may be held liable for the criminal acts of those who represent its directing mind and will and who control what it does. The relevant test is set out in the leading case of *Tesco Ltd v. Nattrass*:

> *Where a limited company is the employer difficult questions do arise in a wide variety of circumstances in deciding which of its officers or servants is to be identified with the company so that his guilt is the guilt of the company. I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent.*[2]

2 *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153; reaffirmed in *Attorney General's Reference (No. 2 of 1999)* [2000] 2 Cr App R 207 at 217-218 in which Rose LJ stated: '*Tesco v. Nattrass* is still authoritative . . . and it is impossible to find a company guilty unless its alter ego is identified. None of the authorities since *Tesco v. Nattrass* . . . supports the demise of the doctrine of identification: all are concerned with statutory construction of different substantive offences and the appropriate rule of attribution was decided having regard to the legislative intent, namely whether Parliament intended companies to be liable. There is a sound reason for a special rule of attribution in relation to statutory offences rather than common law offences, namely there is, subject to a defence of reasonable practicability, an absolute duty imposed by the statutes. The authorities on statutory offences do not bear on the common law principle in relation to manslaughter. Lord Hoffmann's speech in *Meridian* is a re-statement not an abandonment of existing principles . . . .'; and *Environment Agency v. St Regis Paper Co. Ltd* [2012] 1 Cr App R 177, at paras. 10-12 in which, at para. 12, Moses LJ said: 'It seems to us that as a matter of statutory construction it is impossible to impose criminal liability for a breach of Regulation 32(1)(g) to the company in circumstances other than those where an intention to make a false entry can be attributed by operation of the rule in *Tesco Supermarkets*. There is, in our view, no warrant for imposing liability by virtue of the intentions of one who cannot be said to be the directing mind and will of St. Regis Paper Company.' The identification principle was reaffirmed by the Court of Appeal in *R v. A Ltd, X, Y* [2016] EWCA Crim 1469.

It is for the judge to decide, as a matter of law, whether there is evidence on which a jury could be sure that a particular individual was a 'directing mind' within the *Tesco* principles; and, if there is such evidence, the jury must then be sure that the particular individual was in fact a directing mind for the purposes of his particular actions. A directing mind is not necessarily limited to board directors; it may also be found in a delegate who has full discretion to act independently of instructions from the directors. In short, under the identification principle, before a corporate can be found guilty of a criminal offence, someone who represents its directing mind and will must also be found guilty. There cannot be an aggregation of acts or omissions to attribute the company with criminal conduct; rather, the criminal act or omission must be performed by a single person who can be identified with the corporate for it to be liable.

The second technique of attributing liability to a corporate under English law is that of vicarious liability. Although, in general, in the United Kingdom a corporate entity may not be convicted for the criminal acts of its inferior employees or agents, there are some exceptions, the most important of which concerns statutory offences that impose an absolute duty on the employer, even where the employer has not authorised or consented to the criminal act.[3]

Most significantly, statutory developments in the United Kingdom, such as the introduction of the Bribery Act 2010 and more recently Part 3 of the Criminal Finances Act 2017 (which came into force on 30 September 2017), represent a policy shift by introducing the strict liability offences of failure to prevent by an 'associated person' committed on behalf of the corporate, unless the corporate can demonstrate that it had adequate (or reasonable) procedures in place to prevent such an offence occurring. These statutes have broad jurisdictional reach. Under the Bribery Act for example, a corporate, falling within the definition of a commercial organisation under the Bribery Act, could be guilty even where no conduct occurred in, and where the associated person has no connection with, the United Kingdom.

The policy of the legislation to improve corporate governance is clear: Ministry of Justice guidance for the Bribery Act refers to the need for a corporate to create an 'anti-bribery culture'.[4] Similarly, a corporate is guilty of the offence of corporate manslaughter under the Corporate Manslaughter and Homicide Act 2007 if the way in which its activities are managed or organised causes a person's death where a duty of care was owed. Guidance issued for the corporate offences of failure to prevent the criminal facilitation of tax evasion, which closely mirrors the Bribery Act guidance, also refers to the culture of the organisation. For example, top level commitment should foster 'a culture within the relevant body in which activity

3 These statutory offences are referred by Rose LJ in *Attorney General's Reference (No. 2 of 1999)* [2000] 2 Cr App R 207 at 217-218, at footnote 2 above.

4 Ministry of Justice Guidance on the Bribery Act 2010, issued pursuant to section 9 of the Bribery Act 2010.

intended to facilitate tax evasion is never acceptable.'[5] Each piece of legislation and accompanying guidance invites consideration of the corporate's culture – its attitudes, policies, systems and practices. The test for liability is closer to the test in the regulatory context where liability of a corporate is wider and based on broad principles. In respect of the new tax offences, the UK government has stated that it expects 'rapid implementation' with companies expected to have a clear time frame and implementation plan in place by the time the offences came into force.

It may be that this model of corporate criminal liability expands, in due course, to all economic crimes; on 13 January 2017 the government issued a Call for Evidence (which ran until the end of March 2017) to examine whether the law on corporate criminal liability in the United Kingdom needs reform. The government said that it was seeking to establish whether there is evidence of corporate crime going unpunished because of the current impediments presented by the identification doctrine, as well as evidence on the costs and benefits of further reform, bearing in mind the significant changes made in certain sectors to tackle misconduct. This, it indicated, would inform government decisions over whether to make further reforms.[6] It set out five options for reform: amendment of the identification doctrine; a strict (vicarious) liability doctrine; a strict (direct) liability offence (effectively a widening of the current section 7 offence); incorporation of the failure-to-prevent wording into substantive offences, but with the burden on the prosecution to establish that the corporate had not taken adequate steps to prevent the unlawful conduct; and possible sector-by-sector regulatory reform (in the form of implementation in other sectors of similar arrangements to the new individual accountability regimes introduced for financial services in the United Kingdom). It is yet to be seen what impact political uncertainty in the United Kingdom will have on this thinking. In the deferred prosecution agreement (DPA) context, the current high threshold for establishing corporate criminal liability in the United Kingdom is a problem inherent in the DPA regime: to enter into a DPA, a prosecutor must satisfy the evidential test, which requires either that the evidential stage of the Full Code Test in the Code for Crown Prosecutors is satisfied[7] or, that 'there is at least a reasonable suspicion based upon some admissible evidence that [the corporate] has committed the offence, and there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance

5 Tackling tax evasion: Government guidance for the corporate offence of failure to prevent the criminal facilitation of tax evasion, 1 September 2017, at page 25.

6 Ministry of Justice, Corporate Liability for Economic Crime: Call for Evidence, Consultation Document at p. 4, https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/supporting_documents/corporateliabilityforeconomiccrimeconsultationdocument.pdf.

7 Namely that prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case that does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

with the Full Code Test.'[8] For that reason many expected DPAs to be used principally for section 7 offences, where the identification principle does not present an obstacle to satisfying the evidential test. The prospect for DPAs to be used for the proposed failure to prevent the facilitation of tax evasion offence is specifically laid out in the government's guidance.[9] Both the first two DPAs in the United Kingdom were for section 7 offences, although XYZ Ltd – anonymised because of ongoing criminal proceedings against individuals – also accepted misconduct in relation to conspiracies to corrupt and to bribe. However, XYZ Ltd was a small company and, as Sir Brian Leveson, President of the Queen's Bench Division, found, 'there is no question but that XYZ spiralled into criminality as a result of the conduct of a small number of senior executives bending to the will of agents.'[10] In other words, the identification principle did not, in that case, present a problem. The Call for Evidence recognises that 'the effectiveness of the DPA as an alternative disposal is dependent on there being a realistic threat of prosecution', which, they conclude, 'lends weight to the suggestion that the "failure to prevent" model would offer a more realistic threat of successful prosecution than a case built on the application of the identification doctrine.'[11] The failure to prevent model as enacted in the Bribery Act and now the Criminal Finances Act is described in the Call for Evidence as having 'some clear advantages'. Apart from being readily applicable to offending by organisations of any size, the government is explicit in the power of the model to effect corporate cultural change by acting as 'an incentive to companies to include the prevention of economic crime as an integral part of corporate governance and, should it afford a more realistic threat of prosecution, it might enhance the effectiveness of DPAs as an alternative to criminal prosecution.'[12]

Corporate criminal liability in the United States 1.1.2

The United States has long recognised principles of corporate liability based on common law and statutory bases.[13] The application of these concepts, however, has evolved over time and was most recently shaped by the global financial crisis of 2007–2008, where the spectre of industry and market collapse loomed large. Today, increasing emphasis on individual liability and corporate culture continues to shape and refine this area of law.

In the United States, the common law of agency plays an important role. Specifically, under principles of *respondeat superior*, a company may be held

8 DPA Code of Practice, at para. 1.2(i)(b)(https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/).

9 Government Guidance, at p. 13. See footnote 5, above.

10 *SFO v. XYZ Ltd* Case No. U20150856, (Preliminary Redacted) Approved Judgment, dated 8 July 2016, at para. 34.

11 https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/supporting_documents/corporateliabilityforeconomiccrimeconsultationdocument.pdf at p. 23.

12 Ibid. at p. 21.

13 Charles Doyle, Congressional Research Service, Corporate Criminal Liability: An Overview of Federal Law 1 (2013).

vicariously liable for the illegal acts of any of its agents (including employees and contract personnel) so long as those actions were within the scope of the agents' duties and were intended, even if only in part, to benefit the corporation.[14] An act is considered 'within the scope of an agent's employment' if the individual commits the act as part of his or her general line of work and with at least the partial intent to benefit the corporation.[15] The corporation need not receive an actual benefit and may be liable for these offences even if it directs its agent not to commit the offence.[16]

Moreover, even where no single employee has the requisite intent or knowledge to satisfy the *scienter* element of a crime, courts have recognised a 'collective knowledge doctrine' – where several employees collectively know enough to satisfy the intent or knowledge requirement, courts can impute this collective intent and knowledge to the corporation.[17] While historically courts have used the doctrine to establish knowledge on the part of a corporation, in recent years the doctrine has also been used to establish a corporation's intent (i.e., to establish whether the corporation acted wilfully).[18] This doctrine is not universally accepted and some courts have limited it to circumstances where the company was flagrantly indifferent to the offences being committed.[19]

Additionally, beyond the common law principle of *respondeat superior*, some legislation imposes criminal liability for companies, including in the fields of environmental and antitrust law.[20] Such statutes have the dual effects of forcing com-

14 *Jones v. Federated Fin. Reserve Corp.*, 144 F.3d 961, 965 (6th Cir. 1998). See also *Hamilton v. Carell,* 243 F.3d 992, 1001 (6th Cir. 2001).

15 *United States v. Singh*, 518 F.3d 236, 249 (4th Cir. 2008) (citing *United States v. Automated Med. Labs.*, 770 F. 2d 399, 406–47 (4th Cir. 1985)).

16 *Automated Med. Labs*., 770 F.2d at 407.

17 *United States v. Sci. Applications Int'l Corp.*, 555 F. Supp. 2d 40, 55–56 (D.C. Cir. 2008). See also *United States v. Bank of New England, N.A.*, 821 F.2d 844, 856 (1st Cir. 1987); *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738–39 (W.D. Va. 1974).

18 See *United States v. Pac. Gas & Elec. Co.*, No 14-CR-00175-TEH, 2015 WL 9460313 (N.D. Cal. 23 December 2015). There, a grand jury charged the Pacific Gas & Electric Company with violating the Pipeline Safety Act after a gas line erupted causing several deaths and injuries. The company moved to dismiss on the basis that the grand jury received incorrect instructions on, *inter alia*, collective intent. In denying the motion to dismiss, the court held that the collective knowledge of the corporation's employees demonstrated that they wilfully disregarded their legal duty to abide by the safety standards outlined in the Act. Id. at *3. Following a jury conviction on five counts, the company sought to have the case set aside; however, the court held that a reasonable juror could have found wilfulness beyond a reasonable doubt based on the evidence presented. *United States v. Pac. Gas & Elec. Co.*, No. 14-CR-00175-TEH, 2016 WL 6804575, at *3 (N.D. Cal. 17 November 2016). See also *United States v. FedEx Corp.*, 2016 U.S. Dist LEXIS 52438 (N.D. Cal. 18 April 2016) (denying FedEx's motion to dismiss, which was premised on the ground that the jury received incorrect instructions on collective intent and collective knowledge).

19 *T.I.M.E.-D.C., Inc.*, 381 F. Supp. at 740.

20 See, e.g., *United States v. Hopkins*, 53 F.3d 533 (2d Cir. 1995) (imposing a strict liability standard for a violation of the Clean Water Act); *United States v. Weitzenhhoff*, 35 F.3d 1275 (9th Cir. 1993). Contra *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996) (suggesting that there is a *mens rea* requirement for violations of the Clean Water Act). See also James Swann and Alex Ruoff,

panies to internalise the costs of their wrongdoing and of increasing the deterrent effect of the law or regulation. For example, in a field like environmental law, where misconduct can have tremendous collateral and long-term consequences, the imposition of liability on the company acts as a strong incentive for corporate monitoring of employees and thorough due diligence and risk assessment.

Although corporate criminal liability has been a feature of US law since the nineteenth century,[21] the criminal prosecution of corporations slowed abruptly and significantly – although temporarily – following the ill-fated prosecution of Arthur Andersen in 2002; the conviction (subsequently overturned by the US Supreme Court) resulted in the firm's collapse and job losses for many thousands of innocent employees.[22] In the aftermath of the *Arthur Andersen* case, prosecutors became far more hesitant to unleash the brute force of criminal charges against companies.[23] Although limited prosecutions continued following *Arthur Andersen*, they were further reduced in number when, in the wake of the financial meltdown of 2007–2008, many feared that prosecuting big banks and large employers might lead to further economic turmoil.[24] This idea, that an entity might be 'too big to fail', is now widely rejected by both prosecutors and the public, and there has since been a marked uptick in prosecutions. Today, prosecutors are generally less willing to accept the prospect of dire collateral consequences as justification for not pursuing criminal charges against corporations and have required guilty pleas from large corporations, previously considered 'too big to jail'. As corporations survive – and even thrive – in the wake of guilty pleas, the spectre of the *Arthur Andersen* case recedes and the rigour with which prosecutors pursue companies continues to increase.[25]

In recent years, the United States has increasingly placed emphasis on an organisation's compliance culture and internal controls. The result is that self-reporting, full acceptance of responsibility and the disclosure of all relevant

---

Self-Referral Law Seen as Barrier to New Provider Agreements, Bloomberg BNA (5 May 2016), http://www.bna.com/selfreferral-law-seen-n57982070764/ (discussing the physician self-referral law's imposition of strict liability).

21 For a discussion of the history and development of corporate criminal liability in the United States, see Kathleen F. Brickey, Corporate Criminal Accountability: A Brief History and an Observation, 60 Wash. U. L.Q. 393, 404–15 (1982).

22 *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). For a complete history of Arthur Andersen LLP, see Susan E. Squires et al., Inside Arthur Andersen: Shifting Values, Unexpected Consequences (2003).

23 See Gabriel Markoff, Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century, 15 U. Pa. J. Bus. L. 797, 805–07 (2013).

24 See Gretchen Morgenson & Louise Story, Behind the Gentler Approach to Banks by US, N.Y. Times, 7 July 2011, at A1.

25 See, e.g., Peter J. Henning, Seeking Guilty Pleas From Corporations While Limiting the Fallout, N.Y. Times Dealbook (5 May 2014), http://dealbook.nytimes.com/2014/05/05/seeking-guilty-pleas-from-corporations-while-limiting-the-fallout/; Francine McKenna, Why the Ghost of Arthur Andersen No Longer Haunts Corporate Criminals, MarketWatch (21 May 2015), http://www.marketwatch.com/story/why-the-ghost-of-arthur-andersen-no-longer-haunts-corporate-criminals-2015-05-21.

facts concerning culpable individuals (regardless of seniority) now form the basis on which the government awards co-operation credit. The Department of Justice's (DOJ) US Attorneys' Manual, the Security and Exchange Commission's (SEC) Seaboard factors, US Sentencing Guidelines, and most recently the so-called 'Yates Memorandum', each of which is discussed in detail in various later chapters, all reflect this pronounced shift in enforcement priorities. Although the price of attaining corporate co-operation credit is often painfully high, most companies have no choice but to tolerate it; co-operation typically provides the best prospect for a company to prevent a criminal charge, minimise financial penalties and avoid other harsh collateral consequences, such as the imposition of a monitor. Still, co-operation is not for the faint of heart, and any company operating in the United States or subject to US jurisdiction should carefully consider the far-reaching consequences – both good and bad – of setting off down the often treacherous path of co-operation. Once a company voluntarily discloses misconduct to the government, the ability to defend the case and control the process is effectively relinquished, and a company will find it very difficult to withhold sensitive, embarrassing or even harmful information. Given the highly uncertain alternative to co-operation, however, most companies accept and embrace this new reality from the start of an internal investigation and understand that factual findings far more often than not – if they involve potential criminal misconduct – will be presented to law enforcement.[26]

1.2 Double jeopardy

Another key question in any global investigation – where misconduct crosses borders and where more than one enforcement authority may seek to assert jurisdiction – is the extent to which different authorities can sanction the same or similar conduct. While domestic constitutional provisions on double jeopardy are similar between nation states, no universally accepted international norm exists and the protection afforded by the laws in one country may offer no protection in another. This can present a major difficulty to achieving a satisfactory global settlement for a client.

The doctrine of double jeopardy is that a person should not be tried twice for the same offence.[27] Its underlying objective is to bring finality to criminal proceedings against individuals and companies in specific circumstances. Double jeopardy applies to criminal proceedings, but has been held by the European Court of Human Rights (ECtHR) to encompass an administrative penalty, in circumstances where that penalty was classified as a criminal penalty because of the nature of the charges and the severity of the punishment.[28]

26 U.S. Dep't of Justice, United States Attorneys' Manual 9-28.700 (2015).

27 The *ne bis in idem* or double jeopardy principle is well established both in EU law and under the European Convention on Human Rights. The phrase is derived from the Roman law maxim *nemo debet bis vexari pro una et eadem causa (*a man shall not be twice vexed or tried for the same cause).

28 *Grande Stevens and Others v. Italy* (4 March 2014) Application Nos. 18640/10, 18647/10, 18668/10 and 18698/10. The judgment is not final.

In the United Kingdom, there are two essential conditions for the doctrine to apply. First, the case must be 'finally disposed of' and second, any penalty imposed must actually have been enforced or be in the process of being enforced. The rationale for the doctrine is that it confers protection on the person (individual or corporate) from the risk of repeated prosecution by the State with its greater resources.[29] Reflecting similar concerns, the concept of double jeopardy in the United States is rooted in the Fifth Amendment to the US Constitution, which reads in relevant part: 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.'[30] These twenty words have generated tens – if not hundreds – of thousands of pages of case law and are worthy of a treatise in themselves. Distilled to its essence, however, double jeopardy in the United States applies to prohibit subsequent prosecution or multiple punishments of an individual or corporation for the same conduct.[31] Nevertheless, the doctrine of double jeopardy is complicated by the question of dual sovereignty, which holds that double jeopardy's bar against successive prosecution for the same conduct does not apply when the prior prosecution was brought by a separate sovereign, for example, the US government is not barred from bringing a case where a state or another country has already prosecuted the defendant for the same conduct or *vice versa*.

Double jeopardy in the United Kingdom 1.2.1

In England, the principle of double jeopardy is well established and has its origins in 12th century common law and ecclesiastical law. The modern principle of double jeopardy in English law was set out by the Divisional Court in *Fofana v. Deputy Prosecutor Thubin Tribunal de Grande Instance de Meaux, France*:

> *The authorities establish two circumstances in English law that offend the principle of double jeopardy:*
>
> *Following an acquittal or conviction for an offence, which is the same in fact and law* – autrefois acquit *or* convict*; and following a trial for any offence which was founded on 'the same or substantially the same facts', where the court would normally consider it right to stay the prosecution as an abuse of process and/or unless the prosecution can show 'special circumstances' why another trial should take place.*[32]

29 The protection is not absolute. A second trial is permitted in defined circumstances. In the United Kingdom, a prosecutor will seek a retrial if a jury has been unable to reach a verdict in the initial trial. A further trial in murder cases may also be permitted in circumstances where compelling new evidence comes to light.

30 U.S. Const. amend. V.

31 See generally Ernest H. Schopler, Annotation, Supreme Court's Views of Fifth Amendment's Double Jeopardy Clause Pertinent to or Applied in Federal Criminal Cases, 50 L. Ed. 2d 830 (2012).

32 [2006] EWHC 744 (Admin), Judgment, at para. 18.

The Divisional Court referred expressly to the United Kingdom's adoption of Article 54 of the Schengen Convention and its underlying rationale.[33] This is particularly important, as Article 54 states that a person (or company) whose case has been 'finally disposed of' by one Contracting Party may not be prosecuted by another for the 'same acts', provided that any penalty imposed has been enforced or is in the process of being enforced.[34]

Throughout the judgment, the court stressed the need to look at the underlying acts behind each charge, rather than the label of the charge itself. In the event, the court stayed the extradition proceedings on the basis that, although the extradition offence specified in the warrant was not based exactly, or solely, on the same facts as those charged in the UK indictment, there was such significant overlap between them as to require the proceedings to be stayed.[35]

In the case of DePuy International Limited, the Serious Fraud Office (SFO) applied the double jeopardy principle and confirmed that it will likely arise where there is or has been an investigation into the defendant's conduct by another authority overseas and the essence of a criminal offence in England and Wales is the same offence for which the defendant already faces trial, or has been acquitted or convicted. DePuy was a UK subsidiary of Johnson & Johnson, a US company that self-reported to the DOJ and the SEC bribery of foreign officials by DePuy, as well as other offences that did not involve the company, under the FCPA. Johnson & Johnson agreed to a DPA with the DOJ covering the FCPA violations and a civil sanction with the SEC that encompassed criminal and civil fines amounting to US$70 million.

The DOJ informed the SFO of the criminal conduct and the SFO commenced an investigation into DePuy and Mr Dougall, the company's marketing manager. The SFO took the view that the DPA agreed by the parent company with the DOJ had the legal character of a formally concluded prosecution that punished the same conduct that had formed the basis of the SFO investigation. It determined that the rule against double jeopardy prevented any further criminal sanction being applied in the United Kingdom and instead pursued the company using a civil route to obtain the proceeds of crime. The civil sum obtained by the SFO took into account the global settlement in the United States including the civil fines paid and recovered of £4.8 million.

Whether a DPA under the United Kingdom's regime would qualify for double jeopardy protection remains an open question. Although entry into a DPA does not constitute a criminal conviction, it does become the final disposal of specific intended criminal proceedings on its expiry and is almost certain to include the enforcement of a fine against the corporate subject. Furthermore, prosecution may follow in the event of a breach of the DPA.

33 Id. at para. 14.

34 In the United Kingdom, the decision to leave the EU adds further uncertainty to the recognition of double jeopardy principle in its application to convictions in other Member States.

35 *Fofana*, Judgment, at para. 29. See footnote 32, above.

Double jeopardy in the United States 1.2.2

As noted above, the Fifth Amendment to the US Constitution contains a double jeopardy clause. Generally speaking, the double jeopardy clause prohibits the US federal government, or any individual state, from twice prosecuting someone for the same conduct if they have already been acquitted or convicted (or after certain mistrials once a jury has been empanelled and 'jeopardy has attached').[36] It also prohibits courts from imposing multiple punishments for the same conduct, which may be covered in multiple charges in an indictment.[37] The double jeopardy clause of the Fifth Amendment – unlike its privilege against self-incrimination – applies to both individuals and corporations.[38]

The US Supreme Court, however, has recognised a significant exception to the double jeopardy clause, known as the 'dual sovereignty' doctrine. Pursuant to this doctrine, double jeopardy does not prohibit the federal government from prosecuting a person previously convicted or acquitted by a state, or *vice versa*, or one state from prosecuting a person convicted or acquitted by another.[39] In other words, under this doctrine the US federal government can prosecute individuals and entities for the exact same conduct that they have previously been tried for in one of the states, regardless of whether they were convicted or acquitted in that prior case.[40]

To blunt the potentially harsh impact of the dual sovereignty exception, the DOJ has adopted a policy that precludes the initiation of federal prosecution following a prior state (or federal) prosecution based on substantially the same facts. The Dual and Successive Prosecution Policy (the Petite Policy) seeks 'to vindicate substantial federal interests through appropriate federal prosecutions, to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s), to promote efficient utilization of Department resources, and to promote coordination and cooperation between federal and state prosecutors.'[41] To overcome this policy, federal prosecutors must not only comply with the standards applicable for commencing any federal prosecution (i.e., that the defendant's conduct constitutes a federal offence and that the admissible evidence probably will be

36 See U.S. Const. amend. V; *Martinez v. Illinois*, 134 S. Ct. 2070, 2074.

37 See *Breed v. Jones*, 421 U.S. 519, 528 (1975).

38 See *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (applying double jeopardy to corporate defendants without discussing their status as corporations); *United States v. Sec. Nat'l Bank*, 546 F.2d 492, 494 (2d Cir. 1976).

39 *United States v. Lanza*, 260 U.S. 377, 385 (1922).

40 Notably, the Supreme Court very recently declined to extend the dual sovereignty doctrine to successive prosecutions by Puerto Rico and the United States, concluding that the question of separate sovereignty requires an assessment of the source of the power to punish. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016). There, the Court held that successive prosecutions may be brought only where two prosecuting authorities derive their power to punish from independent sources; if those authorities draw their power from the same ultimate source, successive prosecutions are prohibited.

41 U.S. Dep't of Justice, United States Attorneys' Manual 9-2.031 (1999).

sufficient to obtain and sustain a conviction by an unbiased trier of fact), but they must also obtain the approval of the appropriate Assistant Attorney General and establish that: (1) the matter involves a substantial federal interest; and (2) the prior prosecution left that federal interest 'demonstrably unvindicated'. It is the second of these two factors that provides the greatest protection against successive prosecutions, as, under this policy, the DOJ 'will presume that a prior prosecution, regardless of result, has vindicated the relevant federal interest.'[42] While this presumption can, of course, be overcome (and the policy lists the factors relevant to make such an assessment),[43] federal prosecutors traditionally reserve such challenges for those cases where it perceives the preceding result to have been manifestly unjust.

Notably, the Petite Policy does not expressly preclude the DOJ from bringing criminal charges based on the same conduct previously prosecuted by a foreign sovereign. Nevertheless, similar, if not identical, principles are at play whether the prior prosecution was brought by a state or federal government, or a foreign sovereign. Counsel endeavouring to persuade the DOJ to defer to the foreign result certainly should be prepared to demonstrate why a successive prosecution would contravene that policy. The DOJ will, of course, consider if US interests have been sufficiently redressed by the foreign prosecution.[44] And, in the cases of corporate criminal activity, it is likely that the DOJ will seek to extract a penalty based on the harm to its interests.

Still, if a prior prosecution by a foreign sovereign has resulted in adequate penalties proportionate to the conduct, the DOJ may well decline or defer the prosecution or, perhaps, offset any US fines or penalties by the amounts paid abroad, particularly in the corporate context. For instance, in the recent Standard Bank DPA, the English court said that the DOJ had been conducting its own investigation into possible Foreign and Corrupt Practices Act (FCPA) violations but that, '[n]oting the co-operation of Standard Bank and Stanbic with them, the Department of Justice has . . . intimated that if the matter is resolved in the UK, it will close its inquiry.'[45] This, again, is simply a matter of prosecutorial discretion given the dual sovereignty exception to the double jeopardy clause.

The double jeopardy clause generally does not restrict the ability of the US government to pursue successive criminal and administrative remedies for the same conduct.[46] Indeed, while it is more common for administrative investigations to run in parallel with DOJ investigations, double jeopardy is not offended when a criminal prosecution follows the imposition of an administrative sanction (or *vice versa*). As the Supreme Court held in *Hudson v. United States*, the

42 Id.

43 Id.

44 See *Thompson v. United States*, 444 U.S. 248, 248 (1980) (noting that there is an exception to the Petite Policy where US prosecution would serve 'compelling interests of federal law enforcement').

45 *SFO v. Standard Bank Plc* (2015) (Case No. U20150854), at para. 58.

46 See *Hudson v. United States*, 522 U.S. 93, 96 (1997).

double jeopardy clause does not apply to non-criminal penalties.[47] Though the Court in *Hudson* recognised that criminal charges following in the wake of stinging administrative penalties could potentially implicate double jeopardy concerns, a defendant mounting such a challenge must establish by the 'clearest proof' that the administrative penalty was so punitive as to render it criminal for double jeopardy purposes – a very high hurdle indeed.[48]

The application of double jeopardy between EU Member States 1.2.3

Increased focus on combating overseas corruption following the signing of the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, has resulted in a rise in multiple prosecutions. A person or company engaging in overseas corruption faces the prospect of prosecution in any signatory country where he, she or the company may have sufficient involvement, either by citizenship or place of incorporation, or as a place where relevant acts took place.

The picture is evolving on both the supranational and national levels, and this is discussed below. The double jeopardy principle is set out in Article 54 of the 1985 Schengen Agreement.[49] On 29 May 2000 the United Kingdom adopted Article 54 of the Schengen Convention and so it presently forms part of the United Kingdom's domestic law.[50] The rationale for the application of the principle across the EU was made clear in *R v. Gozutok and Brugge*,[51] as permitting finality in criminal proceedings and also engendering mutual trust in national criminal justice systems by requiring that each Member State recognise the criminal laws in force in the others even when the outcome would be different if its own national law had been applied.

The Council Framework Decision 2009 on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (the EU Framework Decision)[52] sets out measures to prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts that might lead to the final disposal of those proceedings in two or more Member States.

The EU Framework Decision is constitutionally binding on the United Kingdom as a Member State and as such must be taken into account by the SFO in its decision whether to open a criminal investigation. The double jeopardy

47 Id. at 99.

48 See id.

49 Article 54: 'A person whose trial has been finally disposed of in one contracting party may not be prosecuted in another contracting party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing contracting party.'

50 2000/365/EC: Council Decision of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis.

51 [2003] 2 CMLR 2.

52 2009/948/JHA.

principle is not a bar to a criminal investigation however and the SFO has very wide discretion in deciding whether to carry out an investigation.[53]

1.2.4 The European Court of Human Rights

Article 4 of Protocol 7 to the European Convention on Human Rights (ECHR) specifically recognises the double jeopardy principle.[54]

The importance of the principle was emphasised in the ECtHR's Chamber judgment in the case of *Grande Stevens and Others v. Italy*.[55] Here, the applicants received an administrative penalty from Consob, the Italian Companies and Stock Exchange Commission, in respect of providing false or misleading information concerning financial instruments. The penalty took the form of substantial fines and various banning orders. Subsequently, the applicants were committed for trial before the Turin District Court in respect of criminal allegations of market abuse arising out of the same facts.

The applicants argued before the ECtHR that the subsequent criminal proceedings were in breach of Article 4 as the applicants had already been subject to a penalty that was akin to a criminal penalty, even though it was imposed as an administrative penalty. The court accepted their argument and ruled that the administrative penalty should be considered a criminal penalty for the purposes of the ECHR and that Article 4 prevented the criminal proceedings from taking place on the grounds of double jeopardy.

In March 2015, France's Constitutional Court ruled that Airbus executives could not be prosecuted for insider trading because they had been cleared over similar administrative charges by France's Financial Markets Authority, the AMF. In reaching its decision the Court gave considerable weight to the decision of the ECtHR in the *Grande Stevens* case.

The Grand Chamber of the Court of Justice of the European Union has recently considered the application of the double jeopardy principle to the Schengen Agreement in the context of an individual under investigation in Poland and Germany for allegations of extortion.[56] In this case it upheld the German

53 Section 1(3) of the Criminal Justice Act 1987; 'The Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud.' See also *R (Corner House) v. Director of the SFO* [2008] EWHC 714 (Admin), at para. 51.

54 'Article 4 – Right not to be tried or punished twice
1 No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2 The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3 No derogation from this Article shall be made under Article 15 of the Convention.'

55 *Grande Stevens and Others v. Italy* (4 March 2014) Application Nos. 18640/10, 18647/10, 18668/10 and 18698/10. The judgment is not final.

56 Case C-486/14, *Kossowski*, 29 June 2016.

prosecutor's decision that the double jeopardy principle did not apply. The matter had not been finally disposed of as no detailed investigation had taken place.

On 15 November 2016, the Grand Chamber of the Court of Justice of the European Union rejected an appeal brought by two applicants who were penalised by the Norwegian Tax Authority for failing to pay tax in 2008 and then convicted of aggravated tax fraud in 2009 by the National Authority for Investigation and Prosecution of Economic Crime. The applicants claimed they were being prosecuted twice for the same misconduct in violation of double jeopardy rules. Rejecting the application, the court held that ECHR double jeopardy rules are not violated where the contracting party could satisfy the court that dual proceedings are sufficiently connected in time and space so as to represent a coherent whole, rather than two sets of proceedings.[57]

Double jeopardy in France 1.2.5

Recent developments in France warrant a special mention as the issue of double jeopardy and its application has come before the courts on a number of occasions recently. The appellate courts are currently considering the extent to which domestic law will recognise convictions in the United States as a bar to prosecution, as well as the status of US DPAs in domestic proceedings. On 18 June 2015 a criminal court in Paris acquitted four French corporates that were accused of paying bribes in connection with the United Nations' Oil-for-Food Programme on the grounds that they (or their corporate parents) had already signed DPAs with the DOJ. The rationale given was that it was inconsistent with French international obligations to prosecute the companies for a second time on what the Court found to be the same facts. The prosecutor's appeal against the acquittal was successful and in February 2016 a Paris court fined Total SA €750,000 for corrupting foreign officials.

A particular concern in the French courts is the potential unfairness to a corporate that has effectively admitted the offence in another jurisdiction to obtain a DPA and then finds those admissions being used against it in a jurisdiction that does not recognise the DPA under the double jeopardy principle.

At the date of the last edition, former budget minister Jérôme Cahuzac was raising the applicability of double jeopardy in criminal proceedings for alleged tax fraud in circumstances where he had already faced administrative sanctions for the same misconduct. The Constitutional Court rejected the argument regarding criminal charges in respect of income tax[58] and Mr Cahuzac was tried and convicted of criminal tax offences in December 2016.

57 *Case of A and B v. Norway* (Applications nos. 24130/11 and 29758/11) 15 November 2016 lovdata.no/static/EMDN/emd-2011-024130.pdf.

58 The court accepted the arguments in relation to wealth tax offences because both the civil and the criminal charges are heard in the judicial courts, whereas the income tax cases are heard in different venues.

1.2.6 Conclusion

At first sight, the doctrine of double jeopardy appears to be a substantial protection against repeated prosecution in respect of the same conduct. However, although the doctrine may be a protection against a similar prosecution within the state, or member group such as the EU, it may well fail to protect against a prosecution brought by a separate state.

As many countries do not recognise a foreign conviction for the purposes of double jeopardy, it is not possible to reassure a corporate client that a criminal settlement in one jurisdiction will qualify as a settlement in others as well. Further, entering into a DPA in one jurisdiction may risk damaging the client's interests in another if the DPA is not recognised as a bar to prosecution, but the admissions it made to secure the DPA are admissible against it in other jurisdictions.

The picture is uncertain and many questions remain unanswered. These include:

- Should there be international recognition of criminal convictions for the purposes of double jeopardy, to encourage global settlements?
- Should DPAs be given the status of a criminal conviction for the purposes of double jeopardy?
- Should regulatory sanctions qualify for the purposes of double jeopardy?

Until these issues are resolved, a corporate client will only be able to place very limited reliance on the double jeopardy principle as a bar to further prosecution in respect of the same conduct. At present, the only safe course will be to seek to negotiate a global settlement with all the states most likely to take an interest in the conduct, before admitting guilt in any state. Whether this is practicable will vary from case to case.

1.3 The stages of an investigation

Issues that at first glance may appear to be isolated or technical can quickly spread across borders and escalate into multifaceted threats to businesses, reputations and careers. Even within jurisdictions, different enforcement authorities operate within their own, often complex, legal and technical frameworks. Any investigation, whether an internal fact-finding inquiry aimed at establishing the size and nature of a problem or one commenced by an enforcement authority, is inevitably a dynamic process. There can be no 'one-size-fits-all' approach and the scope of an investigation can change significantly as it progresses.

Nonetheless, it is possible to identify three broad, and often overlapping, phases to an investigation, namely the commencement, information gathering and disposal phases. Particular challenges arise, and sometimes recur, at each of these.

Conducting and handling investigations, limiting the damage they cause and bringing them to as swift and efficient a conclusion as possible is an art rather than a science. It requires advisers to anticipate, balance and respond to a wide variety of challenges, and to appreciate the potential ramifications of every interaction with a diverse cast of characters.

Commencement 1.3.1

When deciding whether or how to commence an investigation, or how best to respond to one already commenced by an enforcement authority, it is axiomatic that the very first task to be carried out must be to establish as precisely as possible the size and shape of the problem. Which corporate entities and individuals are regarded as subjects of the investigation? Which offences are they thought to have committed, and which regulatory provisions might they have infringed?

In some cases (typically those involving alleged breaches of regulatory requirements), the answers will be self-evident from notices confirming the commencement of an investigation or the appointment of investigators, and there may be opportunities to seek to establish more detail through scoping discussions. However, in other cases (typically those involving alleged criminal misconduct), the investigators will not necessarily provide details or opportunities for discussions. In some cases, the first indication an individual or entity receives of an investigation by an enforcement authority will be a requirement to attend an interview or provide documents, or, worse still, a knock at the door from investigating officers. In all cases – whether or not enforcement authorities are already aware of alleged misconduct – steps must be taken immediately upon discovery of the alleged misconduct to preserve and to avoid the destruction or deletion (inadvertent or otherwise) of documents that are, or could become, relevant. In large multinational organisations, identifying the custodians of these documents, drafting and disseminating appropriately inclusive document-retention notices, gathering the material and suspending automatic deletion policies is a substantial undertaking in itself.

Where authorities are not already aware of apparent misconduct, considering whether, when and how to disclose matters to them will be an immediate priority. In some cases, specific regulatory obligations will require disclosures. In others, it may be appropriate to voluntarily report matters to maximise the prospects of a consensual resolution on favourable terms. Both types of disclosures require careful handling. Consideration must be given to potential consequences, both for those individuals or corporates already implicated in alleged misconduct, and for those that may become so. Where information is disclosed voluntarily, wider considerations about whether co-operation will be appropriate and would be likely to encourage the relevant enforcement authority to curtail its investigation (and on which terms) should be borne in mind. Identifying the potential risks and benefits will typically involve assessing the enforcement policy and posture of each agency involved (and often of individual investigators) and its ability and propensity to pass information to other investigating or prosecuting authorities (both within and between jurisdictions).

These assessments will inform the answers to a number of practical questions:

- Should an initial notification be made before a full internal investigation has been undertaken?
- What should be disclosed at the end of the internal investigation and to whom?
- Should information be disclosed to the authorities orally rather than in writing?

- Will investigators regard anything less than unfettered access to witnesses' first accounts and other underlying documents as true co-operation enabling them to contemplate a negotiated outcome?
- Is it feasible to maintain claims to legal professional privilege or challenge investigators' actions or demands while still seeking to claim that the subjects of the investigation are co-operating?

Choices made at this stage about how much information and control to relinquish over the investigative process and the robustness of the line to be taken with investigators in relation to issues such as privilege can be crucial in setting the tone for the rest of the investigation, and any proceedings that flow from it.

On this score, we note that since the first edition of this text, case law developments in the UK courts have had a material impact on claims for privilege over the material generated during the course of an internal investigation. While these are disappointing developments, in practice inhibiting a company's ability to obtain sound legal advice, there is no immediate likelihood that the emerging position will be substantially revisited by the courts or Parliament – although one of these cases has, at the time of writing, been granted leave to appeal.[59]

In cases involving allegations made by or against directors or employees, early determinations need to be made as to whether any specific whistleblower protection legislation or rules have been engaged and whether action should be taken to suspend or dismiss those individuals.

1.3.2 Information gathering

Once the scope of an investigation has been determined, the process of gathering and analysing relevant information, whether in documentary or electronic form or in the form of witnesses' accounts, commences. Since the advent of the European investigation order (introduced in England and Wales from 31 July 2017), the process of gathering information across borders will be a much simpler and quicker process for enforcement authorities in Europe.[60]

In substantial cross-border investigations, the task of collating relevant material, ascertaining whether it is responsive to requirements to produce documents or provide information (or whether it should otherwise be produced to demonstrate a co-operative stance), and filtering it to remove material exempt from disclosure is time- and resource-intensive. It often requires specialist technical input and expertise. Information should not be treated as a readily portable commodity, and careful consideration should be given to applicable data protection and other confidentiality constraints before information is transferred between jurisdictions or produced to investigating authorities.

---

59 *Property Alliance Group Ltd v. Royal Bank of Scotland plc.* [2015] EWHC 1557 (Ch); *Re The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch); *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB) 8 May 2017.

60 See Criminal Justice (European Investigation Order) Regulations 2017.

Witness interviews during internal investigations raise no fewer questions. When should interviews take place? Who should be present? What material and questions is it appropriate to put to them during such interviews? Should they be represented (and, if so, at whose expense)? Taking a wider view across all jurisdictions in which action could be taken, and from the individual's perspective, is it in the interests of subjects of the investigation to provide information voluntarily, or should they insist on being compelled to do so?

Of course, where investigations by the authorities have already begun, investigating authorities will be keen to interview individuals who are suspects. Depending on the nature of the investigation and the allegations against them, it may be open to individuals to remain silent in response to questions (although this course of action may limit their options in any proceedings flowing from the investigation). Conversely, it may serve such individuals' interests to proactively volunteer information to secure more lenient treatment by authorities, or ultimately the courts.

Disposal 1.3.3

As the information gathering progresses, and evidence is assimilated and understood, a decision will need to be reached as to whether this may be resolved through negotiation, or whether the individual or corporate disputes the allegations entirely or is unprepared to reach any resolution or enter into any settlement that requires admissions of misconduct.

Where settlement is an option, from economic, commercial and reputational standpoints, settling with as many investigating authorities as quickly and on as favourable of terms as possible is likely to be preferable. Particularly in regulatory enforcement investigations involving corporates, it is often clear from the commencement phase that this will be the most likely outcome, and dialogue throughout the investigation will have to be directed towards this outcome.

It should not be assumed that the process leading to a negotiated disposal is a smooth or simple one. Even in cases involving only one enforcement authority, the legislation and rules governing settlement and the calculation of penalties are complex. Although the discounts available for early settlement are potentially significant, the processes leading to them can involve successive rounds of proposals, counterproposals, representations and negotiations. In criminal investigations, in jurisdictions where it is possible to achieve negotiated outcomes as an alternative to prosecution, although the degree of scrutiny varies depending on which jurisdiction is concerned, such settlements will also be examined by a judge.

Complexity is multiplied where multiple authorities or jurisdictions are involved, or where it is possible that a finding, even if it does not involve any admission of liability, may fuel subsequent litigation from third parties such as erstwhile customers, employees or shareholders.

Although major investigations are unlikely to have progressed to the disposal stage without attracting at least some publicity, it is at this stage that press and political interest will peak. Enforcement authorities usually must make the

outcomes of investigations public (and indeed corporate entities themselves may be obliged to do so if their securities are listed).

Other difficult questions arise with negotiated disposals: what will be the size of the fines, if any? For individuals, is there the prospect of imprisonment or other career-threatening penalties? Will it be possible to settle with all interested investigating authorities? For the corporate to bring matters to a close, will it be necessary to assist authorities in their pursuit of individuals? Will the disposal of the investigations mark the end of the matter, or simply the start of a new phase of litigation or the commencement of a long process of reporting to a monitor and heightened levels of regulatory scrutiny or supervision? What can be said publicly by the subjects of the investigations?

With these themes in mind, we turn now to a detailed consideration of each stage in the chapters that follow.

2

The Evolution of Risk Management in Global Investigations

William H Devaney and Jonathan Peddie[1]

Sources and triggers for investigations 2.1

Corporates have traditionally approached investigations reactively, after the event, as an issue for legal functions and law firms that is largely concerned with suspicions of criminal activity or other misconduct. Such investigations were predominantly an exercise in detection, appropriate reporting and remediation. With the evolution of compliance departments and advances in forensic fact-gathering and analysis, investigations are increasingly regarded as key elements of a sound control environment and generally considered to support a company's commercial agenda.

Now, problems can be discovered through a variety of novel and increasingly proactive ways, and can arise from both internal and external sources.

From an internal perspective, problems can come to the fore during transactional due diligence, or in the course of routine compliance activity, such as conformance reviews, financial and other audits, or corporate surveillance activity. Problems may also be signalled by industrywide regulatory enforcement, or in a discrete area concerning allegations against an employee that indicates broader risk. Corporate awareness of risk may also be triggered though traditional or social media, political pressure, customer complaints, allegations arising in civil litigation, statements made in evidence in regulatory or criminal proceedings, and disclosures by competitors and whistleblowers.

Problems may also be first identified through the direct intervention of a government agency, which may have learned of the issue on its own, through a third party or another agency. The provision of information between law enforcement and regulatory authorities (whether through informal communication protocols,

1 William H Devaney and Jonathan Peddie are partners at Baker McKenzie LLP.

established statutory gateways or recognition of competing jurisdictions) is a rapidly growing area domestically and internationally.

Given the myriad potential avenues for a crisis to develop, corporate counsel must always be on the lookout for the seeds of problems and be prepared to take appropriate steps to prevent the matter from taking root and distracting the company from its core business. Moreover, if a serious problem is identified and cannot be easily contained, an effective response may require a significant level of communication with, and ongoing reporting obligations to, multiple entities, including the company's board and senior management; its legal, compliance, risk and audit functions; external auditors; prosecutors, regulators or other government agencies; litigation counterparties; investors; customers; commercial partners; competitors; trade bodies; and other interest groups. In many cases, the simple gathering of facts and their analysis can be one of the least complex elements of the undertaking. Far more complex is the juggling of competing, often cross-border, legal principles, interests and priorities that these ongoing communication and reporting processes require. These are considered further below, together with some of the complicated legal issues they present.

2.2 Responding to internal events

Not all internal issues raised will require investigation. Take, for example, the self-described whistleblower who writes to senior management to raise points already conclusively determined in a disciplinary hearing, in relation to which there are no wider considerations or further rights to appeal. Where facts are not in issue, the person has exhausted his or her legal remedies and does not bring forward new *bona fides* issues, a corporation should not be deterred from operating efficiently and need not re-investigate the underlying facts. Those concerns that do merit fresh investigation will not necessarily arise only in the context of criminal allegations or regulatory misconduct; some will emerge during transactional due diligence or in the control environment.

2.2.1 Compliance operations and transactional due diligence

A critical aspect of any effective transactional due diligence – whether an acquisition, a joint venture or simply a one-off transaction – must necessarily be to identify risks lurking beneath the surface of a target business or transaction counterparty. In particular, attention to areas that can give rise to successor liability should be of paramount concern to the risk-assessment team on any due diligence. In the anti-money laundering arena, in relation to the United Kingdom, compliance with the Proceeds of Crime Act 2002[2] is only as effective as the quality of the due diligence, ongoing monitoring and surveillance techniques employed by the company. Similar considerations apply to compliance with international

2 Those necessary to enable a person or organisation to comply with reporting duties under sections 330-332 and to avoid commission of separate money laundering offences under sections 327-329 of the Proceeds of Crime Act.

sanctions, where certainty as to the true source of remitted funds, the purpose of the payment and the identities of the payor and payee are central. 'Adequate procedures' required under the UK Bribery Act 2010 will include the ability to assess counterparty risk to avoid participation in a corrupt transaction. In the UK, there is a concerted move to replicate the corporate 'failure to prevent' offence in section 7 of the Bribery Act 2010 in other arenas, increasing the focus on the adequacy of prevention measures within corporations.[3]

The concerns in the United States are similar. The Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have stated in their Resource Guide to the Foreign Corrupt Practices Act (FCPA) that they will be less likely to prosecute an acquiror that conducts effective pre-transactional due diligence, remediates, folds the acquired entity into its compliance programme and voluntarily discloses the conduct.[4] Without delving into the pros and cons of voluntary disclosure, US law enforcement and regulatory agencies generally treat acquirors similarly even when the disclosure does not relate to potential FCPA violations, but to other issues such as money laundering and trade sanctions.

See Chapters 3 and 4 on self-reporting to the authorities

Given these expectations in the United Kingdom, United States and elsewhere, a party offering to warrant that it has not engaged in corrupt practices or other criminal activity will not provide adequate comfort without objective assessment of the risk profile, which is, itself, an exercise in investigation and analysis. For example, in the case of the three primary areas of financial crime risk (money laundering, sanctions, bribery and corruption), further enquiry may be required to investigate and assess the risk presented by politically exposed persons (PEPs), transactions involving higher risk jurisdictions or business practices, complex transactional structures characterised by opacity as to source of funds and ultimate beneficiaries.

In each case it is not only the primary due diligence activities that require investigative skills, but the response to the information delivered by standard or enhanced due diligence may itself stimulate wider investigation. Concerns in open-source materials (such as reports from internet research and reports by Amnesty International and Transparency International's Corruption Perception Index), and information already held on file, in bespoke due diligence reports by third-party vendors and in responses from counterparties to questionnaires and pre-contractual enquiries (which are particularly prevalent in public sector contract due diligence) may all trigger separate lines of enquiry. Red flags such as opaque ownership structures, prior enforcement actions against the counterparty, engagement in high-risk geographies or the presence of PEPs in the ownership or control structure can all raise the risk profile of a person, entity or proposed transaction, putting the company on notice that further investigation is required.

3 Part 3 (sections 44-52) of the Criminal Finances Act 2017 creates the offence of failing to prevent the facilitation of tax evasion, with the corresponding defence of 'reasonable prevention procedures'.

4 A Resource Guide to the US Foreign Corrupt Practices Act (2012), 28 (discussing pre-transactional due diligence).

Ironically, for companies straining to deliver strong due diligence, one of the most significant dangers of an adequate process to flag concerns at the primary due diligence stage is that issues of initial concern will be presented in a clear, contemporaneous record. That record may create disclosable evidence of a company's state of knowledge and awareness, or the fact it was on notice, at a material time – and in the absence of an adequate investigative response, this record itself may assist in incriminating the company[5] despite the positive steps taken to identify the issue in the first instance.

As such, it is the initial response that separates the strong organisation from the weak and moves compliance culture from a tick-box habit to best-in-class governance and control. The tools available to the acquiring company to assess possible exposure beyond the initial indicative information are a blend of the traditional and the innovative. The review of source documents and interviewing of witnesses are standard investigative steps that will remain highly relevant in these circumstances. So too will access to open-source information including historical media content analysis, materials held by ratings agencies and analyses based on public records, disclosures and third-party commentary, a company's own public statements and reports, and bespoke assessments. Reports from third-party investigators (which can range from analysis of public records and open-source material to more detailed data searches including 'dark web' internet content review) may also be available.

Additionally, internal and external audit reports may flag control weaknesses and identify intended remediation plans. These will not constitute privileged documents, although they may be subject to significant confidentiality controls. Action logs should be traced to ensure that audit recommendations were implemented and can be used as evidence. Similarly, analysis of compliance remediation and restructuring plans, conformance reviews of compliance systems and controls, published results of thematic reviews by regulators and other third parties, evaluation of whistleblower logs or statements made by company executives in the public domain (e.g., records of evidence adduced at UK parliamentary select committee or US congressional committee hearings) may also corroborate or appease initial concerns, or may serve to trigger further investigation into wider issues.

Some financial institutions go beyond this level of investigative activity and maintain an intelligence-based client evaluation process, aimed at building customer profiles in anticipation of commercial decisions and regulatory obligations. This is not the use of investigators for the detection of misconduct, but research and analysis to provide the bank with the broadest range of commercial information about a client, customer or counterparty, from identification and verification through to commercial development strategy and market profile, to enhance the bank's strategic decision-making in a highly regulated environment. While these

5 For example, as evidence relevant to the offence in the United Kingdom of failing to prevent bribery under section 7 of the Bribery Act 2010 or in support of a regulatory enforcement for a suspected systems and controls breach under Principle 3 of the Financial Conduct Authority (FCA)'s Principles for Businesses.

processes are driven by commercial objectives, the underlying activity necessary to inform the bank as to the risk profile is no different to the skills applied during a regulatory enforcement investigation or in anticipation of criminal prosecution, and this is why, within banks, there is a gradual migration of employees from 'investigations and enforcement' functions within legal and compliance to 'financial intelligence' units within business teams or as separate risk or compliance teams. These units do not, however, operate as legal advisers and therefore do not benefit from the same protections afforded to legal advisory staff, such as the attorney–client privilege and work-product protections (considered further below).

Policy guidance, opinion procedures and dialogue with public authorities 2.2.2

More formal, alternative third-party sources can provide a higher degree of comfort, subject to the availability of information and the legal and practical constraints as to its use. Use of these sources may be more appropriate where a company has identified a problem while undergoing due diligence. Nevertheless, practitioners should approach these resources with caution.

In the United States, for example, the DOJ may, on submission in writing by a relevant party, provide valuable guidance through the FCPA opinion procedure.[6] Similar to SEC no-action letters,[7] opinion procedures enable a corporation to obtain an opinion from the DOJ as to whether certain specified, prospective – not hypothetical – conduct does not violate the FCPA. The principles require disclosure of the entire intended transaction. An executed contract is not a pre-requisite and in most cases the opinion would be sought prior to a requesting party's entering a contract. The DOJ's opinion will typically set forth a number of remedial or proactive steps, or both, that the company must take to receive protection from enforcement.[8] For example, in Opinion Release 08-02, a US company sought comfort from prosecution surrounding its proposed purchase of a UK company in the oil and gas sector. The UK company had a large number of government customers. The acquiror informed the DOJ that it had inadequate time and access to information to perform sufficient anti-corruption due diligence on the target. It further informed the DOJ that it could not disclose whether it had identified any possibly illicit payments owing to the confidentiality agreement it signed to receive access to information from the target. In its opinion, the DOJ said it

6 These can provide a high degree of comfort to corporations. See, for example, US Department of Justice Foreign Corrupt Practices Act Opinion Procedure Release 14-02 on successor liability principles, which assesses how the DOJ would approach the question of whether it would pursue wrongful pre-acquisition conduct by the target company where the target was not within the reach of the FCPA at the time of the alleged misconduct.

7 SEC no-action letters allow individuals or entities unsure of the legality of a product, service or action to request a letter from the SEC discussing the facts, applicable laws and rules, and providing a conclusion about whether SEC staff would recommend an enforcement action. See https://www.sec.gov/.

8 For Opinion Procedure Releases, see https://www.justice.gov/criminal-fraud/opinion-procedure-releases.

would not initiate an enforcement action, so long as the acquiror disclosed any corruption concerns upon acquisition, conducted rapid and deep diligence (outlined in the opinion) once it owned the target, disclosed any potential violations it uncovered, and quickly folded the target into its compliance programme.

As demonstrated by the few opinions issued each year, practitioners are often wary of this process. First, if the DOJ says no, the company is left without any flexibility to make its own risk-based decision. It must comply. Additionally, as Opinion Release 08-02 demonstrates, the DOJ will often impose conditions and requirements in its opinion that must be adhered to meticulously. Further, seeking an opinion may risk tipping off the government to a larger problem. Opinion procedures are also a limited tool, as they apply only to anti-corruption concerns.

The United Kingdom does not have a process similar to the DOJ opinion procedure. There is no formal basis on which to approach the Serious Fraud Office (SFO) for guidance as to whether a party's conduct infringes the Bribery Act 2010, for example. This evaluation is left to the reporting party, with the more binary decision as to whether or not to make an early self-report to the SFO in relation to which cooperation credit is sought. The SFO will publish operational guidance and Codes of Practice from time to time (e.g., on issues of treatment of evidence, witnesses and legal representation at interviews, deferred prosecution agreements, corporate self-reporting) and, like the DOJ and SEC's Resource Guide to the FCPA, also publishes its related prosecution policies and protocols (such as the Bribery Act Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions, Guidance on Corporate Prosecutions, etc.).[9] These are not, however, consultative processes aimed at clarifying the SFO's approach to legal interpretation or jurisdictional issues (as in the case of the DOJ opinion procedure or SEC no-action letters). The SFO has made clear on a number of occasions that its role is not that of 'regulator, an educator, an advisor, a confessor, or an apologist'[10] but of investigator and specialist prosecutor.

In terms of formal statements, a party dealing with the SFO is limited to the guidance contained in judgments and agreed terms of settlement under deferred prosecution agreements, of which there have only been four to date, three concerning the section 7 offence under the Bribery Act 2010 of failing to prevent bribery (two of which also involved substantive bribery offences).[11] More informal

9 https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/. These are objective statements of position not subjective opportunities for evaluation of specific conduct.

10 'Ethical business conduct: an enforcement perspective'. Speech by David Green QC, Director of the SFO, to PricewaterhouseCoopers on 6 March 2014.

11 (1) *Serious Fraud Office v. Standard Bank PLC (Now known as ICBC Standard Bank plc)*, 30 November 2015, Case No. U20150854. The SFO's press release with the DPA and statement of facts can be found at https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-wit h-standard-bank/; (2) *Serious Fraud Office v. XYZ Limited*, 11 July 2016, Case No. U20150856. The identity of the defendant has been redacted from the press release dated 8 July 2016 and final redacted judgment dated 11 Jul 2016 pending ongoing proceedings, with the full DPA, statement of facts and full judgment due to be published when those proceedings are concluded; (3) S*erious Fraud Office v. Rolls-Royce plc and Rolls-Royce Energy Systems Inc*, 17 January 2017,

statements of policy and approach have been made in speeches by SFO staff to professional audiences,[12] but these remain indicative and are not analogous to the DOJ opinion procedure.

Although, in the United Kingdom, the Financial Conduct Authority (FCA) issues policy statements from time to time, it will not give its blessing to a product, service, contractual undertaking or other course of conduct, nor will it make available records it holds in its supervisory or enforcement capacity, that companies may rely on when evaluating an intended counterparty. This reluctance is a combination of statutory obligation in relation to the management of confidential information (enshrined in the Financial Services and Markets Act 2000 (FSMA)[13]) and because as a regulatory body it is subject to judicial review should it exceed its jurisdiction. Records of authorisations, published enforcement notices and decisions of the disciplinary tribunal are in the public domain, but there is no 'surgery service' to help companies determine the correct approach to the interpretation of their regulatory responsibilities relating to specific counterparty risks. Informal discussion, in the course of 'close and continuous' supervisory dialogue pursuant to a firm's Principle 11 obligations,[14] may shed light on the approach that the FCA may take, but these will not constitute formal policy guidance or policy statements to rely on for the purposes of transactional due diligence or otherwise.

Tensions inherent in the management of privilege and confidentiality 2.2.3

In the United Kingdom and the United States, where similar (but not identical) doctrines of legal professional privilege exist, and in civil law jurisdictions that do not recognise the concept of privilege but rely heavily on the doctrine of professional secrecy, significant pressure points arise as a company seeks to keep material privileged and confidential while also satisfying the appetite of public bodies (regulators, prosecutors and legislators) and customer or investor groups for unguarded candour. There may even be a significant strategic divergence within a company's own board and management on the balance to be struck between transparency and established legal controls. These tensions emerge in investigations and, as a consequence, in the course of corporate activity.

Case No. U20170036. The SFO's press release with the DPA and statement of facts can be found at https://www.sfo.gov.uk/cases/rolls-royce-plc/; (4) *Serious Fraud Office v. Tesco Stores Limited*, 10 April 2017. The judgment, DPA and statement of facts are not available as reporting restrictions remain pending the trial of three former Tesco executives.

12 e.g., Speech to the Annual Bribery and Corruption Forum by Ben Morgan, Joint Head of Bribery and Corruption, Serious Fraud Office, 29 October 2015, in which the principles of co-operation credit and the application of the deferred prosecution agreement jurisdiction were further explored.

13 Sections 348–353 of FSMA govern the FCA's treatment of information provided subject to duties of confidence and include certain exceptions to restrictions on disclosure of confidential information.

14 Under Principle 11 of the FCA's Principles for Businesses, a firm must deal with its regulators in an open and co-operative way and must disclose to the appropriate regulator anything relating to the firm of which that regulator would reasonably expect notice.

For the company, tension immediately arises between the various duties owed to customers, shareholders and employees, on the one hand, and the protection of the right of confidentiality as between lawyer and client on the other. Many would focus on the expectations of regulators and prosecutors in respect of valid claims to privilege, and the difference of opinion between those parties and the company as to the status of information (whether disclosable or not). Yet, it is often tension, error, omission or indecision in the company that creates the greatest scope for complexity, long before any debate with authorities or before the courts has begun.

In a transactional context, for example, a target may want to share information so an acquiring company can assess its exposure to certain risks. The target may hold a volume of documents and information ranging from initial fact-finding witness-interview material to the conclusive investigation report into the precise issues of concern. Yet the target will fear that waiver of privilege over that material may open it up to collateral waiver risk and an inability to defend speculative discovery requests in civil claims at a later date. As such, while non-disclosure may damage the prospects of the transaction or create future litigation risk, unbridled waiver may facilitate third-party litigation down the road.

One possible solution has been the application of the common interest doctrine to the disclosure to the acquirer for a specific and limited purpose.[15] An example of effective use of a common interest privilege agreement is a joint venture business (A), the main investor in which is corporation (B), which invites investment by a venture capitalist (C). A faces substantial patent litigation in relation to the underlying product, constituting a substantial risk to the viability of the business. There exists a legal opinion as to the merits, sought by A in the ordinary course of the litigation. It is privileged and confidential as against B and C who are not parties to the action but have a common interest in its outcome as they are aligned in wanting it to fail. Their investment may even support that. This is the typical circumstance in which a common interest privilege disclosure will be made to two parties, to inform their investment decisions, who are then subject to contractual duties of confidentiality to guard against arguments in litigation over waiver of privilege.

See Chapters 35 and 36 on privilege

15 In the United States, the common interest doctrine varies from state to state. Under New York law, its application is limited to communications related to pending or anticipated litigation, rather than an anticipated merger or other commercial activity. *Ambac Assurance Corp., et al. v. Countrywide Home Loans, Inc., et al.*, 27 N.Y.3d 616, 620 (2016). In Delaware, which is generally considered the leading jurisdiction for corporate law, however, the privilege is much broader. 'A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . (3) by the client or the client's lawyer or a representative of the lawyer representing another in a matter of common interest.' Del. R. Evid. 502(b)(3). The law applies 'especially within the context of a pending transaction' when discussion 'involved legal issues regarding the transaction.' *3Com Corp. v. Diamond II Holdings, Inc.*, No. 3933-VCN, 2010 Del. Ch. LEXIS 126, at *13, *24 & n. 18 (Ch. 31 May 2010).

On these grounds the acquiror can satisfy itself that it has made a true and fair evaluation of the risk, but this still leaves open questions as to how this risk assessment can subsequently be articulated in public statements if privilege is to be maintained and how the decision to advance can be justified to investors in the absence of a subsequent waiver of privilege.

Similarly, a regulated entity will be concerned as to how it can defend a commercial decision to a regulator without sharing the contents of a privileged document. If it does share privileged material, what is the status of that disclosure? Will the restrictions over a regulator's dealings in confidential information,[16] or a specifically worded, limited waiver be sufficient to ensure there will be no onward disclosure or gradual widening of the waiver, weakening subsequent defences to disclosure in civil or criminal proceedings?

See Chapters 35 and 36 on privilege

At the heart of a claim to the protection of privilege is a duty to maintain confidentiality; yet in commercial circumstances the goals of candour and transparency, the disclosure duties set out in financial reporting standards and the reasonable investor test are at odds with the goal of maintaining enforceable claims to privilege in all instances. Counsel therefore often faces the unenviable task of electing which legal risk to prioritise.

In many boardrooms, in common with the views of many regulatory enforcement teams and prosecutors, there is a growing distaste for opportune (though arguably valid) claims to privilege that may obscure a complete understanding of the facts, and increasingly a premium is placed on holding nothing back. This may see the pendulum swinging towards greater disclosure and less concern about privilege, until a company cannot protect against litigation risk that would have been defensible had privilege not been waived. In the United Kingdom this moment has not yet arrived, and prosecutors and regulators are pressing for greater transparency. They cannot legitimately demand waiver of privilege, but can encourage it as part of the 'co-operation credit' debate to which many companies contemplating a deferred prosecution agreement are sensitive. At the same time, the recent decisions in the *RBS Rights Issue Litigation* and *ENRC*[17] further constrain the extent to which materials created in the course of investigation may be withheld on the grounds of privilege.

See Chapter 35 on privilege

In the United States, where prosecutorial demand for privilege waiver for a corporation to receive full co-operation credit was once common, federal prosecutors may no longer ask for a waiver of the privilege, although corporations must disclose all relevant facts to receive co-operation credit.[18] Further, a corporation's not waiving the attorney–client privilege during a government investigation cannot be used against a corporation when determining whether it 'co-operated'.[19]

16 e.g., FSMA, section 348.

17 *Re The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch); *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB) 8 May 2017.

18 U.S. Attorneys' Manual, 9-28.710-9-28.720.

19 Id.

In practical terms there is some hope for reconciliation of these conflicts by creating separate documents during the investigation: reports to management containing legal advice on investigative outcomes (privileged) having a separate purpose to reports of findings to regulators (not a privileged purpose). Additionally, facts themselves are not privileged[20] and may be presented to law enforcement and regulators, with careful handling to present them as only facts and not the product of specific counsel interviews, without waiving the privilege.[21] In the UK, fact-finding interviews can be conducted on the basis that the interviewee is not the client and the purpose of the interview is not the giving or receiving of legal advice (mindful of the *RBS Rights Issue Litigation* and *ENRC* decisions), working on the assumption that notes of the interview will not be privileged communications and should be drafted with that in mind. In the US, however, the same material may be covered by the work-product doctrine.[22] This presents a significant legal and practical concern in the management of transatlantic investigations. Work-product can often be waived piecemeal, without the threat of subject-matter waiver.[23] *Ex post facto* advice to management on the content or outcome of interviews, however, is likely to attract privilege. Yet, ultimately, there may be a point of strategic principle for a board and its advisers to determine: to waive or not to waive.

See Chapter 35 on privilege

20 See *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981).

21 See *United States v. Stewart*, No. 15CR287, 2016 U.S. Dist. LEXIS 103516, at *5 (S.D.N.Y. 22 July 2016) (in-house counsel waived privilege over defendant's communications by disclosing them to the Financial Industry Regulatory Authority, because counsel's disclosure contained not only unprivileged facts, but also the contents of privileged communications, i.e. counsel's questions to the employee).

22 See e.g., *SEC v. Roberts*, 254 F.R.D. 371, 375 (N.D. Cal. 2008); *SEC v. Schroeder*, No. C07-03798 JW, 2009 U.S. Dist. LEXIS 39378, at *20 (N.D. Cal. 27 April 2009); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. AARPO, Inc.*, No. 97-CV-1438, 1998 U.S. Dist. LEXIS 21342, at *4 (S.D.N.Y. 24 November 1998); see also, *City of Pontiac General Employees' Retirement System v. Wal-Mart Stores Inc, et al*, Case No. 5:12-cv-5162 (W.D. Ark 2012), Order 5 May 2017. An internal investigation conducted by non-lawyer investigators, not under the direction of counsel, nor in contemplation of litigation, is protected by neither the attorney–client privilege nor the work-product doctrine.

23 'A waiver of work-product protection encompasses only the items actually disclosed. Thus disclosure of some documents does not imply that work product protection has been destroyed for other documents of the same character.' 6 James Wm. Moore, et al., *Moore's Federal Practice* § 26.70[6][c] (3d ed. 2004). However, the Federal Rules of Evidence do specify a different scope of waiver in the context of a disclosure made in a federal proceeding or to a federal office or agency: 'When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney–client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.' Fed. R. Evid. 502(a). As interpreted, Rule 502(a) tends to narrow the scope of waiver.

Whistleblowers, complaints and concerns 2.2.4

While certain investigations will be triggered by established controls or 'accidental' awareness of conduct risk, a very substantial proportion of matters under investigation will be instigated by virtue of a company's policy and practice on raising concerns, namely staff exit interviews, employee helplines and voluntary communications by staff, customers, former employees and members of the public. Together these forms of communication fall into a single, growing class of investigation trigger: whistleblowing.

Whistleblower complaints present a significant overhead for a company, in both financial and reputational terms. The number of complaints received does not necessarily determine how 'healthy' an organisation is as regards conduct risk; a significant flow of concerns may indicate a more risk-aware body of employees who feel free to challenge or raise issues without fear for their future employment. The key data is in the nature of allegations and the extent to which points raised are substantiated.

There are a series of primary investigative goals, before the underlying facts are conclusively determined. These are (1) the assessment of the credibility of the complaint and complainant (establishing whether it is a *bona fide* concern, and whether the matter has been previously raised and determined); (2) the duty owed to the complainant and any other parties in the circumstances (confidentiality and other safeguards of persons and evidence); and (3) whether a full investigation is necessary and, if so, the precise extent of allegations under investigation. Many companies will have clear policies on handling whistleblower complaints, but different companies and jurisdictions will apply varying standards and expectations as to the treatment of complainants. Some principles of general application are nonetheless emerging.

- Whether complainants are actually whistleblowers if they do not class themselves as such is a matter that can be objectively assessed; it is the nature and context of the concern raised, and the policies and procedures triggered by those concerns, that determine the duty owed to them (such as a right to anonymity, the duty to report to authorities, employment protection and so on).
- How the concern is raised does not determine it as whistleblowing. The issues do not have to be raised in correspondence, through a helpline or formal complaints log: concerns can be raised orally in exit interviews, in informal email correspondence, during tribunal proceedings, by voicemail or in passing in social conversation in the office.
- A sensible rule of thumb is to ask whether the substance falls into the categories either defined in the policy on raising concerns or, in the unlikely event of there not being one, whether it constitutes the form of concern or complaint that a regulator would expect (or best practice would require[24]) to be treated with the controls and protections afforded to a whistleblower.

24 e.g., in guidance by unions, professional bodies or other interest groups or charities such as, in the United Kingdom, Public Concern at Work (www.pcaw.org.uk/).

- In cases of doubt, the rights of the individual to protection should override the interests of the company such that complainants should be treated as whistleblowers and afforded necessary protection until the issue is clarified.
- Care should nonetheless be taken to distinguish between genuine whistleblower cases and the raising of grievances contrary to process, although some allegations may be so significant or toxic to the company's reputation and financial interests that even an issue arising in an employment context but raised inappropriately or otherwise resolved may need to be investigated (e.g., an allegation of bribery made notwithstanding the existence of a compromised exit).
- A whistleblower may be the source of an allegation but need not (and probably should not) be involved in steering process or in determining or influencing the strategy or outcome. There is no obligation to provide a whistleblower with information in relation to findings, and there may be a significant downside in doing so in terms of loss of privilege and confidentiality. However, a whistleblower should be made aware that the allegations have been taken seriously and are being addressed.
- Loss of *bona fides* status (e.g., in circumstances where spurious allegations are made for financial gain, employment protection or to blackmail) may result in the individual losing enhanced 'whistleblower' protection,[25, 26] but this must be contrasted with jurisdictions encouraging whistleblowing through 'bounty' schemes such as that offered by the US SEC's Office of the Whistleblower.[27]
- Bounty schemes and similar arrangements may influence the jurisdiction in which matters are first raised, but a company cannot rely on regulatory issues staying within that jurisdiction. As noted above, regulatory information gateways provide for the sharing of information between regulators and prosecutorial authorities in different jurisdictions (e.g., between the FCA and SEC, and between the DOJ and the SFO). As such, there should be an assumption of wide knowledge.
- Whistleblower initiatives are not gaining universal traction across the globe. Whereas the United Kingdom and the United States have established practices,

25 In the United Kingdom, the Public Interest Disclosure Act 1998 sets out protections for whistleblowers who are dismissed or affected as a consequence of making a disclosure as a whistleblower. Section 17 narrows the definition of protected disclosures to those made 'in the public interest'. Section 18 provides that tribunals may reduce compensatory payments in circumstances where the disclosure was not made in good faith.

26 In the United States, one eligibility requirement for whistleblower retaliation protection under the Dodd-Frank Act is that the whistleblower report conduct he or she 'reasonably believes' constitutes a violation. 18 U.S.C. § 1514A(a)(1). The employee's 'reasonable belief' must be both subjectively and objectively reasonable, and a good faith requirement has been interpreted as part of subjective reasonableness. *Day v. Staples, Inc.*, 555 F,3d 42, 54 (1st Cir. 2009); *Ashmore v. Cgi Cgp.*, 138 F. Supp. 3d 329, 344 (S.D.N.Y. 2015).

27 Pursuant to the Dodd-Frank Act, the SEC provides monetary awards to individuals, providing they meet certain criteria, who provide information leading to an enforcement action in which over US$1 million in sanctions is ordered. Awards range from 10-30 per cent of the amount collected. See https://www.sec.gov/whistleblower/.

there are significant cultural differences and enhanced data protection laws in certain European jurisdictions (particularly those whose current laws reflect the reaction to overactive secret intelligence services in the 20th century, and where it is necessary to respect the legitimate reasons why these countries may continue to wrestle with the idea that staff should be encouraged to report colleagues' misconduct). A significant variance in the availability of whistleblowing as a source of investigation trigger therefore exists.

See Chapters 19 and 20 on whistleblowers

The role of the internal audit function 2.2.5

Many companies do not have (whether as a consequence of funding limitations, strategy or structural considerations) free-standing internal investigations capability. Some will have delegated that responsibility to the internal audit function. Even within that sector, which does have specific investigative capability, there may be examples of investigations having been undertaken by the internal audit functions as part of their ordinary control function activity. As internal investigation capability and practice have grown as a priority for business, so has the recognition that this is not the role of an internal audit function.

In a well-governed business, the purpose of internal audit is to provide the board with independent objective assurance as to the effectiveness of the enterprise-wide risk management strategy. In summary this means the identification of the appropriate controls in respect of specific (financial and other) risks and the assessment of their efficacy: identifying the risk to which the control relates; identifying the risk 'owner'; measuring the effectiveness of the control; mandating improvements where breaches or weaknesses are observed and escalating material control weaknesses to senior management or the board as necessary; tracking remedial action; and assessing the improved control environment.

These activities are closely connected to, but not synonymous with, investigations. Internal audits are systematic reviews of the group-wide risk control framework and are not event-driven. They do not concern themselves with the investigation of complaints or claims with free-ranging subject matter or context, but are limited to the structure of the control framework devised by senior management.

Internal audit is not part of a legal function providing advisory services, so the output is not subject to legal privilege as a matter of English law. In the United States there is a practical refinement: where for a particular exercise members of the internal audit team are designated as working under the direction and control of the legal department, as its agent, for the purpose of providing expert assistance to the legal department in rendering legal advice to management then privilege will attach to their communication.[28] In the United Kingdom this may be theoretically possible in circumstances where the audit team forms part of a working group under the control of a legal counsel or team, yet the very distinct role differentiation between audit and legal functions in UK corporate governance makes this a hard argument to sustain. Usually, an audit report that addresses legal

28 See *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

issues, setting them out with clarity, identifying the controls, possible breaches and remediation recommended, and then identifying a lack of action in response to the recommendation can present dangers for an organisation. The report will be an unprotected disclosable document that presents a regulator, prosecutor or civil litigation claimant with a perfect platform – a charter for enforcement or a document undermining the credibility of a defence in a civil action. But this is not to suggest that internal audit has no role in internal investigations. On the contrary, it is one of the most important company functions, yet the timing and structure of its involvement in investigations is critical.

Internal audit output permits a pre-emptive, focused approach to investigation that is not simply limited to the complaints and concerns raised but operates within a risk-based evaluation culture. Internal audit reports allow a group-wide perspective on control weaknesses that enables investigators to concentrate resources in the most pressing areas of concern (whether in terms of reputational or financial risk) to the board, as opposed to responding piecemeal to each issue as it presents itself. This is important for an effective investigation function, as successful performance generates greater reliance and workloads can escalate aggressively once business leaders identify the value it can deliver. An internal audit function can therefore help to align an investigative function's input and output with the business's strategic risk management agenda.

Internal audit activity can also coincide with investigations, with the two functions reviewing similar subject matter, each with distinct purposes, strategies and methodologies, creating the obvious danger of conflicting or partly inconsistent outcomes (at least one of which will not be a privileged document and may contain stark conclusions in relation to the cause of a control breach). An internal audit, ideally, should occur subsequent to an investigation and may even rely on the contents of an investigators' report to focus the audit process. However, audit programmes tend to be cyclical, thematic or random, and internal auditors are understandably resistant to pressure from any part of the company to suspend or reschedule a standard audit (as this itself could constitute a breach of policy or control deficiency). Enhanced levels of communication between functions may assist in avoiding this risk, but a clash may be inevitable.

What steps can be taken to mitigate this risk? It may be possible to argue that audit is a limited process for a specific purpose, and not a comprehensive factual review. Investigation reports do have to distance their findings from time to time from historical and problematic audit reports, and this can cause an issue where there are different findings on the same or similar facts in close proximity to each other. A forensic investigation is likely to be more comprehensive as it is likely to have included a wider range of evidence including document reviews, e-discovery and witness interviews. Furthermore, lawyers may be able obtain more detail in the course of a privileged (i.e., protected) interview dialogue where witnesses feel less inclined to guard against wider disclosure. It is essential, therefore, that the scope and purpose of an investigation be distinguished at the outset from a narrower control review or audit.

The role of the compliance function 2.2.6

A number of the observations above in respect of internal audit apply equally to the compliance function and are not repeated here. The standard control environment model is a three-legged stool: legal, compliance and risk, each with distinct but collaborative functions, with internal audit acting as a monitor separate from those operational controls. While positioning investigative capability within the legal function maximises claims to privilege and creates the opportunity for deploying the forensic expertise of litigation lawyers in investigative roles, it is by no means standard in the market, and many companies still engage compliance teams in investigative activity. The advantage is the natural connection between investigation, control assurance, control remediation and regulatory liaison, but the separation of roles avoids the risk of conflicts of interest (where, for example, a compliance function has been responsible for implementation of controls and measurement of their effectiveness, but is then charged with investigating breaches and establishing personal accountabilities).

As compliance functions are developing, particularly in the regulated financial services sector after the global financial crisis, a consensus is developing within companies and regulators that the proper home for conduct risk, whistleblowing and certain categories of investigation is the compliance function. There is an increasing pattern of financial crime risk management (policy ownership for bribery and corruption, money laundering, sanctions) being owned by the compliance function, and this has led a significant proportion of companies to extend the responsibility for investigation of these areas to compliance teams as well.

There is, however, a significant difference between ownership of policy and risk, on the one hand, and investigation of a suspected breach on the other, and significant governance concerns arise where the owners of a risk investigate the adequacy of their own conduct. For example, initial public criticism of banks' handling of issues over LIBOR focused on the decision within some firms not to escalate concerns beyond the compliance function or the conduct of inadequate, early investigation by compliance teams within the affected businesses lines. Independent legal teams then proceeded with more thorough investigation of the issues, benefiting from the application of privilege where applicable (noting the points above and in Chapter 35 in relation to *The RBS Rights Issue Litigation* and *ENRC* decisions) as well as acting independently of the business. Learning from this episode, a number of banks restructured their compliance functions, separating the three legs of the stool more emphatically. They created greater levels of governance and control as between the respective functions, with operational framework agreements in place to ensure formal triggers for referral from compliance to legal in certain circumstances where the value or subject matter identifies a level of enhanced legal risk (e.g., bribery and corruption, financial sanctions, high value fraud, other systemic control breaches that could have material financial or reputational implications).

2.3 Considerations for investigations triggered by external events

2.3.1 Contact by authorities

In the UK regulated sector, where open and transparent supervisory dialogue is expected, it is comparatively rare for a business to find out about issues for the first time as a result of unilateral contact from a regulator. Ordinarily the regulated entity's report to the regulator leads to further investigation. By contrast, however, contact from prosecutors, competition authorities and, in certain circumstances, civil litigants may occur without prior warning. In the United States, corporates frequently learn of an investigation for the first time from prosecutors, and criminal referrals from regulatory agencies to the DOJ are common. The following does not seek to list all circumstances in which contact from authorities may trigger investigation, but it highlights certain aspects of unsolicited contact that may raise legal concerns.

The first challenge for a company is to discern the nature and purpose of the authority's enquiries, and in particular to distinguish between an investigation by a regulator and one by a prosecutor. While a company may be inclined to treat the two forms of organisation as synonymous, they are not. They discharge different duties, carry different powers (although they sometimes overlap) and have different expectations regarding co-operation. Accordingly, a company's approach to dealing with a regulator may differ from its response to a prosecutor.

A prosecutor investigating a matter is normally seeking evidence to decide whether a crime has occurred and whether individuals or the company should be criminally charged. If it proceeds with a prosecution, it carries the burden of proof (with certain limited jurisdictional and subject-matter exceptions). Apart from specific mandatory reporting regimes,[29] there is no obligation to volunteer information about misconduct to a prosecutor in the absence of a subpoena, warrant or other court order. It may be an offence to obstruct an investigation, but, in the United Kingdom, obstruction does not extend to failure to volunteer evidence in the absence of compulsion; however, the provision of false, misleading or incomplete information to a prosecutor could amount to an offence of perverting the course of public justice. In the United States, it is a crime to destroy evidence, even in the absence of compulsion or the initiation of a proceeding, when the purpose is to avoid its disclosure in an anticipated criminal or regulatory investigation or proceeding.[30] Further, the Fifth Amendment right against self-incrimination extends only to individuals, not corporations. Therefore, ancillary Fifth Amendment protections, such as the act of production doctrine, which permits an individual to hold back documents if the mere act of producing them, as opposed to their content, will be incriminating, does not apply to corporates.[31, 32]

See Chapters 5 and 6 on beginning an internal investigation

29 e.g., the obligation in the United Kingdom to submit suspicious activity reports under section 330 of the Proceeds of Crime Act 2002.

30 See 18 U.S.C. § 1519.

31 See *United States v. Hubbell*, 530 U.S. 27 (2000).

32 For the UK financial services industry, this is to be contrasted with the duty of open and co-operative dealings with the FCA where evidence of a control breach would be reported without

In dealings with UK prosecutors, while opportunities for mitigation and leniency exist through demonstrable co-operation[33] (and a company may regret not being able to obtain co-operation credit later on), co-operation is a matter of pragmatic choice rather than legal obligation. The starting point remains unchanged: under what valid power does the prosecutor seek the evidence, what are the company's reasonable defences and how tactically does the company respond? While principles of co-operation with government agencies in the hope of gaining leniency or mitigation are more clearly defined and have a longer tradition in the United States, the general rule of law remains intact and questions of powers, defences and tactics are no less germane.[34]

Where a prosecutor, police or investigative agency, competition authority or other public body serves a subpoena, order or warrant entitling it to documents and electronic information, or to enter, search and seize, monitor or restrain, the challenge for the affected organisation is twofold: (1) to provide information or permit access and activity within the confines of the power granted; and (2) to ensure the company is not left behind (and preferably remains in front) in its own understanding of the relevant facts.

See Chapter 11 on production of information to authorities

In the United States, grand jury subpoenas are the most common tool prosecutors use to gather information against a corporation in a criminal investigation. Various civil and regulatory enforcement agencies, such as the SEC and CFTC, may also issue subpoenas. General principles to follow when responding to a subpoena include issuing hold notices to the relevant employees and, if appropriate, third parties, to ensure that all information requested or potentially relevant to the enquiry (emails, other electronically stored information, hard-copy documents, etc.) is retained; controlling insider lists to identify those now aware of facts that may constitute inside information; preparing witness lists (to ensure they do not receive updates or advice on the matter, which may contaminate their evidence); and giving consideration to the treatment of witnesses (whether they require independent legal advice, or should be removed from the office environment through suspension or relocation so as not to risk evidence tampering, collusion or undue influence over other witnesses). In a criminal matter, defence counsel will almost always engage with the prosecutor to determine the company's status as a witness (potentially having relevant information, but no criminal liability), subject (the

delay and significant regulatory implications could arise from a failure to do so. A US corporate's duty to disclose is limited. See Chapters 9 and 10 on co-operating with authorities.

33 In the United Kingdom, with the introduction of the Serious Fraud Office's deferred prosecution agreement power in 2015.

34 There is no legal obligation to co-operate in an investigation in the United States. Under the Principles of Federal Prosecution of Business Organizations, a corporation's willingness to co-operate is, however, a factor in determining whether to charge the corporation. But, a corporation's refusal to co-operate alone is not justification for prosecution. See U.S. Attorneys' Manual, 9-28.700. Formal obligation aside, from a more pragmatic perspective, US and UK entities under a DPA or NPA, or parties subject to monitorships, may find they have little choice but to disclose, as might a member of the heavily regulated financial services sector, which could face adverse findings in relation to the duty to deal openly and transparently with its regulator.

largest category, in which the government does not yet have sufficient information to determine criminal liability) or target (the government is gathering evidence to bring criminal charges against the company).[35] Counsel will also almost certainly work to narrow the scope of the information requested.

A number of important general principles apply also to the execution of search warrants and the conduct of dawn raids:

- The order or warrant must be reviewed to ensure that the party serving or executing it has the requisite power. (Does it catch the correct entity? Is it the correct site or office? Are the search area and the items the authorities are searching for described with the requisite particularity? Are there date or time discrepancies? Is it signed or executed? In the United Kingdom, does it bear the correct court seal? Does the person conducting the inspection have the requisite authority in that jurisdiction?)
- All relevant parties need to ensure the full scope and context of the search is understood (and where electronic searches are undertaken, that the relevant keyword searches are agreed and out-of-scope material, such as privileged documents or personal data, is excluded by agreement).
- As with a subpoena, it will generally be necessary to issue hold notices immediately after receipt of the order or warrant with instructions not to destroy or spoil evidence or to give false or misleading information. As well as the obvious practical importance of preserving relevant evidence, there is also significant value in being seen to co-operate as an initial response.
- Individuals executing the order should be subject to ID verification checks to ensure that execution is in accordance with the terms of the order and that their identification is recorded (in the event that the order is breached and an individual's identity becomes relevant to any proceedings arising as a consequence).
- Staff, including reception and a designated dawn raid team, should be trained in advance as to how to conduct any interaction with investigators from the moment of first access to the premises. This includes training and instruction on not answering apparently casual questions on the subject of the search. The informal question to the unready on the walk along the corridor is a well-established source of information for experienced investigators. Any questions asked of staff should be noted. Employees may be informed of their legal rights not to speak to investigators and their right to counsel. Additionally, if the company is willing, the employees may be told that the company will provide legal counsel to them at no cost if investigators wish to speak to them or if they are later contacted. The company may not, however, instruct employees not to speak to investigators. That is the employee's choice.
- A separate room should be set aside as a base for investigators and discussions between legal function representatives and the visitors so that debate and investigative activity does not take place within earshot of those under investigation.

35 See also, U.S. Attorneys' Manual 9-11.151 defining 'target' and 'subject'.

- Local IT support (technology, plus a nominated IT representative) should be made available in the same room to ensure the IT environment can be explained to investigators and accessed. A log of access and copies of materials reviewed or seized should be made as the matter progresses so that a company's own investigators and lawyers can subsequently review the same material and evaluate compliance with the order or warrant.
- A written log, or even video if possible, should be kept of all places searched and items seized. Legal counsel should be present, if possible, to assert objections based on the attorney–client privilege, to identify commercially sensitive information or the sensitive personal information of customers or employees and to object if the search exceeds its authorisation. None of this, however, can be obstructive. The remedy for an improper search or seizure is to be had in court, not while the search is being conducted.
- Seek to agree in advance on the definition and scope of legal privilege, commercial confidentiality, relevance, personal data and other material the company would contend falls outside the terms of the order, and to a protocol for handling these materials during and after the search.
- Consider whether it is necessary and appropriate to prepare a press release or public disclosure (e.g., stock exchange announcement) confirming the on-site inspection and its scope or purpose. In the United States it may be advisable to convene a 'town hall' meeting with employees to discuss the search and the looming investigation, but in the United Kingdom this could potentially tip off individuals who are not intending to comply, triggering evidence tampering or impacting the integrity of witness testimony.

See Chapters 37 and 38 on publicity

External whistleblowers 2.3.2

Many of the points in Section 2.2.4 on internal whistleblowers apply equally to whistleblowers from outside the organisation. There are, however, further legal sensitivities in dealing with external sources of concern that merit consideration.

While an employee cannot be prohibited or discouraged, contractually or otherwise, from reporting concerns to regulators or law enforcement, an employee will probably otherwise be subject to a contractual duty of confidentiality in respect to matters arising within the company and may often have a sense of loyalty to the company. Hence an internal whistleblower presents a more limited threat of public or further disclosure than an external whistleblower. Where an employee does not respect his or her obligations, care should be taken on the issue of enforcement of contractual and other duties of confidentiality, as a first response that apparently seeks to silence someone speaking up can appear extremely unattractive to the media, regulators and other authorities.[36]

36 See e.g. *SEC v. KBR*, Release No. 34-74619 (1 April 2015) – fining and imposing remedial relief against KBR for violating Rule 21F-17, which prohibits impeding an individual from communicating directly with the SEC staff about a possible violation of the securities laws. KBR's violation stemmed from its having employees sign confidentiality agreements as part of internal investigations, stating that they would not disclose interviews or the subject matter of interviews

External whistleblowers frequently adopt a multi-level strategy for ensuring their concerns receive attention. First, they communicate through the formal whistleblower route, challenging the company to demonstrate the efficacy of its response. At the same time, or shortly after, they write directly to board, senior management and shareholders, frequently copying in other third parties. Frustrated by inaction, they may turn to media interviews to increase pressure. Communication with regulatory authorities and other public bodies may follow.

It may be tempting to regard these scattergun approaches as self-evidently undermining the credibility of the issues raised and the complainant, but they are in fact remarkably effective strategies for ensuring the matter receives urgent attention, and the tools at hand for stopping wider publication are limited. Injunctive relief rarely succeeds in the face of a public interest justification.

Dialogue with the whistleblower, giving the clear impression that the company is grateful to the person for having spoken up and that an investigation is now under way, helps to reduce wider dissemination risk or slows the timetable. However, this must be balanced with the need to avoid encouraging the whistleblower to believe he or she is in charge, will be informed of the outcome of the investigation or in some way will influence the company's strategy in dealing with the issues.

A helpful counter to the lack of control a company has over the conduct of external whistleblowers is the lack of access they have to company confidential material and staff. By the same token, however, the company has limited line of sight into external whistleblowers' dealings with third parties, including public authorities. It is, therefore, advisable to invite the whistleblower to meet or speak with a member of the legal function to establish what he or she knows, has done so far and is intending to do next.

Finally, internal and external whistleblowers may have protected status, whether as employees or former employees under various EU, UK and US laws, or as a consequence of a company's policy and practice. Whether or not they are protected as a matter of law, it is essential that all whistleblowers are, and are seen to be, immune from retribution. This requires the application of significant care in the treatment of their complaints, evidence, the handling of witnesses, their anonymity (whether or not requested) and the reporting of facts within the organisation, recognising that ordinary line-reporting duties may be suspended to protect the identity of the whistleblower and avoid reprisal.

2.3.3 Media coverage

Unexpected media reports or more aggressive or intrusive media behaviour (such as undercover investigative journalism) can trigger an investigation in extremely pressurised circumstances. The media body running the story will often have completed its investigation before the company is aware of the matter. In the worst

or investigations to anyone without the KBR legal department's prior approval, threatening disciplinary action up to termination for breaching the confidentiality agreement.

cases, the first a company learns of the facts is in the publication or broadcast, although various broadcasting codes and voluntary editorial principles encourage the opportunity for a right of reply, so most coverage will follow a short period of discussion of content between media and the subject of the story, yet not enough to accommodate an investigation and fully informed response. The company's investigation is therefore under time pressure from its first step, with media, customers, shareholders, regulators and government agencies pressing for answers or redress before the company's senior management has been able to evaluate the facts or take advice on the risk they present.

Even if it has been aware of the broader issue, and is undertaking some form of investigation, sudden and intense media scrutiny can require a company to adjust the level of response to be seen to understand public demand for resolution. Companies that were otherwise intending to adopt a more passive approach, or undertake low-key investigations and adopt a reactive media and customer stance can appear to be on the back foot as they scramble to intensify investigative efforts.

All of this can, of course, play out as complaints and concerns become part of a viral episode through social media, reducing timelines to hours and days, not weeks and months. From a practical point of view, there is an immediate balance to be struck between thorough investigation and a sufficient grasp of the facts to allow the company to demonstrate a clear strategy that can be articulated publicly (consider, for example, the initial days of the Deepwater Horizon accident in the Gulf of Mexico in 2010).

Above all, these pressures require strong triage skills and pre-existing crisis management and investigations governance, which allows incident response, investigation, legal risk management, media, shareholder and customer relations strategies to follow well-practised routines so that precious time is not taken up debating who is leading and what the right first step may be. Setting up an investigations steering group and having effective policies and processes in place that are respected by senior management will ensure that emergency investigations are not obstructed by administrative chaos.

Customer and competitor complaints and regulatory response 2.3.4

As well as direct complaints to the company and civil litigation (which trigger the fact-gathering process), customers and competitors may refer complaints to regulators, consumer bodies and ombudsmen. Individual incidents may be sufficiently problematic to merit investigation in their own right. However, even with low-value customer complaints there comes a point where a volume of similar-fact criticisms raise concerns as to the fairness of underlying sales processes and adequacy of complaints handling systems, or perhaps even broader questions of breaches of systems or controls, that may combine to catch a regulator's attention.

While it might be hoped that a company's own monitoring of complaints levels and sources should trigger deeper investigation into the underlying issues, it will sometimes take unilateral regulatory enquiry and enforcement processes to bring about a non-voluntary, full evaluation, including thematic reviews, 'skilled

persons appointments',[37] market studies and industry sweeps. Such investigations will have a significant distinguishing feature: the company's in-house investigators will not set the parameters of the investigation (though they can add significant value in debates with regulators over scope and process and may be heavily involved in the activities that follow, by partnering the external firm in a skilled person's review, for example). The in-house function will remain critical in the parallel process of evaluation of evidence as it comes to light so that advice may be taken to develop a response to regulatory or legal liability.

2.3.5 The influence of political agendas

The regulatory agenda is often set, adjusted or inflamed by the political climate, such that external regulatory or criminal investigations would not commence but for political pressure or the sudden availability of funding. The political agenda itself may change overnight in the face of public or media pressure.

Take, for example, UK parliamentary politics in the wake of the LIBOR regulatory settlements in the summer of 2012. Prior to the announcements in the summer of 2012, the former Director of the SFO, Richard Alderman, had declined to commence an investigation into LIBOR manipulation citing insufficient resources to pursue the matter following budget cuts and a concern that the SFO might duplicate efforts by the FSA and Office of Fair Trading, which he considered better placed to determine the issues. He stepped down in April 2012 and the issue came to the public's attention in June 2012 when the first regulatory settlements were announced.

There followed a period of intense criticism in the media, growing public outcry and then questions in the House of Commons in late June 2012 as to why the SFO was not investigating the issues. Shortly after the Prime Minister's appearance in the House of Commons to answer questions on the issue, the Chancellor of the Exchequer announced that emergency funding was being made available, and on 6 July 2012 the SFO announced it was commencing an investigation. While the banks in question had either resolved matters with their regulatory bodies or were in the process of doing so, they then faced parallel investigations into the same matters (but on a different, criminal footing concerning the conduct of individuals as opposed to the regulatory breaches by the corporations). Formal requests for witness evidence were served in the weeks and months following. Prosecutions of individuals followed in 2015 and 2016 and continue in the United Kingdom and United States.

Although banks had already conducted their own investigative activity – in certain cases some years prior to the individual prosecutions – the purpose and nature, timescale and outcomes of the SFO's enquiries were different from the regulatory investigations by UK, US and other prosecutorial authorities, and different again to the multiple competition authority enquiries on the same issues that had already occurred, requiring a flexibility in approach by banks'

37 FSMA, section 166.

investigations teams, not to mention significant capacity to handle such large-scale and long-running matters.

Investor complaints and shareholder derivative lawsuits 2.3.6

While this section considers the external causes of investigations, and complaints and claims by investors may appear to fall more obviously into the 'litigation' than 'investigations' workload for a company, claims and complaints are rarely so neatly delineated. The reality for many companies is that allegations raised by shareholders can trigger twin legal activities: a defence strategy in cases where issues of liability are plainly articulated and facts are either already established or may be simply assessed; and separate investigations into wider concerns raised by the complaint, or where the facts are far from clear and the allegation cannot be adequately responded to without an investigation.

A major sensitivity in matters of this nature, that can be overlooked in pursuit of the defence of the civil action, pursuit of the HR agenda and rebuttal of individual shareholder complaints are the ongoing disclosure and transparency obligations arising from stock exchange listing rules. It is one thing to investigate sufficiently to position a company to defend litigation on the balance of probabilities, or to be able to respond to a letter of concern or questions from the floor in an AGM, but another to investigate to a point where a public statement can be made with sufficient accuracy to satisfy the reasonable investor test.[38]

While a company may wish to respond speedily to concerns raised by an investor, and in other circumstances considered above a 'triage' approach enables early management of matters under investigation, dealing with investor complaints carries a further layer of complexity and a balance needs to be struck, in risk-management terms, between the urgency to make a statement to the market and the time it may take to investigate facts sufficiently to permit that statement to be adequately precise and informative. The publication of false or misleading statements through inadequate or incomplete investigation simply increases the range of potential legal liabilities and further delays resolution.

Competitor complaints 2.3.7

A final category of external triggers is the complaint by a competitor (whether directly to the company or to a regulatory or criminal authority that then notifies the company).

On first analysis this seems to be little different from any other external trigger, but a complaint or concern raised by a participant in the same market raises a number of wider risks that impact the complexion of the subsequent investigation. In certain ways a competitor complaint has more in common with whistleblowing (and may even be regarded as such by authorities) in that it may create forms

38 In the United Kingdom, information a reasonable investor would be likely to use as a basis for their investment decisions. See FSMA and Article 7 of the Market Abuse Regulation relating to inside information. These provisions require a high degree of precision in the accuracy of factual statements.

of protected disclosure, confidentiality obligations and behavioural expectations from particular authorities. This is certainly the case in competition matters where leniency or immunity is sought following a self-report to a competition authority following a tip-off or complaint by a competitor. This immediately limits the scope for communication of issues (including even the existence and subject matter of the investigation) among staff and will have a particular bearing on the management of evidence, including witness handling and interview processes. It will also affect the extent to which there may be ongoing communication outside the organisation where, for example, witnesses may exist within the competitor organisation but further dialogue is not possible without consent of and careful choreography by the relevant authority.

3

Self-Reporting to the Authorities and Other Disclosure Obligations: The UK Perspective

Amanda Raad, Jo Torode, Arla Kerr and Mair Williams[1]

Introduction 3.1

The decision whether to disclose voluntarily a breach or wrongdoing on the part of a company involves various complex and interrelated issues. In some cases, there may be clear advantages to self-reporting, and, where a decision is taken to disclose on this basis, this should be carefully managed. This chapter considers the advantages and disadvantages of self-reporting, including how the manner and timing of a self-report can make a crucial difference to mitigating any potential penalties that may be imposed.[2] Understanding the current views of authorities in the United Kingdom and how these views continue to evolve is an important part of this analysis.

See Sections 3.3 to 3.6

In 2009 the Serious Fraud Office (SFO) issued guidance (the 2009 Guidance) to encourage companies to self-report instances of overseas bribery by promoting the idea that 'in appropriate cases' such self-reports would receive a civil rather than a criminal penalty.[3] The 2009 Guidance appears to have followed on from the approach adopted by the SFO in its settlement with Balfour Beatty Plc in 2008, which self-reported overseas corruption and received a civil recovery order instead

1 Amanda Raad is a partner, and Jo Torode, Arla Kerr and Mair Williams are associates, at Ropes & Gray LLP.

2 In addition to the potential risks and benefits of self-reporting, this chapter also outlines the mandatory disclosure obligations companies may face (see appendix to this chapter). Depending on the entity's regulatory status and the sector in which it operates, certain disclosure obligations may be imposed by statute, regulatory requirements or membership of professional bodies. Companies must first consider mandatory disclosure obligations as well as the impact those disclosures may have on any decision to self-report to other authorities who may become aware of the misconduct through information sharing.

3 The 2009 Guidance is no longer publicly available.

of criminal sanctions.[4] This approach changed in 2012 when the SFO abruptly withdrew its policy of favouring civil settlement in self-reported cases. This followed a report by the Organisation for Economic Co-operation and Development (OECD), which criticised the SFO's position as undermining the seriousness of a bribery offence. It also followed soon after a change in regime at the SFO when Richard Alderman was succeeded by David Green CB QC as director. In a revised statement of policy citing the OECD's concerns, the SFO stated, 'Self-reporting is no guarantee a prosecution will not follow.'[5]

Today, authorities in the United Kingdom continue to encourage companies to self-report and consider an open and co-operative relationship to be an important factor when determining what further action to take. The SFO considers voluntary disclosure to be a key factor in any potential settlement, as illustrated by its comments in relation to the United Kingdom's first deferred prosecution agreements (DPAs).[6] The OECD credited the United Kingdom's introduction of DPAs with 'bolstering incentives to self-report' in its March 2017 evaluation of anti-bribery measures in the country.[7] However, the recent *Rolls-Royce*[8] case (where Rolls-Royce was offered and agreed a DPA even though it had not self-reported to the SFO) shows that the SFO may not consider self-reporting in its strictest sense a precondition to agreeing to a DPA.[9] In that case, both the judge and the SFO made clear that the DPA was only made possible by virtue of the 'extraordinary

4 The 2009 Guidance was also published approximately two weeks after the SFO secured the first ever corporate criminal conviction for bribery offences against Mabey & Johnson Ltd. The company pleaded guilty to corruption charges related to the alleged payment of bribes to win contracts in Jamaica and Ghana between 1993 and 2001, voluntary disclosure of which was made by Mabey & Johnson's holding company to the SFO in February 2008. While the company had launched an internal investigation prior to notifying the SFO, it appears its self-report to the SFO was only triggered after public allegations of improper payments were made by a former company executive. The self-report was also likely deemed flawed in that the company was already under investigation by the SFO for its alleged participation in violations of the United Nations Oil-For-Food programme and corrupt payments to officials.

5 The SFO's revised statement of policy can be accessed here: https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/.

6 See, for example, speech by Alun Milford, SFO General Counsel, European Compliance and Ethics Institute, Prague, 29 March 2016 '[I]t should . . . be obvious from a cursory review of the public policy guidance that we will not enter into a DPA with a company that has not co-operated with us. Our Director . . . has repeatedly emphasised this point . . . . The Standard Bank case shows how this can be made to work in practice. . . . Their conduct was an object lesson in how to co-operate.' Available at https://www.sfo.gov.uk/2016/03/29/speech-compliance-professionals/.

7 http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf

8 *SFO v. Rolls-Royce Plc and Rolls-Royce Energy Systems Inc*, Crown Court (Southwark), 17 January 2017, Case No. U20170036.

9 David Green QC, Director of the SFO, spoke about the Rolls-Royce DPA at the International Bar Association Anti-Corruption Summit in Paris on 13 June 2017. He noted that while Rolls-Royce had not self-reported the initial conduct the SFO inquired about in China and Indonesia, the company voluntarily reported other matters of concern, which were well beyond the scope of the SFO's initial inquiries.

cooperation of Rolls-Royce.'[10] Like the SFO, the Financial Conduct Authority (FCA) also describes the nature of a firm's overall relationship with the regulator as an 'important consideration before an enforcement investigation and/or action is taken forward'.[11]

As well as the approach of authorities in the United Kingdom, it is also essential to consider what impact self-disclosure will have on other jurisdictions. Information sharing between enforcement agencies in different countries has become much more common, which means that the timing, order and manner of disclosures must be carefully assessed.

Reporting to the board 3.2

As a first step, and before any external disclosure is made, details of the breach should be reported to and considered by senior management. Companies should have procedures in place for the escalation of issues to board level. Issues that may materially affect the company should be reported to the board in a timely manner and potential conflicts of interest between the company, management and directors should be carefully considered when deciding how to review or investigate any potential issue. In many cases, it may be most appropriate for the board or a special committee of the board to oversee the investigation and ultimately any potential reporting decision. More specifically, if the allegations implicate senior management or board members, an independent investigation committee should be established. Alternatively, larger companies may have an oversight or audit function that has sufficient autonomy.

See Chapter 5 on beginning an internal investigation

Communication to members of the board should also be proactively managed to maintain legal privilege. Under English law, privilege will not extend to the whole corporate entity, or even the whole group or department seeking advice.[12] Both *The RBS Rights Issue Litigation*[13] and *ENRC*[14] cases have further narrowed the definition of 'client' for the purpose of asserting legal advice privilege. It is therefore now even more important to establish who the client is when conducting an investigation with the assistance of in-house or external counsel. This may be more straightforward where an independent investigation committee has been established as the client will be a clearly defined group. This will also help to control information flows internally and ensure that the board receives timely and appropriate information regarding an investigation.

See Chapter 35 on privilege

See Chapter 5 on beginning an internal investigation

10 https://www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf.

11 FCA Enforcement Guide, which can be accessed here: https://www.handbook.fca.org.uk/handbook/document/eg/EG_20160101.pdf.

12 *Three Rivers District Council v. Bank of England* [2003] EWCA Civ 474.

13 [2016] EWHC 3161 (Ch).

14 [2017] EWHC 1017 (QB).

3.3 Advantages of self-reporting

Where there is no mandatory requirement to disclose, deciding whether to voluntarily self-report a breach or issue to the authorities will require a review of all possible advantages and disadvantages.[15]

3.3.1 Information control

Generally speaking, a company will have an element of control over the information disclosed to a government authority, at least at the outset. Voluntary disclosure provides an opportunity for the company to explain and clarify matters on its own terms. In circumstances where there is a possibility of the information being disclosed to the authorities in another way, for example by a whistleblower, the ability to control the disclosure may weigh heavily in favour of self-reporting. However, following *ENRC* (where the SFO successfully challenged claims of both litigation and legal advice privilege over documents created during an internal investigation), this ability to control information is less clear and is arguably a disadvantage of self-reporting.

3.3.2 Demonstration of a culture of compliance

Self-reporting can also be an opportunity to demonstrate a culture of good compliance, particularly if the company's own compliance systems detected the wrongdoing and the company moved quickly to remediate and disclose it. This backdrop can help cast subsequent interactions with government authorities in a positive and co-operative light, which may improve the likelihood of an early resolution and mitigate any penalties.

3.3.3 Co-operation credit and penalty mitigation

The DPA Code of Practice 2014 (DPA Code) lists co-operation first as an additional public interest factor against prosecution.[16] The prosecutor will decide whether the company subject to the investigation has supplied sufficient information about the circumstances of the breach concerned, as well as any relevant conduct, when considering the extent of co-operation. The DPA Code provides specific examples of co-operation including 'identifying relevant witnesses', 'providing a report in respect of any internal investigation' and 'where practicable . . . making the witnesses available for interview when requested.'[17] While this guidance has not changed, the judicial landscape certainly has. The DPA with Rolls-Royce showed that an absence of self-reporting in its strictest sense

15 See appendix to this chapter for potential mandatory disclosures. The likelihood of information sharing between authorities may very well lead a company to proactively make other timely disclosures in hopes of receiving full co-operation credit and benefit from a voluntary disclosure.

16 Paragraphs 2.8.2(i) and 7.8(iii) of the DPA Code which can be accessed here: https://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf.

17 Ibid.

(without any regulator interactions or prompt) may be compensated for only by an extremely high level of co-operation.

While full co-operation is stated as being a condition for a DPA, the United Kingdom's shorter track record in this area makes it harder to assess the true level of co-operation expected. Certainly comments from the SFO have made clear that co-operation has to be full and unfettered on the part of a disclosing company. Ben Morgan, Joint Head of Bribery and Corruption at the SFO, said in October 2015 that 'you [companies] don't have to co-operate, but if you say you want to – back it up, really do it; don't say one thing, but really work to a different agenda. We see straight through that and it doesn't work. Self-reporting alone is not sufficient.'[18] However, many practitioners have expressed concern that what is being expected of companies is not clear and this uncertainty may deter self-reporting, even as DPAs become more widely used. In 2017, Ben Morgan added to the confusion by asserting that, 'for those that behave responsibly, (DPAs are) the new normal'.[19] While confirming that the SFO wishes to continue to roll out the use of DPAs it remains unclear how much co-operation from a company is required in order to make it 'responsible'. The SFO's ongoing investigation of Petrofac unfortunately provides little clarity on this matter. An announcement in May 2017 by Petrofac, under investigation by the SFO in connection with its Unaoil dealings, revealed the SFO's dissatisfaction with Petrofac's co-operation to date. Despite Petrofac's stated efforts of co-operation (including suspension of its chief operating officer, disclosure of large volumes of materials and sharing findings of its internal investigation), the SFO informed Petrofac it does not consider Petrofac to have co-operated with it, 'as that term is used in relevant SFO and sentencing guidelines'.[20] The SFO has not specified how Petrofac's actions have fallen short of full co-operation, however.

Failure to report wrongdoing within a reasonable period after the offence comes to light is regarded by prosecutors as being a public interest factor in favour of prosecution.[21] An attempt made to conceal misconduct is a factor that will increase the seriousness of the offence and will likely result in steeper penalties being imposed.[22] David Green QC, Director of the SFO, said in an interview recently '[i]f a company is totally uncooperative and sort of leads us a merry dance for four or five years by not cooperating with our investigation . . . it would be almost impossible for us to represent to the judge that the DPA would be in the

18 Ben Morgan, Joint Head of Bribery and Corruption at the SFO, Speech at the Annual Anti-Bribery and Corruption Forum, 29 October 2015, which can be accessed via: https://www.sfo.gov.uk/2015/10/29/ben-morgan-at-the-annual-anti-bribery-corruption-forum.

19 Ben Morgan, Joint Head of Bribery and Corruption, in a speech delivered on 7 March 2017 entitled 'The future of Deferred Prosecution Agreements after Rolls-Royce', available at: https://www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/.

20 Petrofac, Update on SFO investigation and Board change, 25 May 2017, available here: https://www.petrofac.com/en-gb/media/news/update-on-sfo-investigation-and-board-change.

21 Guidance on Corporate Prosecutions, issued by the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of the Revenue and Customs Prosecutions Office at p. 7.

22 Sentencing Council's Fraud, Bribery and Money Laundering Offences Definitive Guide, at p. 50.

interests of justice.'[23] The threat of criminal sanction and associated reputational damage once the matter becomes public may encourage a company to self-report, particularly for more serious breaches.

In contrast to the United States, prosecutors in the United Kingdom have made it clear that self-reporting does not provide a guarantee that prosecution will not follow, but early disclosure may confer some advantages. The UK Sentencing Council's Fraud, Bribery and Money Laundering Offences: Definitive Guideline (UK Guidelines) makes clear that early admissions by a company or voluntary self-reporting will reduce the seriousness of the offence or otherwise reflect mitigation, reducing the sentence imposed.[24] However, unlike the United States' Federal Sentencing Guidelines for Corporations, the UK Guidelines are not based on factors that have a set numerical value attributed to them. Instead, any weight given to the factors set out in the UK Guidelines, including self-reporting, is solely within the judge's discretion. In addition to the quantitative approach of its Federal Sentencing Guidelines for Corporations, the United States has recently moved to further increase certainty for companies looking to co-operate. The Department of Justice's (DOJ) Pilot Program recently marked its first year anniversary with a notable record of rewarding the self-disclosure of potential FCPA violations, and penalising non-disclosure. The Pilot Program aimed to standardise co-operation credit in FCPA cases by allowing for a 25 per cent reduction in fines for companies that do not self-report misconduct, but later co-operate with a DOJ investigation. In comparison, self-disclosure combined with full co-operation can lead to up to a 50 per cent reduction in fines or lack of prosecution. There is no similar scheme as yet in the United Kingdom and no indication that one is being planned.

The United States also has a much longer history of providing formal mechanisms by which companies are incentivised to co-operate, such as DPAs. DPAs have existed in the United States since the 1990s, whereas the United Kingdom implemented DPAs relatively recently in February 2014.[25] As of the time of writing, the UK courts have approved DPAs entered into between the SFO and four corporates, namely ICBC Standard Bank Plc (Standard Bank); an unnamed company identified as 'XYZ Limited',[26] Rolls-Royce and Tesco.[27] This, coupled with the relative lack of corporate criminal convictions in the United Kingdom (again, as compared with the United States), makes it difficult to assess the extent

23 'Serious Fraud Office boss warns big names to play ball – or else', *The Observer,* 2 April 2017, available here: https://www.theguardian.com/business/2017/apr/01/serious-fraud-office-deferred-prosecution-agreements.

24 The Guidelines are effective from 1 October 2014 and provide a structure for the sentencing of corporate offenders in the United Kingdom for the first time.

25 DPAs were deployed sparingly during the 1990s and early 2000s in the United States, with a significant increase in the number entered into from 2005. See Anthony and Rachel Barkow, Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct, p. 4 (NYU Press, 2011).

26 *SFO v. XYZ Limited*, Crown Court (Southwark), 11 July 2016. As of the time of writing and due to ongoing related litigation, the court took the decision not to name the company concerned.

27 https://www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/.

to which the penalties imposed were mitigated by early self-reporting and full co-operation. The level of credit granted to companies will become clearer once the United Kingdom builds up more of a track record of both corporate criminal convictions and DPA settlements. Nevertheless, a certain degree of judicial consistency has been applied to the four DPAs reached in the United Kingdom, insofar as they have at least all been agreed by the same judge. As more DPAs are agreed in the country, more useful penalty patterns are of course likely to emerge.

See Section 3.5.1

See Chapter 23 on negotiating global settlements

The DPA Code initially provided clarity on the level of discount available for financial penalties imposed pursuant to a DPA by stating that a one-third discount must be provided for DPAs where the circumstances are comparable to the submission of an early guilty plea by the company.[28] This went beyond the statutory position in the Crime and Courts Act 2013, which only requires that the financial penalty for a DPA 'be broadly comparable to a fine that the court would have imposed . . . following a guilty plea.'[29]

However, in June 2016, the SFO suggested that the current one-third discount applicable under the DPA Code may be reconsidered: in a Q&A on 17 June 2016, David Green QC said that the DPA regime may be modified in the future, particularly concerning what reduction in financial penalty companies can expect. Mr Green also touched on the continuing development of the DPA system in the United Kingdom as part of his consideration of discounts by explaining that '[a]s our experience of DPAs develops there will be space to consider if the system is correctly balanced.'[30] This Q&A foreshadowed the discounts which were then applied in the DPAs in *XYZ Ltd* and when the judge gave a discount of 50 per cent for extraordinary levels of co-operation. Given the fact that such a discount is not codified, a certain level of uncertainty as to the effect of self-reporting on any penalty imposed remains, although there are now a number of DPAs that can be examined to glean a better picture.

28 The DPA Code of Practice states: 'a financial penalty [for a DPA] must provide for a discount equivalent to that which would be afforded by an early guilty plea. Current guidelines provide for a one third discount for a [guilty] plea at the earliest opportunity.' DPA Code of Practice 2013 which can be accessed here: https://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf.

29 Schedule 17, Paragraph 5(4) of the Crime and Courts Act 2013.

30 David Green QC, SFO Director, 'As our experience of DPAs develops there will be space to consider if the system is correctly balanced. And I say that . . . because I know that in our system by law the discount for the DPA is the same as that for a guilty plea.' Q&A, London, 17 June 2016, organised by The Fraud Lawyers Association and the European Fraud and Compliance Lawyers association. Excerpts from the Q&A sessions can be accessed here: http://globalinvestigationsreview.com/article/1036163/david-green-sfo-can-learn-from-fca-approach-to-internal-investigations.

DPA Counterparty	*Date*	*Self-reported?*	*Nature of co-operation*	*Reduction in Penalty*
Standard Bank Plc	30 November 2015	Yes. Standard Bank was praised for the prompt nature of its self-reporting: • first its mandatory SAR to SOCA (the predecessor to the NCA); and then • its discretionary disclosure to the SFO six days later.	Earliest admission of responsibility. Full disclosure of its internal investigation and agreement to ongoing co-operation with SFO post DPA in the form of an independent review of its anti-corruption policies.	1/3
XYZ Limited	8 July 2016	Yes. XYZ made a written self-report via its lawyers and then continued to feed the SFO information while conducting its own investigation. XYZ also made two further self-reports.	Commendably early self-report. Earliest admission of responsibility. Pre- and (agreement to) post-DPA co-operation with the SFO in all matters relating to the conduct arising out of the circumstances of the draft indictment. Review, maintenance of and reporting to the SFO on the organisation's existing compliance programme.	50%
Rolls-Royce Plc & Rolls-Royce Energy Systems Inc	17 January 2017	No. Although Rolls-Royce did not self-report the conduct in China and Indonesia that the SFO initially inquired about, the company voluntarily reported other matters of concern, which were well beyond the scope of the SFO's initial inquiries.	'Extraordinary' levels of co-operation: Rolls-Royce voluntarily supplied the SFO with reports on the findings of its various internal investigations. The SFO then commenced its own investigation. Not only did the SFO have access to Rolls-Royce's own investigations, including the interviews conducted therein (after the company waived any claim for legal professional privilege on a limited basis), but Rolls-Royce: • deferred certain interviews in its own ongoing investigations until the SFO had first completed its interview of the same individual; • provided all material requested by the SFO voluntarily; • consulted the SFO in respect of developments in media coverage; and • sought the SFO's permission before winding up companies that may have been implicated in the SFO's investigation. Going forward, Rolls-Royce also agreed to: • co-operate in the investigation and prosecution of individuals related to this case or any other matter of interest to the SFO where Rolls-Royce holds relevant information; • at the reasonable request of the SFO, assist law enforcement agencies, regulators and multilateral development banks including those overseas, as directed.	50%
Tesco Plc	10 April 2017	Details not yet released. Reporting restrictions apply.		

Risks of self-reporting 3.4

Self-reporting does not prevent prosecution 3.4.1

Companies in the United Kingdom should be aware that self-reporting is no guarantee that prosecution will not follow in cases of more serious wrongdoing and where proceeding to prosecute is in the public interest. Significantly, this decision can be made by the SFO or the court late in the process and after documents, details and transcripts of witness interviews and other information have already been provided to prosecutors, effectively building the case against the company. In addition, any statement of facts within a proposed DPA can be used against a company if prosecution is pursued. This is a major risk for a company looking to self-report, as it could face prosecution (and the associated negative publicity that brings) based largely on information provided by the company in the context of voluntary DPA negotiations and a co-operative company approach. Furthermore companies will now (post-*ENRC*) have to consider what control they will sacrifice by self-reporting. A company that has provided the regulator or prosecuting body with potentially privileged documents to demonstrate co-operation may then find itself defending a prosecution having already disclosed the most damaging, and privileged, documentation.

Greater scrutiny and long-term obligations to co-operate and remediate 3.4.2

Companies should consider the risk of increased scrutiny as a consequence of self-reporting and the likelihood of longer-term obligations to co-operate: the DPA Code lists co-operation as one of the three standard terms of a DPA.[31] Even without the costly appointment of a corporate monitor pursuant to a DPA, authorities in the United Kingdom are likely to require ongoing involvement and substantial interaction with the company to address the breach or wrongdoing. This will often mean implementing remedial measures and reviewing and improving compliance systems and controls. These changes can be costly to implement and can cause disruption to the business. Ongoing interactions with authorities should also be carefully managed and only made via designated individuals within the company or its external counsel.

Potential loss of control of any internal investigation 3.4.3

A reduced ability to 'control' or influence the scope or conduct of its own internal investigation is also likely to be a concern for a company that self-reports in the United Kingdom. David Green QC has made clear that the agency may require a company to undertake aspects of an internal investigation in a particular way and

31 DPA Code, para. 7.8(iii), which lists 'cooperation with an investigation related to the alleged offence(s)' as one of the terms that will 'normally' appear in a DPA and whose footnote expands as follows: 'For example in respect of individuals. The obligation would include the provision of material to be used in evidence and for the purposes of disclosure.'

keep the SFO informed of particular developments.[32] For example, a company or its counsel could be required to conduct witness interviews in a particular order and may be required to produce full transcripts of interviews, rather than just summaries. The SFO's demand for interview summaries is even more likely given the recent *The RBS Rights Issue Litigation* and *ENRC* decisions, where the court refused to hold that legal advice privilege or, in the case of *ENRC*, litigation privilege over interview summaries could properly be asserted. In *ENRC* the court also held that audit findings, and investigative reports in the internal investigation context should be disclosed. The rationale for the SFO's role and influence over internal investigations is, according to Mr Green, due to the potential dangers of what he refers to as 'churning up the crime scene', where an internal investigation conducted by a company allegedly hinders an SFO investigation.[33] Mark Steward, the FCA's Head of Enforcement, has been similarly critical of internal investigations by describing the effect of them as 'the crime scene being trampled over.'[34] This shift towards increased control over internal investigations by the SFO is less surprising in light of David Green QC's suggestion in June 2016 that he would like to formalise the process in the same way as the FCA uses 'skilled persons' reviews to investigate authorised firms.[35] Under this process, the FCA will engage an independent law or accountancy firm to investigate areas of concern within an authorised firm.[36] Significantly, while the firm under review is required to pay for the investigation, the third party engaged to conduct the review must be approved by and will report to the FCA, an approach somewhat akin to the imposition of a court-appointed monitor following a corporate resolution.[37] In comparison with the United Kingdom's preferred level of involvement in internal investigations, authorities in the United States often encourage companies to conduct internal investigations more independently so long as they coordinate on scope and share their findings, of course reserving the right to provide direction where necessary. The risk of intrusion into an internal investigation will need to be weighed against the benefits of self-reporting.

See Chapter 7 on witness interviews

32 David Green QC, SFO Director, comments at GIR Roundtable Discussion on Corporate Internal Investigations, 27 July 2015.

33 Ibid.

34 Mark Steward, FCA Head of Enforcement, comments made at 14th Annual Corporate Accountability Conference in London, 9 June 2016, details of which can be accessed here: http://globalinvestigationsreview.com/article/1036084/mark-steward-don%E2%80%99t-trample-the-crime-scene.

35 David Green QC, SFO Director, Q&A, London, 17 June 2016, organised by The Fraud Lawyers Association and the European Fraud and Compliance Lawyers association. Excerpts from the Q&A session in London on 17 June 2016 can be accessed here: http://globalinvestigationsreview.com/article/1036163/david-green-sfo-can-learn-from-fca-approach-to-internal-investigations.

36 Section 166 of the Financial Services and Markets Act 2000.

37 In addition to also reporting to the authorised firm.

Level of co-operation required and impact on privilege is unclear 3.4.4

There has been considerable debate recently as to whether full co-operation may necessitate a waiver of privilege by disclosing companies. Both the SFO and the FCA have commented publicly that companies are 'letting legal privilege become an unnecessary barrier' in sharing the output of internal investigations.[38] Having litigated on this very point in the *ENRC* case, the SFO has now raised the stakes in initial conversations with companies. In contrast, US regulators are prohibited from even requesting a waiver of privilege.

The level of co-operation required by the SFO and the necessity of any waiver of privilege is a developing area. For instance, consider the SFO's differing approaches to its settlements with Standard Bank and XYZ Ltd and the conviction of Sweett Group Plc (Sweett). All three companies instructed external counsel to conduct internal investigations. However, while Standard Bank and XYZ were praised for being transparent and collaborative, Sweett was viewed by the SFO as being unco-operative. Standard Bank and XYZ appear to have conducted their own internal investigations alongside the SFO's own review and seemingly maintained full co-operation with the SFO throughout the investigation process. In his judgment in Standard Bank's DPA, Sir Brian Leveson, President of the Queen's Bench Division, specifically noted that Standard Bank assisted the SFO 'in identifying relevant witnesses, disclosing their accounts and the documents shown . . . making witnesses available for interview . . . providing a summary of first accounts of interviews, facilitating interviews of current employees, providing a timely and complete response to requests for information and material, and providing access to its document review platform.'[39]

Similarly, in approving the SFO's second DPA against XYZ, Leveson P again highlighted that he had given 'considerable weight' to the level of the company's co-operation, explaining in similar language to the Standard Bank DPA that XYZ had 'provided oral summaries of first accounts of interviewees, facilitated the interview of current employees, and provided timely and complete responses to requests for information and material.'[40] Leveson P also referred to the level of co-operation and disclosure of information undertaken by XYZ as 'materially similar' to the co-operation terms specified in the Standard Bank DPA and commented that 'it may be appropriate that they be considered standard in these cases.'[41] Further, in determining the level of fine to impose against XYZ, which if substantial would have forced the company into insolvency, Leveson P took into

38 Jamie Symington, Director in Enforcement (Wholesale, Unauthorised Business and Intelligence), FCA, speech at Pinsent Masons Regulatory Conference, 5 November 2015, which can be accessed via: http://www.fca.org.uk/news/speeches/internal-investigations-firms.

39 Paragraph 30 of the Approved Judgment by Leveson P, which can be accessed here: https://www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Preliminary_1.pdf.

40 See paragraphs 61 and 27 of Leveson P's Preliminary Judgment, which was cross-referenced in the Final Judgment and can be accessed via: https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/.

41 Ibid. at paragraph 62.

account the 'level and nature' of co-operation and set a fine that he acknowledged appeared 'extremely modest' when compared with the sums to be disgorged (but paid by XYZ's parent company). In this instance, full co-operation with the SFO was of significant benefit to the company.

Leveson P also pointed to the high levels of co-operation from Rolls-Royce in the DPA he approved between the company and the SFO, stating that the company's co-operation had been 'far more extensive than was identified in the public domain'.[42] When the SFO raised concerns about Rolls-Royce's businesses in China and Indonesia, the company commenced various internal investigations, before voluntarily supplying the SFO with reports on the findings of those investigations, which went well beyond the scope of the concerns initially raised by the SFO. When the SFO subsequently commenced its own investigation, not only did it have access to Rolls-Royce's internal investigations and interviews (Rolls-Royce having made a limited waiver of its claims for legal professional privilege over them), but also Rolls-Royce deferred certain interviews until the SFO had completed its interviews of the same individuals. In addition, the company provided all material requested by the SFO voluntarily, consulted the SFO when there were developments in media coverage and even requested permission from the SFO before winding up companies that they thought may have been implicated in the SFO's investigation.

In contrast with both the Standard Bank and XYZ DPAs, Sweett's interactions with the SFO appear to have deteriorated following its self-report in 2014. In December 2015, Sweett became the first company to plead guilty to the offence of failing to prevent bribery under section 7 of the UK Bribery Act 2010. Employees of Sweett's subsidiary in the UAE were found to have paid bribes to secure and retain a contract with Al Ain Aihlia Insurance Company (AAAI). Sweett was required by the SFO to issue a statement to investors not long after its self-report stating that the SFO viewed the company as unco-operative as it had decided to continue its own internal investigation into bribery allegations. It appears that Sweett took the decision to continue its independent investigation and exercise its privilege rights after the SFO had begun its formal investigation into the company. A conflict between the company and the SFO appears to have arisen as a result of Sweett's unwillingness to provide evidence from first witness accounts. In response, and as an indicator of the deterioration in relations, the SFO issued a demand to Sweett that it not 'trample' on evidence. It was also discovered that while the SFO investigation was ongoing, Sweett Group representatives attempted to secure a letter from AAAI stating that the sham subcontract was in fact legitimate. It was not until November 2015 that Sweett Group repudiated all of its contracts with the agent. Taken together, this conduct undoubtedly influenced the SFO's decision to refrain from offering Sweett the opportunity to enter into a DPA with the SFO. Sweett ultimately pleaded guilty to failing to prevent bribery

42 It is unclear if high levels of co-operation also influenced Leveson P's view of Tesco because the judgment/decision remains confidential at the time of writing.

under section 7 of the Bribery Act 2010.[43] In contrast, both Standard Bank and XYZ were deemed to have fully co-operated with the SFO and entered into DPAs, despite the SFO not conducting interviews with certain key individuals in the case of Standard Bank, and only having been provided with oral summaries of key witness accounts in both the Standard Bank and XYZ examples.

Adding to the confusion, the SFO has issued a number of public statements on the issue of whether witness summaries or transcripts should be provided by a company, none of which provides a clear answer, while at the same time mandating such documents in the dispute over privilege in the *ENRC* case. On 18 May 2016, the SFO stated publicly that companies do not need to waive privilege to qualify for co-operation credit, but will be required to provide the SFO with first witness accounts if taken, meaning that the SFO expects access to witness interview summaries and associated materials flowing from a company's internal investigation.[44] Shortly after this statement, on 24 May 2016, the SFO attempted to clarify the position again, explaining that a 'charge of inconsistency assumes that there is a difference in terms of privilege between a contemporary record of a witness account, a written summary of it or an oral summary of it. It is an interesting question how valid that assumption is and not one that was required to be tested on the Standard Bank case.'[45] The recent *ENRC* and *The RBS Rights Issue Litigation* cases reinforce the legal position that verbatim witness transcripts will not be privileged, but witness summaries and 'associated materials' may be the subject of greater debate depending on the stage of an investigation at which they are prepared and whether the summaries betray the content of the legal advice sought or received. The SFO's conflicting responses to companies seeking to co-operate, teamed with the SFO's robust stance in litigating *ENRC* and the implied suggestion that co-operation without waiver of legal privilege may not result in full co-operation credit will likely cause companies to consider carefully the risks associated with self-reporting, particularly taking into account the effect of a privilege waiver on matters in other jurisdictions such as the United States where aggressive civil litigation is often pursued based on information obtained through such waivers.

See Chapter 33 on parallel civil litigation

In addition to the rhetoric from the SFO, the decision to litigate a claim of privilege in the *ENRC* case and the challenge to Barclays' assertion of privilege shows that the SFO is willing to challenge privilege claims that it considers unfounded. In *ENRC* the court agreed with the SFO and its limited view of privilege, finding that interview summaries, third-party audit findings and investigation summaries, produced for the purpose of ENRC's external counsel-led

43 The corporate offence of failing to prevent bribery.

44 Matthew Wagstaffe, Joint Head of Bribery and Corruption at the SFO, speaking at the 11th Annual Information Management, Investigations Compliance eDiscovery Conference on 18 May 2016, which can be accessed here: https://www.sfo.gov.uk/2016/05/18/role-remit-sfo/.

45 Written statement provided to Global Investigations Review by Ben Morgan, Joint Head of Bribery and Corruption at the SFO, 24 May 2016, which can be accessed here: http://globalinvestigationsreview.com/article/1035797/sfo-cooperation-to-be-considered-in-the-round.

investigation, were not privileged (with the exception of those investigation summaries that were delivered in a presentation to the client and therefore expressly subject to legal advice privilege). In the Barclays investigation, the SFO challenged Barclays' decision to withhold documents on the basis of legal professional privilege, taking the aggressive stance that the claim for privilege by Barclays was ill founded and that the privilege could not be maintained in circumstances where there was *prima facie* evidence of fraud. Barclays eventually waived privilege before a final hearing of the dispute, disclosing over 100,000 documents to the SFO.

3.4.5 Dealing with authorities in multiple jurisdictions

A decision to self-report is further complicated where the company is contemplating disclosures in multiple jurisdictions, particularly where the approach of the authorities and the benefits of self-reporting are inconsistent or uncertain. For example, in contrast with the United Kingdom's discretionary approach, authorities in the United States are moving towards a more standardised methodology in relation to co-operation credit, as recently indicated by the introduction of the Pilot Program. The DOJ has also published its FCPA Enforcement Plan and Guidance to enable companies to make an informed decision whether to co-operate under the Pilot Program. Similarly, authorities in the United Kingdom and the United States have different views regarding privilege and the level of their expected involvement in an internal investigation. The *ENRC* case has restricted the interpretation of privilege in investigations to such an extent that different approaches in different jurisdictions may now be needed. In the United States, not only would most of the materials addressed in *ENRC* likely be subject to privilege, regulators would not even be allowed to ask for a privilege waiver when evaluating co-operation. This sharp distinction makes it challenging for companies to navigate expectations in cross-border investigations – what one jurisdiction will consider the bare minimum may leave a company unnecessarily exposed in another given that, for example, the United States may consider it a waiver if any privileged documents are produced to the SFO.

See Section 3.3.3

See Section 3.4.4

There may also be scenarios where companies are subject to mandatory reporting obligations in the United Kingdom, but not in other jurisdictions in which they operate. For example, an entity operating in the 'regulated sector', which is required to file suspicious activity reports (SARs) with the National Crime Agency (NCA) in certain circumstances to comply with its obligations under the Proceeds of Crime Act 2002 (POCA), will also have to consider whether, as a result of this mandatory disclosure, other disclosures should be made elsewhere.[46]

In addition to these challenges, authorities in different jurisdictions are increasingly sharing information and combining enforcement efforts. In the 2010 case of *BAE Systems Plc*, the United States' DOJ and the United Kingdom's SFO worked in conjunction to investigate BAE and reach a settlement. In a press release, the DOJ acknowledged and expressed its appreciation of the significant assistance

46 See appendix to this chapter.

provided by the SFO.[47] Today authorities continue to consider how they can go further to proactively collaborate in their enforcement actions. Jamie Symington, Director in Enforcement at the FCA, recently described the collaboration between authorities in different jurisdictions as 'key'. He also remarked that collaboration should go further than co-operation to mean 'building relationships', having a 'shared strategy' and 'learning from each other what the challenges are to delivering successful outcomes.'[48] Practical examples of collaboration provided included 'talking early', proactively 'sharing information', 'regular updates', and 'coordination of outcomes'. Companies subject to authorities in multiple jurisdictions will therefore need to consider the ramifications of disclosure in each, and the potential sequence and manner of any such disclosure.

When to disclose and to whom 3.5

Timing 3.5.1

Having made the decision to self-report, the company and its counsel will need to consider the timing of any report and to which authority (or authorities) it will disclose. It is understandable that before making a report, companies will want to have an idea of the nature and scale of the breach or wrongdoing, so far as practicable, and that requires some level of internal investigation. However, the SFO has made clear that early reporting is vital and any delay will likely count against a company. The SFO's guidance on corporate self-reporting states that '[p]rosecutors will also be mindful that a failure to report the wrongdoing within a reasonable time of the offending coming to light is a public interest factor in favour of a prosecution.'[49] This, coupled with the court's ability to consider DPA negotiations and agreed facts means that the timing even of a voluntary disclosure that may not otherwise have come to light could be used against a company if it is deemed to be too late or insufficiently complete. However, *ENRC* has further complicated the decision-making process for companies deciding on an appropriate time to strike up a dialogue with the SFO. The longer a company waits for an internal investigation to uncover the kind of adverse material which may increase its chances of asserting litigation privilege, the less likely it is to receive credit for an early self-report.

The value of early self-reporting was emphasised in the DPAs entered into with the SFO. First, and most dramatically, Standard Bank notified the authorities before its external counsel had started an internal investigation on the bank's behalf. In the XYZ Ltd example, the company retained legal counsel immediately on becoming aware of the issues in late August 2012. While investigating, XYZ's counsel orally reported to the SFO effectively a little more than one month later

47 See DOJ press release, March 2010, which can be accessed here: https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine.

48 Jamie Symington, Director in Enforcement (Wholesale, Unauthorised Business and Intelligence), FCA, speaking at GIR Live London conference, 28 April 2016.

49 See https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/ (Revised October 2012).

on 2 October 2012 (without naming the client). Thereafter, the company and its counsel continued to conduct an internal investigation and actively met and engaged with the SFO on 13 November (confirming that XYZ would be making a written self-report) before making a formal written self-report on 31 January 2013. Two further reports were also made.[50]

In contrast, during the *Sweett* prosecution, HHJ Beddoe criticised the company for only submitting a self-report after it had received information that the *Wall Street Journal* was going to publish bribery allegations against it. Sweett received no credit for self-reporting.[51] Distinguishing this exact fact scenario, Leveson P, when approving the XYZ DPA, specifically noted that there was no suggestion of a whistleblower and that had it not been for the self-report the offences may have continued undetected by the SFO.[52] This indicates that the timing, openness and motivation behind a self-report may determine whether a company receives any credit for self-reporting, which, in turn, could be an important factor in the SFO's decision to pursue a DPA or a prosecution.

Following the Rolls-Royce DPA, self-disclosure can no longer be considered a precondition to the availability of (or indeed a full discount under) a DPA, in the United Kingdom. Timing alone will therefore no longer determine whether a DPA is offered, with 'extraordinary' levels of co-operation now being sufficient if a company is approached by the SFO with concerns. The authorities have consistently recognised the need for companies to conduct internal investigations to establish the facts and are cognisant that disclosing companies have a difficult balance to strike between the need to disclose promptly and ensuring they have investigated the issue as far as is reasonable to be able to make an accurate report.[53] Further analysis of the DPAs approved to date does, however, indicate that early self-disclosure, along with full co-operation going forward, tends to be rewarded by the judiciary.

50 The SFO with the assistance of XYZ and its counsel then conducted its own investigation between April 2013 and January 2016, which confirmed the information already provided to the SFO. From the date of the submission of the formal written report and throughout the SFO's investigation, the company and its counsel continued to investigate and supplement the self-report. See paragraph 12 of Leveson P's Preliminary Judgment and paragraph 11 of the Final Judgment, both of which can be accessed via: https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/.

51 According to secondary sources as the judgment does not appear to be publicly available.

52 Paragraph 25 of Leveson P's Preliminary Judgment, which can be accessed via: https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/.

53 The timing of a self-report made under the European Competition Commission Cartel Leniency Policy is particularly important given the possibility of full immunity for a company involved in a cartel, provided it discloses to authorities first before any other company in the cartel. For companies involved in the same cartel, a sliding scale of fine discounts applies; the sooner a company discloses the greater the discount with the Commission imposing full penalties on whichever company in the cartel fails to report.

Priority of disclosures to multiple agencies 3.5.2

Any mandatory disclosures, such as the filing of an SAR with the NCA for those operating in the regulated sector, should be considered and made first.[54] However, as illustrated by the *Standard Bank* case, this mandatory reporting requirement has a significant consequence if the knowledge or suspicion of a money laundering offence being committed by another arises as a result of criminal activity, in this case bribery, which may prompt a separate (discretionary) notification to the SFO.

In the *Standard Bank* example, the SFO noted the short timeline of disclosure to both it and the Serious Organised Crime Agency (SOCA) (predecessor to the NCA) in its press release announcing the Standard Bank DPA, highlighting that it was notified six days after Standard Bank submitted its mandatory SAR to SOCA.[55] Companies considering, or required to make, disclosures to multiple agencies should bear in mind any time lapse between notifications to different authorities.

In this scenario, companies should also bear in mind the likelihood of information sharing between authorities. The NCA's guidance note on Submitting A Suspicious Activity Report within the Regulated Sector specifically states that by submitting a SAR, companies will provide law enforcement agencies with 'valuable information of potential criminality.'[56] With 381,882 SARs filed between October 2014 and September 2015, the volume of SARs constitutes a large body of intelligence at the NCA's disposal.[57]

As stated elsewhere in this chapter, mandatory reporting obligations such as SARs can have a significant impact on a company's decision whether to make a discretionary disclosure, particularly when an internal investigation is already under way. For example, there may be circumstances in which the threshold for filing a SAR is met during the course of an investigation into underlying criminal conduct, but the information that gives rise to the SAR represents an incomplete or even a misleading impression of the true underlying misconduct – pending further internal investigation. There is case law that says that a 'suspicion' for POCA purposes must be 'settled', but this does not necessarily mean that a company can wait until the end of its internal investigation before making a SAR.[58]

In practical terms, POCA reporting obligations may force or accelerate a separate, additional disclosure to, say, the SFO or overseas enforcement agencies. This is particularly true where the POCA report is made to obtain 'appropriate consent' from the NCA in relation to a substantive money laundering offence, rather than so-called 'regulated sector' reporting. A company that has discovered bribes

54 See appendix to this chapter.

55 See SFO press release dated 30 November 2015, which can be accessed here: https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/.

56 National Crime Agency guidance on 'Submitting A Suspicious Activity Report (SAR) within the Regulated Sector' dated February 2015 at p. 2.

57 NCA SARs Annual Report 2015, which can be accessed here: http://www.nationalcrimeagency.gov.uk/publications/677-sars-annual-report-2015/file.

58 *K Ltd v. NatWest* [2006] EWCA Civ 1039.

being paid by its own employees or agents in circumstances where those bribes have resulted in contracts being won will need to seek and obtain such 'consent' if they wish to avoid the risk of charges of money laundering on top of any charges of bribery. Seeking consent from the NCA, unlike the making of a 'regulated sector' SAR, requires more direct contact with the NCA, which must determine whether consent should be granted.

There may also be situations where POCA reporting obligations will have little bearing on a decision to self-report. The threshold for making a SAR under Part 7, POCA is low and can result in the reporting of another person's very minor misconduct that conceivably has no link to the United Kingdom beyond the maker of the report being subject to POCA reporting obligations. In such circumstances there may well be nothing to self-report. However, where a company has made a report to the NCA seeking 'appropriate consent' because it believes that it possesses criminal property as a result of, say, a bribe being paid, it is much more likely that issues of voluntary self-reporting to the SFO will arise.

3.6 Method of disclosure

Certain authorities in the United Kingdom have prescribed methods for corporates to disclose information. For example, HM Treasury provides a 'breach form' on its website for 'relevant institutions' to report a breach of financial sanctions.[59] The data protection regulator in the United Kingdom, the Information Commissioner's Office (ICO), also requires to be notified of serious data security breaches in writing via a specific form. Similarly, the SFO has outlined the process to be adopted by corporate bodies and their advisers when self-reporting.[60] This requires that initial contact be made via the SFO's Intelligence Unit through an online secure reporting form, with hard-copy reports setting out the nature and scope of any internal investigation to follow.[61] The level of information required by the SFO at this initial notification stage reflects its view on the level of co-operation required of companies that self-report.

See Section 3.4.4

Where there is no prescribed format to disclose, in practice initial self-reports may be made orally to the relevant authority, with a more formal and detailed oral or written report, or both, to be provided at a later stage. There are risks and benefits associated with both oral and written disclosures, however.

Oral disclosures provide authorities with the necessary information, without the company or its advisers having to produce a written document that may be open to misinterpretation or misuse. An oral report, with written materials as appropriate, is also likely to be produced more quickly and efficiently and should allow the disclosing company to promptly and fully explain the issues at hand.

Alternatively, a written report can help manage any particularly difficult disclosures and provide a clear record of what information was provided to the authorities and when. It may also provide a roadmap for authorities to conduct

59 See appendix to this chapter.

60 See the SFO's Guidance on Corporate Self-Reporting, revised October 2012.

61 Ibid.

their own investigation, which could be an advantage to a disclosing company as they effectively retain more control over the direction of the investigation.

Bearing in mind the emphasis on full co-operation, any information disclosed must be accurate and complete, avoiding even the perception that the company is withholding relevant information. The SFO is sensitive to disclosures that seek to confess and avoid, as David Green QC has said: 'There is, of course, little or no value to the SFO in an expensive and glossy lawyer's final report which minimises culpability and ignores difficult facts.'[62]

Conclusion 3.7

The decision whether to voluntarily self-report is not straightforward. Companies and their counsel will need to carefully weigh the various factors for and against to judge whether the benefits of self-reporting outweigh the risks, and inevitably this judgement will depend on the particular circumstances of the breach or wrong-doing in question. The changes in policy and practice from the SFO will also continue to heavily weigh on deliberations about self-reporting, particularly with respect to the privilege of internal investigations.

Determining whether to report is, to a certain extent, more complicated and less certain for companies in the United Kingdom than in the United States. With only a handful of DPAs entered into so far in the United Kingdom, authorities do not yet have the same track record of co-operation arrangements and penalty reductions, as seen in the United States, to which companies can refer, assess and more easily quantify the risks and benefits of self-reporting. Further, authorities in the United States understand that certainty of outcome is an important factor that encourages companies to self-report, as indicated by the introduction of the Pilot Program.

With further DPAs anticipated in the United Kingdom and the SFO's repeated and public statements on self-reporting and co-operation, it remains to be seen whether certainty of outcome following a self-report is something that can be relied on in the United Kingdom and whether it will encourage more self-reporting by companies.

62 David Green QC, SFO Director, Q&A, London, 17 June 2016, organised by The Fraud Lawyers Association and the European Fraud and Compliance Lawyers association. Excerpts can be accessed here: http://globalinvestigationsreview.com/article/1036163/david-green-sfo-can-learn-from-fca-approach-to-internal-investigations.

Appendix to Chapter 3

Summary of Mandatory Disclosure Obligations

The chart below details some of the key mandatory reporting requirements that companies (and in some cases their directors) in the United Kingdom may encounter, depending on the sector in which they operate and their regulatory status. As noted in this chapter, these obligations must take priority over any voluntary report, and companies should assume that information from these mandatory disclosures could likely be shared with other authorities.

Directors' duties	Directors owe fiduciary duties to a company to act in the company's best interests and exercise independent care and skill. Company directors considering self-reporting (or omitting to do so) will need to be satisfied that the proposed course of action is in the best interests of the company having regard to the matters and other duties detailed above. A director's personal interests could conflict with those of the company.
Sanctions breaches	Where a 'relevant institution' (defined in UK statutory instruments that enforce the various EU regulations as including firms with permission under Part IV of the Financial Services and Markets Act 2000, such as a bank or investment firm) believes it has committed a sanctions offence, for example by holding funds or assets of a sanctioned party, this must be reported to HM Treasury as soon as practicable. Relevant institutions should provide information about the sanctions target and all information relevant to the breach, such as the nature and amount of funds received from the party subject to sanctions. HM Treasury requires disclosing companies to report breaches via a specific disclosure form, which can be submitted with any relevant documents.
Anti-money laundering legislation	Persons within the 'regulated sector' (including, for example, FCA regulated firms lawyers, accountants and tax advisers) must submit SARs to the NCA under Part 7 of POCA and the Terrorism Act 2000 (TACT), where an entity knows or suspects that a person is engaged in money laundering or terrorist financing, or is otherwise attempting to do so. Failure to report suspicions of money laundering or terrorist financing are criminal offences. Companies not within the regulated sector must seek consent from the NCA via an 'authorised disclosure' (section 338 POCA) to undertake an activity that would otherwise constitute a substantive money laundering offence under POCA (sections 327-329), such as using or retaining the proceeds of crime. This disclosure provides the reporting entity with a defence to the substantive money laundering offences set out in POCA. The Criminal Finances Act 2017 introduced significant changes to the SAR regime, though it did not, as originally suggested, abolish the 'consent regime', instead modifying it by allowing the NCA to extend the moratorium up to 186 days at the end of the first 31-day period, in increments of 31 days.

Data security breaches	All 'data controllers' (defined in the Data Protection Act 1998 as a person who determines the purposes for which and the manner in which any personal data is processed) are required by the Data Protection Act to ensure appropriate and proportionate security of the personal data they process. With limited industry-specific exceptions, under the current UK legislation, there is no general legal obligation on data controllers to report data security breaches (for example, the loss or theft of customer information). However, the ICO has published non-binding guidance that makes clear that in its view there are circumstances in which data breaches should be reported – in particular, where a breach is deemed to be 'serious'. Its guidance sets out factors to bear in mind when considering whether to disclose to the ICO. If a serious but non-reported data security breach comes to the ICO's attention, the ICO may use its discretion to impose greater fines than if the breach had otherwise been reported. Discretion as to whether to disclose a data breach will be restricted under the new EU General Data Protection Regulation, which is expected to come into effect in mid 2018. Under the Regulation, data controllers in the UK must notify almost all data breaches to the ICO without undue delay and, where feasible, within 72 hours of becoming aware of the breach. In certain cases, the data controller will also be obliged to inform the affected data subjects.
Competition law breaches	Entities regulated by the FCA must notify the regulator if they have or may have committed a 'significant infringement' of competition law. In contrast, companies not authorised and regulated by the FCA are not subject to a positive legal obligation to report breaches of competition law to the Competition and Markets Authority or the European Commission.
Listing Rules and Disclosure and Transparency Rules	Companies whose securities are admitted to trading on a market operated by the London Stock Exchange (LSE) are subject to ongoing disclosure obligations pursuant to the AIM Rules, the Listing Rules (LRs) and/or the Disclosure and Transparency Rules (DTRs). For example, inside or price-sensitive information and any details of transactions involving the company's directors, managers or substantial shareholders will need to be disclosed to the LSE, the FCA, the company's shareholders and the public via a regulatory information service and/or via the company's website. The exact application of the rules will vary depending on the nature of a company's listing and the business sector in which a company operates. In addition to specific disclosure requirements, companies subject to the AIM Rules or the LRs must provide the FCA and the LSE with all information reasonably required to ensure the smooth operation of the market and to protect investors.
Disclosures relating to audit	Auditors reviewing companies operating in the financial sector also have their own obligations to disclose to FCA and/or the Prudential Regulation Authority certain matters relevant to the soundness of the regulated entity, for example, the ability to maintain adequate financial resources or circumstances that give reason to doubt whether senior management are effective as 'fit and proper persons'. Directors must volunteer information to auditors. If a director knowingly or recklessly misrepresents the information provided to an auditor, for example by concealing or not reporting a legal or regulatory breach, he or she will be guilty of a criminal offence. Directors may also be asked by the company's auditors to make written representations to confirm that the information the auditors have relied on in forming their opinions is free of misstatements and omissions, and that the effects of any uncorrected misstatements identified by the auditor are immaterial.
Disclosures by authorised firms to the Financial Conduct Authority	The fundamental obligation requiring disclosure to the FCA is set out at Principle 11 of the Principles for Businesses in the FCA Handbook. Principle 11 requires authorised firms to deal with its regulators in an open and co-operative way. Firms must disclose to the FCA anything relating to the firm of which it would reasonably expect notice.
Disclosures to insurers	Notifications to insurers of issues that may give rise to an internal or external investigation should be made at an early stage to ensure costs coverage. This is likely to be a condition of the policy. Insurers are also likely to require updates on the progress of an investigation, whether internal or external, including any findings made by authorities.

4

Self-Reporting to the Authorities and Other Disclosure Obligations: The US Perspective

Amanda Raad, Sean Seelinger, Jaime Orloff Feeney and Arefa Shakeel[1]

4.1 Introduction

While there is typically no formal obligation in the United States to disclose potential wrongdoing to enforcement authorities, there can often be strategic advantages to doing so. Indeed, in some cases, subjects of investigations may avoid some of the most adverse consequences by self-reporting, including reduced penalties and more favourable settlement terms. Additionally, companies in certain regulated sectors may avoid potential debarment even where clear violations occurred. Moreover, US regulators have increasingly been incentivising companies to self-report by offering potential co-operation credit for doing so. Unlike the current approach in the United Kingdom, US regulators are receptive to parties reporting facts while preserving privilege during the co-operation and reporting process. US regulators are specifically prohibited from conditioning co-operation credit on privilege waiver. In comparison, UK regulators continue to encourage waiver as a sign of co-operation and also test the boundaries of legal privilege (most recently through the *SFO v. ENRC*[2] litigation), particularly in the context of co-operation in a criminal matter. However, while the US enforcement regime has created a substantial historical record to analyse, the unique circumstances of each case, as well as changing principles and priorities of regulators, make quantifying such strategic advantages difficult.

1 Amanda Raad is a partner, Sean Seelinger and Jaime Orloff Feeney are associates, and Arefa Shakeel is counsel at Ropes & Gray LLP.

2 *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB) 8 May 2017.

Mandatory self-reporting to authorities 4.2

Prior to considering whether to make a voluntary disclosure, it is important for at least two reasons to determine whether the company has any potential mandatory reporting obligation. First, mandatory reporting obligations often contain specific requirements with respect to the recipient, form, timing and content of the disclosure. Second, any evaluation of whether to self-report will be materially altered if a mandatory report is required, even if that report is in another jurisdiction, given the clear commitment to sharing information between regulators in the United States and abroad. In other words, if a company is required to self-report in at least one jurisdiction, it should consider voluntarily disclosing in other jurisdictions given the likelihood that the government agencies will share information.

Indeed, cross-border collaboration has significantly increased in recent years. In April 2016, Andrew Weissmann, the former chief of the Fraud Section at the US Department of Justice (DOJ), remarked that companies should expect that the DOJ will inform its foreign counterparts of potential violations of law, even if those violations are self-reported. The DOJ's placement of a secondee with the SFO increases the likelihood of such referrals.[3] Mr Weissmann also noted that international regulators will co-operate to divide fines instead of piggybacking on each other's cases.[4] There has been no indication from the Trump administration that the United States' interest in cross-border co-operation and enforcement has changed. While there have been no Foreign Corrupt Practices Act (FCPA) settlements since the new administration took over, this is not conclusive. The DOJ only announced two corporate settlements in 2015, and the upsurge in 2016 may have been an anomaly. The many vacancies in the DOJ's ranks may be a contributing factor.[5]

3 See 'New Fraud Position in London Aimed to Help Fight Economic Crime and Foreign Corruption', available at https://www.justice.gov/archives/opa/blog/new-fraud-position-london-aimed-help-fight-economic-crime-and-foreign-corruption.

4 Practising Law Institute Seminar, Enforcement 2016: Perspectives from Government Agencies, by DOJ Fraud Section Chief Andrew Weissmann (29 April 2016).

5 Megan Zwiebel, DOJ Seeks to Reassure on FCPA Enforcement, The FCPA Report (16 April 2017), https://www.fcpareport.com/article/2534.

Case Study: International Coordination in Enforcement		
	BAE Systems PLC	*Standard Bank*
Background	BAE Systems PLC (BAES) is a multinational defence contractor with headquarters in the United Kingdom and with a US subsidiary. From 2000 to 2002, BAES was responsible for a number of infractions, including making false statements to US regulators and breaching its duty to keep accounting records under UK law. BAES did not offer substantive co-operation or self-report.	Standard Bank is one of South Africa's largest banks and operates in numerous African countries as well as other key markets around the world, including the United Kingdom, and has ties to the United States. During 2012 and 2013, Standard Bank engaged its Tanzanian affiliate to raise $600m of sovereign debt to finance electricity, water and other infrastructure projects. After failing to achieve its target, Standard Bank engaged a local third party, on whom it did not conduct diligence, to assist in exchange for a 1 per cent fee. The third party was closely associated with a senior tax official and $6 million paid to it by Standard Bank quickly went missing.
Enforcement	The Department of Justice (DOJ) and the Serious Fraud Office (SFO) leveraged their international relationship and worked in conjunction to investigate BAES and come to settlement. In its press release, the DOJ acknowledged and expressed its appreciation of the significant assistance provided by the SFO, and further expressed its gratitude to that office for its partnership in the fight against overseas corruption.	Standard Bank self-reported and fully co-operated with the SFO. It coordinated with global regulators to reach a single global settlement. In considering Standard Bank's overall co-operation with authorities, the SEC emphasised its prompt and voluntary reporting to the SFO upon learning from employees of potentially improper activities. The order also notes Standard Bank's significant co-operation with the SEC and its willingness to conduct an internal investigation.
Resolution	BAES entered guilty pleas in the United States and in the United Kingdom. BAES was required to pay a $400 million criminal fine to the United States and a record-setting £30 million corporate fine to the United Kingdom. In the United States, BAES was also required to implement a corporate compliance programme and hire an independent compliance monitor for three years.	Standard Bank reached the first ever DPA with the SFO, under which it agreed to pay compensation and interest of just over $7 million to Tanzania (indirectly through the SFO); disgorge profits of $8.4 million; pay a financial penalty of $16.8 million; pay the SFO's costs of £330,000; and enter into a review and monitorship of the bank. In the United States, the SEC ordered a disgorgement of $8.4 million but agreed to consider it satisfied upon payment of the entire $8.4 million to the SFO.

4.2.1 Statutory and regulatory mandatory disclosure obligations

In the United States, most disclosure obligations originate in statute or regulations. Key examples include:

- the Sarbanes-Oxley Act of 2002, which requires the disclosure of all information that has a material financial effect on a public company in periodic financial reports;
- the US Bank Secrecy Act of 1970, which requires financial institutions to disclose certain suspicious transactions or currency transactions in excess of US$10,000;

- the US Anti-Money Laundering Regulations, which require financial institutions to report actual or suspected money laundering under certain circumstances;[6, 7]
- state data breach regulations – 47 of 50 US states have laws requiring companies conducting business in the state to disclose data breaches involving personal information; and
- the Anti-Kickback Enforcement Act of 1986, which requires government contractors to make a 'timely notification' of violations of federal criminal law or overpayments in connection with the award or performance of most federal government contracts or subcontracts, including those performed outside the United States.

Disclosure obligations under existing agreements with the government 4.2.2

In addition to statutory or regulatory-based mandatory disclosure requirements, companies must also evaluate whether they have any mandatory disclosure obligations under pre-existing agreements with the government. For example, if a company is subject to a deferred prosecution agreement (DPA) or corporate integrity agreement (CIA), these agreements often contain self-reporting mandates for any subsequent violations. In many cases, these agreements may require the appointment of independent monitors. While DPAs, CIAs, and similar agreements have been used frequently in the United States, other countries are also now seeking to increase use of similar agreements to drive self-reporting and co-operation. Most notably, in the United Kingdom the Serious Fraud Office (SFO) entered into its first DPA, with Standard Bank, in late 2015 and has since entered into three additional DPAs.

See Chapter 32 on monitorships

Other sources of mandatory disclosure obligations 4.2.3

Individuals and companies may also have mandatory disclosure obligations as a result of private contractual agreements as well as membership in professional bodies. Such disclosures between private parties may lead to a disclosure to a regulator by the receiving entity. For example, a subcontractor may be obliged by contract to report issues to the contracting party. That contracting party may subsequently determine that it is subject to its own reporting obligation or may in turn choose to self-report to reduce any potential liability.

Voluntary self-reporting to authorities 4.3

While the DOJ and the US Securities and Exchange Commission (SEC) consider several factors in deciding how to proceed with and resolve investigations

6 See, e.g., 31 U.S.C. 5318(g).

7 These requirements are far more limited, however, than those in the United Kingdom under the Proceeds of Crime Act, which imposes broad suspicious activity report filing requirements on all parties in the regulated sector, including financial institutions, lawyers and accountants, upon the knowledge or reasonable suspicion of money laundering. Part 7 of the Proceeds of Crime Act 2002 ss.327-329.

and enforcement actions in cases involving corporations, self-reporting and co-operation are important factors for both agencies. Whether to voluntarily self-report to US authorities is a fact-intensive and holistic inquiry. There is no one-size-fits-all approach to this analysis, but those contemplating voluntarily disclosing misconduct to US authorities should keep certain considerations in mind.

Key Considerations in Resolving Enforcement Actions	
US Department of Justice	*US Securities and Exchange Commission*
• Self-disclosure and willingness to co-operate in the investigation • Pervasiveness of wrongdoing within the corporation • Existence and effectiveness of a compliance programme • Meaningful remedial actions	• Self-reporting and investigation of misconduct • Effective compliance procedures and appropriate tone at the top • Whether the case involves a potentially widespread industry practice • Whether the conduct is ongoing

4.3.1 Advantages of voluntarily self-reporting

The primary benefit to self-reporting is to secure potentially reduced penalties through earned co-operation credit and, moreover, to maintain the opportunity to control the flow of information to regulators. In recent years, US regulators have become increasingly vocal about the benefits of self-disclosure and co-operation, with the DOJ even formalising the benefits available to self-disclosing companies in its now-extended FCPA Pilot Program (Pilot Program).[8] Most recently, Attorney General Jeff Sessions indicated that, when making charging decisions, the DOJ will continue to take into consideration whether companies co-operate and self-disclose their wrongdoing.[9] Yet, co-operation, which inevitably goes hand in hand with a voluntary disclosure, imposes significant demands on corporations and is not without meaningful risk.

4.3.1.1 DOJ co-operation credit

To encourage self-reporting and co-operation, the DOJ has issued and subsequently revised guidance on the subject for many years. In June 1999, the DOJ issued the Principles of Federal Prosecution of Business Organizations, now known as the 'Holder Memorandum', to articulate and standardise the factors to be considered by federal prosecutors in making charging decisions against corporations.[10] The Holder Memorandum instructed DOJ prosecutors to consider

8 For more details see, 'The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance' available at https://www.justice.gov/opa/file/838386/download.

9 See 'Attorney General Jeff Sessions Delivers Remarks at Ethics and Compliance Initiative Annual Conference', available at https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual.

10 Memorandum from Eric Holder, Deputy Attorney Gen., Dep't of Justice, on Bringing Criminal Charges Against Corps. to Dep't Component Heads and U.S. Attorneys (16 June 1999) (Holder Memorandum), available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF.

as a factor in bringing charges whether a corporation has timely and voluntarily disclosed wrongdoing and whether it has been willing 'to cooperate in the investigation of its agents.'[11] In 2008, the then Deputy Attorney General, Mark R Filip, added language to the US Attorneys' Manual (USAM),[12] maintaining that when assessing a corporation's co-operation, a prosecutor may consider 'the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives.'[13] Mr Filip also outlined in his memorandum nine factors on which prosecutors base their corporate charging and resolution decisions, the so-called 'Filip Factors', that incorporated some of the language provided initially by Holder in 1999 (Filip Factor Four, a corporation's 'willingness to cooperate in the investigation of [its] agents'), and the addition of Filip Factor Eight: 'the adequacy of prosecution of individuals responsible for the corporation's malfeasance.'[14]

The Yates Memorandum

Building on the prior DOJ guidance, former Deputy Attorney General Sally Quillian Yates issued the Memorandum of Individual Accountability for Corporate Wrongdoing, now known as the 'Yates Memorandum', in September 2015.[15] The Yates Memorandum is still operative and outlines the 'six key steps' prosecutors should take in all future investigations of corporate wrongdoing.[16] Some of these steps represent significant – though not drastic – policy changes, whereas others are simply a memorialisation of best practices that have already been in place in various United States Attorney's Offices across the country. The most significant policy shift in the Yates Memorandum concerns the relationship between a company's co-operation with respect to individual wrongdoers and the company's eligibility to receive co-operation credit. Previously, the Filip Factor Four weighed the provision of information regarding culpable individuals as one consideration among many. Following the Yates Memorandum's directives, the identification of responsible individuals is now a 'threshold requirement' for receiving any co-operation credit consideration.[17] On 20 April 2017, Acting Principal Deputy Assistant Attorney General Trevor N McFadden indicated that the DOJ continues to prioritise the prosecutions of individuals, echoing Attorney

11 Id. at 3 (listing eight factors prosecutors should consider in deciding whether to bring charges against corporations that include '[t]he corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents . . . .').

12 U.S. Attorneys' Manual U§§ 9-28.000.

13 Id. §§ 9-28.700 – Value of Cooperation.

14 Memorandum from Deputy Attorney General Mark Filip to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (28 August 2008), at 4.

15 Yates Memorandum, Department of Justice, 9 September 2015, available at http://www.justice.gov/dag/file/769036/download at 3.

16 The DOJ revised the section of the U.S. Attorneys' Manual titled 'Principles of Federal Prosecution of Business Organizations' in November 2015 to reflect these steps.

17 U.S. Attorneys' Manual § 9-28.700 (2015).

General Jeff Sessions's emphasis on the importance of individual accountability for corporate misconduct.[18]

See Chapter 10 on co-operating with authorities

By making full disclosure and co-operation with regard to individuals a prerequisite for any co-operation credit for the company, the DOJ has raised the stakes. Ms Yates emphasised that a failure to conduct a robust internal investigation is not an excuse, stating that '[c]ompanies may not pick and choose what facts to disclose.'[19] At face value, the Yates Memorandum and Ms Yates's accompanying remarks suggest that a company could conduct a diligent and thorough investigation that still fails to identify culpable individuals despite the best efforts of the company. However, subsequent public statements by Ms Yates and former Assistant Attorney General Leslie Caldwell emphasised the DOJ's willingness to use appropriate discretion. The revised USAM reflects this consideration, noting: 'There may be circumstances where, despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence or is actually prohibited from disclosing it to the government.'[20] However, the USAM is clear that in such cases 'the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor.'[21] Consequently, the importance of thorough and properly scoped internal investigations has never been greater.

One-Year FCPA Pilot Program

In April 2016, the DOJ announced through the Fraud Section's revised FCPA Enforcement Plan and Guidance that it was launching a one-year Pilot Program to enhance its efforts to detect and prosecute individuals and companies for violations of the FCPA.[22] On 10 March 2017, the DOJ announced that the Pilot Program would remain in place after the initial one-year period ended on 5 April 2017. Among other things, the Pilot Program endeavours to further increase coordination with foreign counterparts, recognising the multi-jurisdictional nature of most FCPA cases, and to provide greater transparency about what the DOJ already requires from companies seeking mitigation credit for voluntarily self-disclosing misconduct, fully co-operating with an investigation and remediating.

The Pilot Program sets forth specific factors that must be met for a company to earn credit for voluntary self-disclosure. The disclosure (1) must not be mandated by any law, agreement or contract; (2) must occur prior to an imminent threat of disclosure or government investigation; (3) must be disclosed within a reasonably prompt time after the company becomes aware of the offence; and (4) must

18 See Acting Principal Deputy Assistant Attorney General Trevor N. McFadden of the Justice Department's Criminal Division Speaks at ACI's 19th Annual Conference on Foreign Corrupt Practices Act, available at https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-justice-department-s.

19 Yates Memorandum at 3.

20 U.S. Attorneys' Manual § 9-28.700.

21 Id.

22 See Fraud Section's FCPA Enforcement Plan and Guidance available at https://www.justice.gov/criminal-fraud/file/838416/download (FCPA Enforcement Plan and Guidance).

include all relevant facts known to the company, including all relevant facts about the individuals involved in any FCPA violation.[23] The Pilot Program also provides specific guidance on the steps a company must take to earn full co-operation credit and to provide timely and appropriate remediation, noting that such steps are consistent with the Yates Memorandum and the USAM's Sentencing Guidelines.

The FCPA Enforcement Plan and Guidance also sets forth the benefits available to companies under the Pilot Program, and the credit available to companies that meet the conditions for disclosure makes clear that the DOJ deeply values a company's voluntary self-disclosure. Under the Pilot Program, companies that fully co-operate with DOJ investigations and implement appropriate remediation in FCPA matters, but that do not voluntarily self-disclose, will be eligible for limited credit, at most a 25 per cent reduction off the bottom of the Sentencing Guidelines fine range. However, when a company has voluntarily self-disclosed, fully co-operated with the DOJ, and has timely and appropriately remediated, the company will qualify for the full range of potential mitigation credit. This means that if a criminal resolution is warranted, the Fraud Section's FCPA Unit 'may accord up to a 50 per cent reduction off the bottom end of the Sentencing Guidelines fine range, if a fine is sought; and generally should not require appointment of a monitor if a company has, at the time of the resolution, implemented an effective compliance programme.'[24] Depending on the seriousness of the offence and whether the company has resolved other matters with the DOJ within the past five years, the FCPA Unit may also consider a declination of prosecution, though companies would still be required to disgorge all profits resulting from the FCPA violation.[25]

The Pilot Program sends a clear message that the DOJ deeply encourages voluntary self-disclosure and will reward companies that come forward with timely and complete information, at least for the next year until it is re-evaluated. As currently formulated, the Pilot Program is available to companies negotiating potential resolutions with the DOJ, even if their initial disclosures were made prior to the announcement of the Pilot Program.[26]

On 7 June 2016, the DOJ issued its first declinations under the Pilot Program.[27] The DOJ declined to prosecute US-based cloud computing and content delivery network company, Akamai Technologies, Inc. (Akamai), and US-based residential and commercial building products manufacturer Nortek, Inc. (Nortek) for

23 FCPA Enforcement Plan and Guidance.

24 Id. at 8.

25 Id. at 9.

26 See https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program.

27 The DOJ has demonstrated a prior willingness to reduce penalties for companies providing full co-operation. For instance, the DOJ declined to prosecute PetroTiger Ltd., a British Virgin Islands oil and gas company, after it voluntarily self-disclosed the existence of a bribery and kickback scheme orchestrated by top executives relating to a US$40 million oil services contract between PetroTiger and a state-owned Colombian petroleum company. PetroTiger took remedial measures and fully co-operated with the investigation, which led to the indictments of the company's two former co-CEOs and former general counsel.

unrelated FCPA violations by their Chinese subsidiaries.[28] The DOJ stated that both companies fulfilled the Pilot Program's requirements through (1) prompt voluntary self-disclosure of the misconduct, (2) thorough internal investigation, and (3) thorough co-operation and remediation. Among other factors, the DOJ specifically acknowledged both companies' identification of all individuals involved in the misconduct, sharing of all relevant facts, compliance programme and internal accounting controls enhancements, voluntary translation of documents from Chinese into English, voluntarily making witnesses in China available for interviews, appropriate remedial actions against the individuals and entities involved in the misconduct, and disgorgement of relevant profits through both companies' coordinated resolutions with the SEC. Akamai and Nortek separately entered into non-prosecution agreements (NPAs) with the SEC for violations of the books and records and internal controls provisions of the FCPA (these were only the second and third FCPA NPAs from the SEC since it announced in 2010 that it was adopting NPAs and DPAs).[29] While these declinations did not necessarily result in a more favourable result than would have been achieved under prior settlements following full co-operation, the Pilot Program nevertheless provides companies a more formal and certain pathway towards disclosure and co-operation credit.

The Pilot Program has demonstrated the DOJ's commitment to rigorous FCPA enforcement, and by many accounts has been viewed as very successful. All of the companies who self-disclosed under the Pilot Program received either a declination or an NPA with a 50 per cent reduction off the bottom of the sentencing guidelines. There were no DPAs, guilty pleas or monitors for those companies who self-disclosed. For the companies that did not self-disclose under the Pilot Program, 80 per cent were resolved with a guilty plea or DPA and 72 per cent had a monitor. Those companies also received a maximum discount of 25 per cent off the bottom of the sentencing guidelines.[30, 31]

4.3.1.2 SEC co-operation credit

Although it can be difficult to precisely quantify the benefit of co-operation with the SEC, the Commission will consider general principles of sentencing, especially general deterrence. In both public statements and in practice, the Commission has made clear that companies can receive significant leniency for full co-operation. During a speech on 29 April 2016, former SEC Enforcement Director Andrew

28 See http://globalinvestigationsreview.com/article/1035951/doj-issues-declinations-to-two-companies-under-fcpa-pilot-programme.

29 See Department of Justice FCPA webpage, available at: https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

30 See Department of Justice FCPA webpage, available at: https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

31 Rebecca Hughes Parker, SEC and DOJ Address Corporate Concerns About Future FCPA Enforcement, The FCPA Report (7 June 2017), https://www.fcpareport.com/article/2557.

Ceresney emphasised the importance of co-operation, noting that companies have dodged monetary penalties for helping the agency in its investigations.[32]

While the Akamai and Nortek NPAs in June 2016 only represented the second and third FCPA NPAs since their inception in 2010, the SEC nevertheless affirmed its commitment to using NPAs as a tool to reward co-operation. Mr Ceresney stated: 'When companies self-report and lay all their cards on the table, non-prosecution agreements are an effective way to get the money back and save the government substantial time and resources while crediting extensive cooperation.'[33] The SEC will, however, set a high bar before entering into an NPA in an FCPA enforcement action. Kara Brockmeyer, former Chief of the SEC Enforcement Division's FCPA Unit, stated that 'Akamai and Nortek each promptly tightened their internal controls after discovering the bribes and took swift remedial measures to eliminate the problems. They handled it the right way and got expeditious resolutions as a result.'[34]

Risks in voluntarily self-reporting 4.4

While self-disclosure can reap significant monetary benefits, a company must balance the potential risks against any potential benefit. Self-reporting can give rise to lengthy co-operation obligations and increased government scrutiny. As discussed above, the multi-jurisdictional nature of many 'white-collar' matters means that self-reporting may lead to enquiries from global regulators, differing resolutions and ongoing obligations.

Furthermore, the DOJ is likely to impose a stringent bar when evaluating the sufficiency of compliance programmes to determine whether the requirements of the Pilot Program are met or to otherwise reduce liability. In November 2015, the DOJ hired an experienced former in-house compliance officer, Hui Chen, to serve as its Compliance Counsel, to assist prosecutors with the assessment of companies' compliance programmes.[35]

Although Chen resigned from her position in June 2017,[36] during her tenure she helped to formalise the DOJ's guidance to companies who may find themselves under investigation or faced with the decision whether to make a voluntary disclosure. On 8 February 2017, the DOJ published revised guidance for companies called 'Evaluation of Corporate Compliance Programs' (the Guidance). The Guidance is composed of 119 common questions that the DOJ asks when evaluating a company's compliance programme. The Guidance focuses on three overarching areas: (1) company culture, (2) compliance structure and resources, and

32 See 'SEC Announces Two Non-Prosecution Agreements in FCPA Cases' available at https://www.sec.gov/news/pressrelease/2016-109.html.

33 See 'SEC Announces Two Non-Prosecution Agreements in FCPA Cases' available at https://www.sec.gov/news/pressrelease/2016-109.html.

34 Id.

35 https://www.justice.gov/criminal-fraud/file/790236/download.

36 See 'DOJ Corporate Compliance Watchdog Resigns Citing Trump's Conduct', available at http://thehill.com/homenews/administration/340472-doj-corporate-compliance-watchdog-resigns-cites-trumps-conduct.

(3) effectiveness of company policies and procedures. This third category received considerable attention in the Guidance.

Although the content of the Guidance is largely familiar to practitioners, it does give a clearer picture of the DOJ's current approach to corporate compliance. The issuance of the Guidance underscores the DOJ's renewed focus on the operation, rather than the appearance, of corporate compliance programmes. The Guidance suggests that companies should expect to be asked detailed and challenging questions regarding the scope and effectiveness of their compliance programmes. If a company's compliance programme fails to withstand such scrutiny, it risks losing credit for the programme, paying higher penalties or even facing separate violations for inadequate internal controls. While the Guidance remains in place even after Ms Chen's departure, the DOJ is currently seeking applicants for a new Compliance Counsel. It remains to be seen how a replacement could affect DOJ's position on corporate compliance programmes.

Taking these existing increasingly stringent co-operation standards into consideration, companies considering self-disclosure should carefully assess whether they can meet regulator expectations. If companies fall short, regulators may refuse co-operation credit and use the information obtained through the self-disclosure against the company.

4.5 Risks in choosing not to self-report

US regulators have vocally warned that the potential downside of not self-reporting any violation could be significant where the matter is otherwise brought to their attention. Specifically, during his April 2016 remarks, Mr Ceresney warned that companies will face enhanced penalties if the SEC learns that the firm knew of violations and decided not to report them, and that companies that fail to co-operate will be unable to obtain perks like deferred prosecution agreements. Past DOJ enforcement actions reflect this stance as well.

Consequently, companies should carefully consider the likelihood that the conduct will be discovered by other means. It is important to consider whether other industry players could affect the company's position. Industry-wide trends may expose a company's misconduct. If regulators undertake an industry-wide investigation into particular practices, which we have observed in recent years with pharmaceutical companies, medical device manufacturers and automobile companies, a company might be exposed by a competitor's self-report or more passively through a third-party subpoena or any investigative demand.

Companies should also be sensitive to increasing whistleblower activity. Current or former employees are incentivised to report potential misconduct to US regulators, which has led to substantial recoveries for the government. The SEC's whistleblower programme has only been in place for a few years, but has been steadily active so far with 42 whistleblower awards, totalling more than US$100 million in payouts. Whistleblowers are eligible to receive awards between 10 per cent to 30 per cent of the money recovered if their 'high-quality original information' leads to enforcement actions in which the SEC orders at least

US$1 million.[37] The programme continues to be a priority for the Commission. At its annual 'SEC Speaks' conference in February 2015, Regional Director David Glockner stressed the Commission's ability to provide awards to foreign nationals, noting the SEC made its largest whistleblower payment of US$30 million in September 2014 to a non-US resident.[38] It is therefore important that a company consider the real possibility that its conduct could be exposed by means other than voluntary self-disclosure, and the associated, often expensive, risks associated with not being the first to come forward.

When deciding not to self-report, a company must ensure that the decision is appropriately considered and documented. If a company decides not to self-report and the government later enquires about the issue, the best defence is that the company conducted a thorough investigation, remediated the issue, and had a reasonable basis for not self-reporting to the government. US regulators will look to a company's board of directors to ensure the appropriate steps were taken.[39] The SEC has expressed that the board of directors must exercise oversight and set a strong 'tone at the top' emphasising the importance of compliance.

37 More information is available at the SEC's 'Office of the Whistleblower' site at https://www.sec.gov/whistleblower.

38 https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290#.VOzurVUo5ow.

39 Notification of the board of directors is often required under US law. Section 307 of the Sarbanes-Oxley Act of 2002 requires that an attorney report evidence of a material violation of securities laws or breach of fiduciary duty by the company or any agent 'up-the-ladder' (i.e., first to the chief legal officer or CEO and, thereafter, if appropriate remedial measures are not taken, to the audit committee of the board or other board committee comprised solely of non-employee directors). Wherever possible, it is best to engage the board's disclosure counsel to assist in making this determination.

5

Beginning an Internal Investigation: The UK Perspective

Christopher David and Lloyd Firth[1]

5.1 Introduction

The potential trigger points for a company's decision whether to undertake an internal investigation are wide ranging. They can include internal allegations of wrongdoing, adverse press reports, whistleblowing reports, an auditor's discovery of apparent accounting irregularities, complaints made by a supplier or customer, a third-party litigation action being launched, or the commencement of an investigation into the company's affairs by a government authority.

The decision whether to launch an internal investigation is of critical importance. Once begun, the internal investigation process can be difficult to halt and impossible to reverse. Whatever decision a company reaches, it ought to do so promptly to limit further damage to the company, but not before a great deal of careful consideration has been given to the potential upsides as well as downsides.

There are clear incentives on offer to a company (and its senior management) that chooses to commence an internal investigation promptly. A properly focused investigation should allow the company to discover the full facts of, and be in the best position to put an effective stop to, any wrongdoing. Armed with the underlying facts, a company and its advisers will be able to determine what potential defences are available to it to gain control of the situation (in the face of potential external investigations) with the aim of restricting the exposure of the company and its senior management to any potential shareholder, third-party, regulatory or criminal actions.

Of course, a full internal investigation will not always be the appropriate response and to some extent this decision will be informed by the nature of the

1 Christopher David is counsel and Lloyd Firth is a senior associate at Wilmer Cutler Pickering Hale and Dorr LLP. Elly Proudlock left WilmerHale in August 2017.

alleged misconduct. Isolated instances of minor employee misbehaviour, for example, are likely to be satisfactorily dealt with by one or a combination of a company's human resources function, its in-house counsel and its internal audit function. Conversely, an allegation of pervasive criminal conduct or a risk of the behaviour becoming more widespread is more likely to warrant a full-scale internal investigation.

Allegations of anticompetitive behaviour are also likely to weigh in favour of an expedited internal investigation, in light of the immunity and leniency programme operated by the Competition and Markets Authority (CMA). Where the company is the first undertaking to provide the CMA with evidence of cartel activity, in circumstances where the CMA has not already started an investigation and does not already have sufficient evidence of the alleged activity, the company will automatically qualify for full immunity in respect of any civil fines. Likewise, all implicated current and former employees and directors who co-operate with the process will be granted criminal immunity.

Used properly, an internal investigation may be successfully employed as a defensive tool by a company faced with a parallel regulatory or prosecutorial investigation. The decision to initiate a thorough and credible investigation can help to create a corporate culture where compliance is taken seriously and set the tone for any discussions with the relevant government authorities. Being in possession of the full facts can also allow both the company and its professional advisers to anticipate likely developments and stay one step ahead of the regulatory or criminal process.

For those companies looking to avoid a criminal prosecution and potentially benefit from a deferred prosecution agreement (DPA) or an alternative civil resolution, it is made expressly clear in the Joint Prosecution Guidance on Corporate Prosecutions that factors tending against the prosecution of a company include '[a] genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice, involving self-reporting and remedial actions' and 'the existence of a *genuinely* proactive and effective corporate compliance programme.'[2]

See Chapter 3 on self-reporting to the authorities

The Deferred Prosecution Agreements Code of Practice also confirms the potential benefits of the prompt commencement of an internal investigation, stating that, 'a genuinely proactive approach adopted by [the company's] management team when the offending is brought to their notice'[3] will be regarded as a factor weighing against a criminal prosecution and in favour of a DPA.

While neither a company faced with allegations of impropriety nor its directors are expressly obliged under English law to undertake an internal investigation,

2 Guidance on Corporate Prosecutions issued by the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director the Revenue and Customs Prosecutions Office, page 8, paragraphs a. and c, (original emphasis) available at: https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/.

3 The Deferred Prosecution Agreements Code of Practice, page 5, paragraph 2.8.2i., available at https://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf.

the combined effect of a director's fiduciary duties, a company's internal corporate governance codes and its regulatory obligations (for those companies that fall within the UK's regulated sector) can effectively compel them to do so.

All company directors owe fiduciary duties to their company, including a duty to promote the success of the company for the benefit of its members[4] and a duty to exercise reasonable skill, care and diligence.[5] Although the duties are owed to, and enforced by, the company itself, in certain circumstances shareholders may instigate a derivative action based upon a breach.[6]

A company's own corporate governance policies and procedures may also mandate that allegations of serious wrongdoing are responded to in a particular manner, including by means of internal investigation.

Companies regulated by the UK Financial Conduct Authority (FCA)[7] have much less discretion as to whether to commence an internal investigation in response to allegations of wrongdoing, given that they: (1) have a positive duty to disclose to the FCA anything relating to the firm of which the regulator would reasonably expect notice;[8, 9] (2) must adhere to the FCA's Principles for Businesses, notably to conduct their business with integrity,[10] due skill, care and diligence[11] and take reasonable care to organise their affairs responsibly;[12] and (3) must establish and maintain effective systems and controls to prevent the risk of the firm being used to further financial crime.[13]

It is vital that a company clarifies, in writing and at the outset of any investigation, why it is undertaking the investigation and what its objectives are – not least so that the company can strengthen any claim it may have to legal professional privilege. While it is impossible to be definitive about the availability of legal professional privilege in this context, two recent decisions of the High Court suggest that it is likely to be restrictively applied.[14] It therefore remains sound

4 Companies Act 2006, section 172.

5 Companies Act 2006, section 174.

6 Companies Act 2006, sections 260 to 264.

7 The position for companies in the United States is more onerous. The Sarbanes-Oxley Act of 2002 imposes a positive obligation on each relevant company to establish an audit committee with specific responsibility for investigating complaints of financial fraud involving auditing, accounting or internal controls issues. Similarly, under the Whistleblower Programme established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the Securities and Exchange Commission takes into account a company's response to its receipt of an internal tip in determining whether to bring an enforcement action against the company.

8 FCA Handbook, PRIN2.1.1R, Principle 11.

9 Since August 2015, regulated firms have also had a positive duty to notify the FCA as soon as they become aware, or have information which reasonably suggests, that a significant infringement of any applicable competition law has, or may have, occurred (FCA Handbook, SUP 15.3.32)

10 FCA Handbook, PRIN2.1.1R, Principle 1.

11 FCA Handbook, PRIN2.1.1R, Principle 2.

12 FCA Handbook, PRIN2.1.1R, Principle 3.

13 FCA Handbook, SYSC3.2.6R and SYSC6.1.1R.

14 *The RBS Rights Issue Litigation, Re* [2016] EWHC 3161 (Ch) and *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB)

advice that companies should seek to limit, insofar as is possible, the creation of any non-essential documents that address the underlying facts of the investigation. In particular, those conducting the investigation should refrain from drawing any conclusions, in writing, as to the nature of the underlying conduct, on the assumption that the documents may ultimately be disclosable.

See Chapter 35 on privilege

There are significant potential downsides to a full-scale internal investigation, and while they can be mitigated, they cannot be eliminated. All investigations can be extremely costly – placing a huge burden on a company's resources and proving disruptive to its day-to-day functioning. They may also result in the creation of a potentially discoverable, written factual matrix, or route map, of alleged wrongdoing, which would be of great assistance to any regulatory or prosecutorial investigators or civil claimants. This is of particular concern given that all investigations, however restrictively scoped, have the potential to uncover misconduct beyond the scope of the initial allegation.

Such downsides, while real, ought not to dissuade companies from commencing an internal investigation where the circumstances warrant one. Provided it is carefully planned and managed, an investigation frequently offers a company the best chance to mitigate loss, remediate wrongdoing and defend itself.

Determining the terms of reference/scope of the investigation 5.2

In the rush to get to the bottom of what has happened, it is all too easy for those conducting investigations to become slaves to a pre-determined process and to lose sight of what they set out to achieve. Setting and communicating clear objectives, as well as defining and continuously reviewing the scope and terms of the inquiry, are critical first steps towards achieving an appropriate and proportionate outcome.

As soon as an issue comes to the fore, one of the first steps a company should take is to identify all relevant stakeholders and determine responsibility for the investigation. This is important not only for creating a legally privileged environment but also for ensuring the efficient running of the investigation.

See Chapter 35 on privilege

It is advisable to have in place a template investigation plan long before any incident arises, which maps out internal responsibility and reporting lines for different types of hypothetical investigations. An investigation into a suspected low-level theft by an employee is less likely to require engagement at senior management level than one concerning a widespread, systematic fraud, and these distinctions should be reflected in the plan. The plan should be embedded into the company's written processes, along with its protocols for dawn raids and other events requiring rapid responses.

While an investigation plan will assist in assembling a team at short notice, it should nevertheless contain sufficient flexibility so as to allow responsibility for an investigation to be dictated by the particular circumstances. In particular, it is important to be alive to the possibility that some or all of the individuals tasked with carrying out investigations may in fact be part of the problem that requires investigation. Any potentially implicated individuals should be excluded from the investigation team from the outset, to avoid any risk – whether real or perceived

– that the integrity of the investigation be compromised. The constitution of the team should be reviewed regularly as the matter progresses: what starts out looking like a low-level infraction may turn out to be a far more significant problem, requiring the engagement of more senior personnel.

In many cases, responsibility for initiating an internal investigation will fall to the company's general counsel or his or her representative. Depending on the scale of the investigation and the seniority of any implicated individuals, it may sometimes be necessary to set up a special investigation subcommittee of the board to oversee the investigation, or to devolve responsibility for the investigation to the audit committee. In certain circumstances, often owing to the scale or potential implications of the matter, it will be necessary to instruct external lawyers. The involvement of external lawyers can bolster the independence and credibility of the investigation process, which may be helpful when engaging with the authorities over the findings of the investigation. Appointing external counsel can also strengthen any claim to privilege over the investigation.

See Chapter 35 on privilege

Whoever is conducting the internal investigation should establish and document its scope carefully and clearly at an early stage. The scope should cover the overall objective of the investigation, the issues being investigated, the date range, the jurisdictions and whether any overseas legal advice may be required, the relevant corporate entities involved (for example, subsidiary companies) and any other relevant issues.

It is important to document the reasons for any determinations as to scope. If an issue subsequently becomes the subject of a criminal or regulatory investigation that was not identified by the company's own investigation because it fell out of scope, it may become necessary for the company to demonstrate that the issue fell out of scope for legitimate and carefully considered reasons.

The advantages of investing time in detailed planning at this stage are many. Perhaps most importantly, focusing minds on what needs to be achieved can help to limit the company's potential exposure to a wide-ranging, unfocused investigation. An internal investigation is not intended to be a fishing expedition, but rather a considered response to a specific problem that has been identified. That is not to say that unanticipated issues that come to light during the course of the investigation should be ignored; simply that a tightly focused investigation will undoubtedly be more conducive to resolving issues in the most time- and cost-effective manner. The planning process will also put the company in a position to demonstrate to any government authorities and interested third parties that it has taken the issue seriously from the outset.

An important part of the scope-setting exercise is to assess the nature of the potential risks that the company is exposed to. This should be reviewed continuously as the investigation progresses. A problem that appears, on its face, to be regulatory may in fact have a criminal angle that only becomes apparent part-way through, or at the conclusion of the investigation. Whether a company is facing criminal or regulatory risk can have a significant impact on how investigations should be approached.

The scope and terms of reference of the investigation should be communicated to relevant personnel, and agreement sought from key stakeholders.

It may also at this stage be necessary to agree the scope of the investigation with government agencies before proceeding further. By way of example, the FCA has made clear that it expects regulated firms to engage in early communication regarding proposed investigations and not to take any steps that may prejudice or obstruct its own investigations.[15] It may even seek to impose limits on the internal investigation process. The Serious Fraud Office (SFO) is also increasingly likely to seek to restrict the internal investigation process in this way, particularly for witness interviews.

See Chapter 3 on self-reporting to the authorities

See Chapter 7 on witness interviews

This differs markedly from the position in the United States where the Department of Justice (DOJ) arguably expects companies to leave no stone unturned in identifying individuals involved in misconduct. Companies and their advisers can therefore often face a difficult task in attempting to balance the competing demands of multiple government agencies when determining how to approach internal investigations.

See Chapter 10 on co-operating with the authorities

See Chapters 3 and 4 on self-reporting to the authorities

Once the scope is agreed, a detailed work plan should be produced setting out how and by whom the evidence is to be preserved, collected, reviewed and analysed. This should include identifying relevant custodians from whom evidence will be collected; who, if anyone, will need to be interviewed and in what order; and what, if any, external expertise is needed (such as forensic accountants or industry experts) and what implications this may have for privilege. It may also be necessary to seek legal advice on how any issues of data protection or banking confidentiality should be dealt with.

See Section 5.3

At this stage it should be possible to estimate a likely time frame for the investigation and the anticipated resources and costs that will be involved (at least for the initial stages of the investigation), although these will need to be kept under review and updated as the scale of the review task becomes clearer.

The work plan will need to be flexible enough to adapt to changing circumstances. While the initial plan may represent the investigation the company would carry out in an ideal world, in practice, obstacles are likely to arise that should be balanced against the need to conduct a full investigation. These may include issues such as cost, external time pressures, regulatory requirements and the ongoing needs of the business.

Whoever is overseeing the investigation should send regular feedback on progress up the reporting chain, the structure of which should have been mapped out at the scoping stage to ensure that relevant personnel are kept informed and that sensitive reports are not circulated more widely than is strictly necessary. Depending on the level of engagement with the authorities at this stage, updates may also need to be provided externally.

It is important to consider early on how the investigation's findings and conclusions will be presented and to whom they will be disclosed, both internally

15 Jamie Symington, Director in Enforcement (Wholesale, Unauthorised Business and Intelligence), FCA, speaking at the 2nd Annual GIR Live conference on 28 April 2016.

and externally. While a written report can be effective in demonstrating that a thorough investigation has been conducted and the steps taken to remediate problems, any ambiguity over the existence of privilege may lead to those reports being disclosable in future proceedings. Again, the FCA has made clear that it expects to be consulted on these issues early on.

In matters that are potentially cross-jurisdictional, it should be assumed that anything provided to one interested regulator will be forwarded to others. It can nevertheless be advantageous for a company to produce material to relevant agencies proactively rather than relying on cross-border information sharing, as there is often more scope for negotiation over the level of confidentiality with which that material will be treated. For instance, while the FCA will not accept restrictions on the use to which any investigation material can be put, it will normally invite and consider any representations the company wishes to make before it discloses the material to any third party.

See Chapter 11 on production of information to the authorities

5.3 Document preservation, collection and review

One of the most important aspects of any internal investigation is the underlying evidence and contemporaneous documentation. The issue of document preservation, collection and review should be considered at the earliest possible opportunity once a decision has been made to commence an internal investigation. How potential evidential material is preserved and collected is likely to be critically important if it becomes necessary to engage with government agencies. At best, the credibility of any investigation would be damaged by a failure to secure all potentially relevant material at the outset. At worst, an ineffective document preservation and collection process may be viewed by a prosecutor as obstruction or an attempt to pervert the course of justice. A prosecutor or regulator might also view such a failure as unco-operative. This could put a strain on the company's relationship with any external investigators and, potentially, become an aggravating factor in any settlement.

5.3.1 Preservation

Ordinarily the first step that should be taken is the issuance of a 'document retention notice' (DRN) or 'hold' notice, but care must be taken not to inadvertently tip off data custodians who may also be suspects. In some cases issuing a DRN is not appropriate, for example where the company is investigating something outside the public domain and where document collection needs to be carried out covertly (at least at the outset). The company will need to make a careful judgement call in these circumstances and ought to record the reasons for its decisions. This should assist the company to avoid subsequent criticism from any government agency. Ideally a company should have a documented process in place as part of its compliance policies and procedures. In any event, careful consideration should be given by the investigation team as to whom the hold notice should be sent to and what it should say. If the investigation has been triggered by the receipt of a subpoena or other official request for documents, the hold notice should be sent to all employees who are, or may be, in possession of potentially relevant

material. The hold notice should also be sent to any third parties who perform services on behalf of the company and may hold relevant material. Any hold notice must clearly require the recipient to refrain from altering, discarding, destroying or concealing any documents that may be responsive to the subpoena or document request. It is best practice to err on the side of caution and interpret the applicability of any subpoena widely. Even in the absence of a formal document request, the hold notice should broadly provide details of the documents requiring preservation with a similar instruction not to alter, discard, destroy or conceal.

It is good practice to specify the types of material to be preserved. This should include all electronic data such as emails, documents and calendar invites as well as hard-copy documents including notes, drafts and duplicates. The request should also make clear that it applies equally to any relevant material located outside the office or place of work, such as at home or within personal email accounts, mobile telephone text messages (including Whatsapp and other instant messaging applications) and social media accounts.

A clear record should be kept of those to whom the hold notice was sent. Ideally recipients should acknowledge safe receipt, evidence of which can easily be obtained through the use of an email read receipt. Prior to sending a hold notice, routine data destruction practices must be suspended and a complete back-up obtained of all electronic data held. As well as being good practice, this allows investigators to establish whether any recipients have attempted to delete evidence following receipt of a hold notice.

Collection 5.3.2

The collection process presents a number of challenges and can have significant implications later in the investigation process if errors are made. For this reason it is advisable to carefully document all decisions as to what material is being collected and why, as this can be useful later in the process if external government agencies become involved.

Depending on the size of the investigation, it may be necessary to instruct external, expert forensic IT and data collection vendors. While there are inevitable cost implications in using third parties, it can be essential if the necessary expertise is not available in-house. The use of a third-party expert may also assist in retaining credibility with any interested government agencies. This is because the 'forensic' collection of data is highly specialised and a failure to follow the correct processes can have a significant impact on any subsequent legal proceedings. The improper collection of electronic data could interfere with, and ultimately compromise, the integrity of the underlying data.

See Chapter 22 on forensic accounting skills

A digital image of all relevant electronic data sources and devices (such as mobile telephones, tablets and personal computers) should be taken. When electronic devices are collected, they must be switched off by the owner. Under no circumstances should the devices be switched on again by anyone, including the company's IT department, until they have been made available to third-party experts with the necessary expertise and equipment to collect the data without inadvertently compromising it.

It is important to think broadly when collecting electronic evidence. In addition to the more obvious sources of evidence such as network drives, hard drives, mobile telephones and tablets, consideration should be given to both landline and mobile telephone records (including numbers dialled and received), recorded telephone lines, building security logs and CCTV footage.

Collection of hard-copy material should be undertaken following a documented assessment as to where relevant material may be kept. In many cases it will be perfectly proper and proportionate to request that custodians collect the relevant material themselves and provide it either to the investigation team or to external lawyers. In some circumstances – for example, where there is a risk that evidence may be destroyed – it may be necessary to ensure that all relevant evidence is secured by conducting an unannounced collection. When doing this, it is crucial that a company's internal policies and any local employment law considerations are taken into account. Thought should also be given to data protection issues, particularly where data from shared, as opposed to individual, drives has been collected.

See Section 5.3.4

It is good practice to conduct a document collection interview with each custodian, covering the location of all potential sources of material, what software the individual uses, where they save material on the network, the use of personal portable devices such as mobile phones and tablets, the use of chat and instant message systems, the use of personal email accounts, social media sites, recorded phone lines and external hard drives. The interview should also cover the location of all hard-copy documents and the custodian's typical document destruction practices. The custodian should be asked who else, such as a secretary, personal assistant, colleague or family member, has access to his or her emails, other electronic data and hard-copy documents.

Once hard-copy material has been collected it should be held in a secure room or locked cabinet, access to which should be monitored and restricted to members of the investigation team. To ensure a clear chain of custody, a log should be kept of any movement of material outside this locked environment and originals should not be removed.

5.3.3 Review

Given the significant volume of electronic data collected in most investigations, any subsequent review can be daunting, not least in terms of time and cost. In all but the smallest investigations it is normally advisable to upload the collected material to a document review platform. The function of the platform is to collect all of the data in a central online database which has search and tagging functionality, allowing the investigation team to review and produce documents efficiently. A wide range of platforms are available, each offering broadly similar functions, though consideration should be given to data protection and jurisdictional issues. All the material collected should be uploaded to the review platform, including any hard-copy documents that can be processed using optical character recognition technology to allow the text to be searched in the same way as electronic data.

See Section 5.3.4

Once the data is uploaded it can be processed to confine the review set to the relevant parameters. These can include date ranges, document types and custodians, and will usually involve the removal of duplicate documents. It is crucial for both the investigation and its credibility that documents be carefully tracked throughout. To allow for this, each document will be assigned a unique identifying number when it is uploaded to the review platform. The review platform will also provide for any linked parent-and-child documents (such as emails and attachments) to be easily identified.

At this stage of the review process, consideration should be given to creating a list of search terms to narrow the data set further. Traditionally, this process has simply consisted of listing relevant search terms such as names, case-specific keywords, telephone numbers or any other words or phrases that could help in identifying relevant documents. While this remains a helpful method of identifying relevant documents, many vendors now provide more sophisticated search and document review technologies that can accurately detect and relate unique phrases among unstructured data sets to refine the data set to the most relevant information.

These review technologies are broadly classified under the name 'predicative coding' and provide for the building of an intuitive automated learning process and case-specific algorithms into the platform itself. Put simply, once the review is begun, the platform is able to learn what the reviewers are looking for and move the most relevant documents to the top of the review list. This can dramatically speed up the identification of the most relevant documents. Other tools include concept searches, context searches, metadata searches, relevance ranking, clustering and early case assessment. To varying degrees, all of these processes allow review teams to focus quickly on relevant documents and potentially identify relevant witnesses.

Once the collected material has been processed and searched (irrespective of whether any predictive coding technologies have been used), it will be necessary to begin a human review of the data set. A standard linear review, namely a review of all the material responsive to search terms, should be conducted by a first level review team. The size of the team will depend on when the review needs to be completed and how many documents form the review set.

To assist in this process, a senior member of the investigation team should draft a review memorandum, which should include the necessary background to allow the review team to identify the relevant documents and should be accompanied by training for each member of the review team. A document coding protocol should also be prepared, detailing the tags that are available to the review team. The appropriate number of available tags is a matter of preference and will depend on the complexity of the investigation, but it is recommended in order to try and future-proof the investigation so that the document set can be easily cut down to the relevant subsets of material as required. Reviewers will usually tag documents as 'relevant' or 'not relevant', with other issue tags being used as appropriate.

A list of potential interviewees to allow reviewers to identify documents relevant to each interviewee is often helpful at this stage. However a document review

is structured, it is important that 'hot documents' are identified and quickly escalated to the relevant people within the investigation team. Establishing a daily call or meeting allows the review team to provide feedback on the type of material they are seeing in their review and to receive guidance from the investigation team. It may also be helpful for reviewers to be tasked with creating event chronologies. The source of each event identified in the chronology should be clearly identified.

It is best practice for reviewers to identify potentially privileged material, broadly defined to include material that may be subject to bank examiners' privilege (in the US), bank secrecy (in the UK), data protection or other jurisdiction-specific issues. Regulators and third-party litigators will often request a privilege log, and a considerable amount of time can be saved if this is created at the outset.

See Chapter 35 on privilege

5.3.4 Considerations when documents are located in multiple jurisdictions

A range of complicating factors can arise when material located in multiple jurisdictions is being reviewed. Local legal advice should be sought if there are any concerns about reviewing material or moving it from one jurisdiction to another. Bank secrecy and data privacy requirements often mean that reviews have to be carried out in the territory where the data is held. In these circumstances data should not be uploaded to a server located outside the territory. It may be helpful to arrange for a mobile server to be deployed, so that the data does not have to leave the company's premises.

See Chapter 11 on production of information to the authorities, Section 11.2

Data protection issues are often a concern and expert advice should be sought in cases of doubt. If the investigation is necessary for legal proceedings (including prospective legal proceedings), for obtaining legal advice or to establish, exercise or defend legal rights to comply with a UK legal or regulatory obligation, data protection should not be a significant concern so long as the investigation is carried out in a reasonable and proportionate manner. If the investigation is for some other purpose, the position is more difficult and the proportionality of the search will need to be considered carefully. Extra care should be taken if the investigation involves the processing of sensitive personal data, though few investigations are likely to fall into this category.

6

Beginning an Internal Investigation: The US Perspective

Bruce E Yannett and David Sarratt[1]

Introduction 6.1

The aim of this chapter is to provide the reader with useful tools to navigate the beginning of an internal investigation. Mistakes made in the initial phases of an investigation can produce costly repercussions down the road, and for this reason, it is important to consider all the relevant legal, commercial and logistical factors when making early decisions.

Assessing if an internal investigation is necessary 6.2

Information giving rise to the need for an internal investigation can come from a variety of sources including customers, employees, whistleblowers, lawsuits, counterparties, news and social media, as well as from prosecutorial and regulatory authorities. Regulatory changes have created new incentives for individuals to come forward and report suspected wrongdoing. For example, the Sarbanes-Oxley Act of 2002, and its implementing rules, require attorneys who appear and practise before the SEC to report evidence of a material violation up the ladder to a company's chief legal officer and CEO. The reporting obligation is not discharged until the attorney reasonably believes the company has provided an appropriate response.[2] Similar reporting obligations apply to issuers and auditors.[3]

When confronted with information – from whatever source – that the company or its employees may have engaged in serious misconduct, in-house counsel's first step is often to assess whether it would be in the company's interest to conduct an internal investigation. Counsel will want to consider whether

1 Bruce E Yannett and David Sarratt are partners at Debevoise & Plimpton LLP.

2 See Sarbanes-Oxley Act of 2002 § 307, 15 U.S.C.A. § 7245 (2002); 17 C.F.R. Part 205.3(d).

3 See Securities Exchange Act of 1934 § 10A, 15 U.S.C.A. § 78j-1.

government authorities are already investigating, or are likely to investigate, the matter, whether civil litigation will follow and in what form, and the potential (or likely) need for remediation. Depending on the facts, counsel may also want to balance the costs of investigating and the potential disruption to normal business, as well as any potential reputational risk or commercial fallout.

In some instances, external legal obligations may require an investigation to be conducted. Board members and management, for example, have a fiduciary duty to protect the interests of the corporation and its shareholders, and in some cases that duty will include an obligation to investigate indications of serious misconduct at the company. An investigation may also be required in certain instances so that company executives can meet any affirmative certification obligations they have, whether under Sarbanes-Oxley or otherwise.

More often, however, counsel will want to conduct an investigation to make an informed decision about whether it is in the company's interest to self-report the matter to law enforcement or regulators. Over the past two decades, the United States Department of Justice (DOJ) has placed an increasing focus on self-reporting both in charging decisions and in the degree of co-operation credit that will be afforded to a company. To guide the charging decisions of its own attorneys, the DOJ has set out a number of factors that prosecutors should consider in determining whether to charge a business entity, including co-operation and voluntary disclosure, the adequacy of the corporation's compliance programmes, and any remedial actions or restitution undertaken.[4] Subsequent DOJ directives have expanded on these factors.[5] Most recently, the Yates Memorandum of 2015 made clear that 'in order to qualify for *any* co-operation credit, corporations must provide to the [DOJ] all relevant facts relating to the individuals responsible for the misconduct,' and in 2016 the Fraud Section of DOJ instituted a 'Pilot Program' announcing even greater emphasis on voluntary self-reporting in deciding whether to charge or how to resolve corporate criminal matters.[6] For all practical purposes, an internal investigation is necessary so that the company can identify what, if any, information should be disclosed to the DOJ, and whether

See Chapter 4 on self-reporting to the authorities

4 See Holder Memorandum, Bringing Criminal Charges Against Corporations, Dep't of Justice, Deputy Attorney General Eric Holder (16 June 1999).

5 See Thompson Memorandum, Principles of Federal Prosecution of Business Organizations, Dep't of Justice, Deputy Attorney General Larry D. Thompson (20 January 2003); McCallum Memorandum, Waiver of Corporate Attorney–client and Work Product Protections, Dep't of Justice, Acting Deputy Attorney General Robert D. McCallum (21 October 2005); McNulty Memorandum, Principles of Federal Prosecution of Business Organizations, Dep't of Justice, Deputy Attorney General Paul J. McNulty (12 December 2006); Filip Memorandum, Principles of Federal Prosecution of Business Organizations, Dep't of Justice, Deputy Attorney General Mark Filip (28 August 2008).

6 Yates Memorandum, Individual Accountability for Corporate Wrongdoing, Dep't of Justice, Deputy Attorney General Sally Q. Yates (9 September 2015) (emphasis added); Leslie R. Caldwell, Criminal Division Launches New FCPA Pilot Program (5 April 2016) (noting that '[i]f a company opts not to self-disclose, it should do so understanding that in any eventual investigation that decision will result in a significantly different outcome than if the company had voluntarily disclosed the conduct to us.').

co-operation credit is attainable. This, however, may be a false dilemma as, in many instances, a corporation's co-operation can be the most significant determining factor in how the DOJ resolves a case, including the amount of any penalty.[7]

Many regulatory agencies have likewise increasingly come to expect companies to perform a robust internal investigation of any potential legal or regulatory violations and to report such violations to the agency. For example, the Consumer Financial Protection Bureau has stated that 'responsible conduct' – namely proactive self-policing for potential violations, prompt self-reporting of identified violations, complete remediation of resulting harm and co-operation with the CFPB – would influence the CFPB's resolution of an enforcement investigation.[8] Similarly, the US Department of Treasury Office of Foreign Assets Control specifically provides companies with mitigation credit of 50 per cent off its base penalty amounts for voluntary disclosures and further mitigation for co-operation.[9]

Even apart from legal considerations, business and reputational concerns alone may provide grounds for conducting an internal investigation. Indeed, counsel will often need to have a baseline understanding of the underlying facts, and an informed sense of whether there is any substance to the allegations of misconduct, in order to make a reasonable assessment of the potential business and legal consequences and the need for corrective action. Commencing a thorough internal inquiry will often also be important to any related public relations efforts, and will be critical to maintaining the company's credibility with its customers, business partners and other affected individuals.[10]

Identifying the client 6.3

Once the company decides to commence an internal investigation, the next step is to determine who will conduct the investigation and for what specific client within the organisation. In large organisations, particularly those with multiple subsidiaries across the globe, counsel should think strategically about where to locate the attorney–client relationship, to whom the investigating attorneys should report, and who will be making key decisions as the investigation proceeds. In making these decisions, counsel should consider what relationships will best protect the integrity and confidentiality of the investigation, the location and custody of relevant documents, and the overall aims of the investigation over the short and long term.

In some circumstances, counsel may also want to consider whether the investigation should be conducted on behalf of the board (or its subcommittee), with

7 U.S.S.G. § 8C2.5(g), cmt. 13 (2015).

8 CFPB Bulletin 2013-06, Responsible Business Conduct (25 June 2013).

9 31 C.F.R. Part 501, Economic Sanctions Enforcement Guidelines (9 November 2009).

10 In rare circumstances, some facts will be so clearly unlawful on their face – e.g., if an employee is providing clearly and materially false information to investors – that the company should consider notifying the relevant law enforcement or regulatory authorities even before conducting a complete internal investigation, particularly where time is of the essence and, if appropriate, continue with the internal investigation in parallel.

counsel reporting to and directed by the board, rather than by management. In a shareholder derivative suit, having the board direct the investigation will be the norm, given that the conduct of management will often be at issue and to ensure that the investigation will not be subject to the derivative-claim exception to the attorney–client privilege recognised in some jurisdictions. The board may also be best suited to lead an investigation when the allegations are particularly serious or could have serious consequences for the company, when the allegations concern the actions of senior management, or when reputational or other concerns require that the investigation be conducted independently of management. Making that decision in any particular case will depend heavily on the specific facts involved, the company's business and position in the marketplace, the relationship dynamics at the company and the overall goals of the investigation.

See Chapter 36 on privilege

Whatever decision is made, it is important that the company clearly document who the client is, and the reporting and oversight structure for the investigation.

6.4 Control of the investigation: in-house or outside counsel

Although routine matters can often be handled by in-house counsel, an outside firm should ordinarily conduct the investigation where the potential misconduct could produce significant adverse legal or commercial consequences for the company. Though internal investigations can be expensive and time-consuming, these concerns often pale in comparison to the possible legal, financial and reputational risks faced by the company, as well as the need to demonstrate independence. Hiring outside counsel allows for a clearer application of attorney–client privilege to communications and work-product of the outside firm, especially where corporation counsel has both business and legal functions. Often, both commercial and legal concerns can precipitate an internal investigation, so using outside counsel can decrease the risk of inadvertently waiving privilege.[11] External counsel also brings expertise, experience and resources to support the company in challenging situations that are unlikely to arise with any frequency at a particular company.

Depending on the circumstances, counsel may want to consider using outside counsel that is not the company's usual firm.[12] Bringing in a separate firm that is less familiar with the company's business, of course, will often involve additional time and expense. Whether this step is justified in a particular case will depend on the sensitivity and significance of the investigation, the level of management implicated in the conduct, the need for perceived independence of the investigation, and the attitude of potentially relevant regulators who may be assessing the quality and results of the investigation in considering whether the company deserves credit for co-operation.

11 See, e.g., *United States v. Ruehle*, 583 F.3d 600, 606-12 (9th Cir. 2009) (statements made for the purpose of disclosure to outside auditors not privileged).

12 See *In re John Doe Corp.*, 675 F.2d 482, 491 (2d Cir. 1982) (recognising that when corporate counsel finds evidence of criminality protected under *Upjohn* 'the wiser course may be to hire counsel with no other connection to the corporation to conduct investigations').

Determining the scope of the investigation 6.5

The importance of clarifying the investigation's scope and purpose at the outset cannot be overstated. First, a well-defined and memorialised purpose can help establish the legitimacy of privilege claims over attorney–client communications and work-product produced in the course of the investigation. The claim to attorney–client privilege is likely to be much stronger if an independent investigation has been commenced or litigation is reasonably in contemplation.

See Chapter 36 on privilege

Additionally, defining the investigation's purpose can impose a welcome discipline and accountability on the investigators themselves. Corporate counsel are quite familiar with the tangents that can cause an investigation to become rudderless and wasteful. As explained below, a short period of preliminary investigation can often be helpful in defining a purpose and scope to the investigation that is reasonably clear and realistic, while identifying key uncertainties and inflection points to come.

Key documents and scoping interviews 6.5.1

Most investigations will begin with counsel's review of a handful of critical documents that are at the heart of the information triggering the need for the investigation. In many instances, the documents themselves, rather than individuals, may have alerted the company to alleged wrongdoing and precipitated the need for an investigation. In almost every case, however, conducting a small number of initial scoping interviews will be a useful way for the investigators to focus in quickly on the truly important material.

Identifying the most useful individuals to speak with in these scoping conversations can be delicate, as investigators seek to strike a balance between speaking with individuals who are knowledgeable about the issue at hand but who are sufficiently removed from the potential misconduct that they can safely be viewed as reliable in terms of setting the scope and maintaining the confidentiality of the investigation. Of course, interviewing an employee at the early stage, without the benefit of a complete set facts or documents, could result in incomplete information and the need for a further interview. One logical place for outside counsel to start is to thoroughly debrief the in-house legal team and, potentially, the individual or individuals who brought the issue to the attention of the organisation. These interviews can serve to identify key custodians, the nature and volume of relevant documents, the ways documents are stored, and who has access to them. If there is an obvious investigation target, interviewing that individual in the initial stages may be more efficient, but this must be weighed against other strategic considerations, including alerting the target to the focus of the investigation and compromising the investigation later on.

Identifying necessary partners 6.5.2

Another early consideration for counsel is what outside investigative partners may be needed. These can range from technical subject-matter experts to local counsel in foreign jurisdictions to data processing and hosting services to forensic

accountants. Counsel ordinarily will want to interview a number of firms in deciding which vendors to use, and the discussions can sometimes yield helpful insight into the size of the tasks ahead, likely costs, potential alternative strategies and timing. Engaging these third parties at the outset of the investigation – even if their work is not needed immediately – will often be valuable in defining the scope and methods of the investigation. As noted above, given the consideration of attorney–client privilege, generally outside counsel will retain the third-party vendors on behalf of the company so that their work and work-product is undertaken on the instruction of outside counsel in anticipation of litigation and thereby covered by privilege and attorney work-product protections.

6.5.3 Developing a work plan

Once the investigating attorney has identified the subject matter of the investigation (the who, what, when and where), the scope and the purpose of the investigation and a concrete plan for carrying it out should ordinarily be memorialised by outside counsel in a written work plan. A memorandum allows for client input on the investigative process, gives inside counsel clear expectations about how the investigation will progress, and provides investigating attorneys with a benchmark for strategic judgments as the investigation moves forward. It can also serve as a useful tool for dividing responsibilities among the investigating attorneys and tracking progress toward key investigative goals. Keep in mind that the work plan may be a document that the company decides to share with the criminal or regulatory authorities and therefore should be drafted as such.

In building the work plan, counsel should consider the time frame and geographical range of the inquiry, as well as which entities of the company (e.g., subsidiaries, affiliates, departments) will be covered and, if applicable, the rationale for not covering other entities at this stage. The memorandum should clearly set forth the subject matter under investigation and, to the extent possible, (1) what company documents will be retrieved (and by whom), (2) how data will be processed (and by whom), and (3) how documents will be reviewed (and by whom). In collecting, reviewing and preserving documents, the investigating attorney should take into account any data privacy concerns that may arise, as discussed below.

Where possible, the work plan should list any interviews that have been or will be conducted, or at least the categories of people to be interviewed. To the extent there is a rationale for interviewing some individuals and not others, it should be stated. Likewise, if the involvement of other third parties, such as forensic accountants and industry experts, is foreseeable, the document should describe the scope of their expected engagement.

The work plan should also set a rough schedule for key deliverables in the investigation, and at least tentatively identify the form that the ultimate work-product will take. In particular, it is useful to know at the outset of an investigation whether the preparation of a written investigative report will be useful and in the company's interest, or whether an oral presentation of findings to management or the board would be preferable. A written report will most often be advisable when the company believes providing the report to a third party or to the public will be

beneficial, whether for reputational, business or legal reasons. In most other cases, an oral report will often serve the client's interests just as well without creating a risk of inadvertent or compelled disclosure.

Finally, the work plan should be flexible. Although careful planning is always beneficial, investigations in the real world are not scripted affairs. The investigative team will have to adapt to new information and challenges as the investigation progresses, and the work plan should lay out a process for making those decisions – particularly in terms of who should be consulted and who should approve – before the investigative team moves in a new direction not contemplated by the plan.

Certain investigations may implicate the general counsel or other members of senior management in alleged misconduct. In that circumstance, the investigating attorneys should report to the board (or a designated member or committee of the board) or to a senior executive who has no involvement in the facts at issue and who does not report to any member of management whose conduct may be under review.

Document preservation, collection and review 6.6

Preservation 6.6.1

As soon as possible, the in-house attorney should implement a litigation hold and document preservation notice to prevent the intentional or inadvertent destruction of relevant documents and material. In fashioning the document retention policy, it is ordinarily advisable to err on the side of overbreadth, at least at the beginning when the extent of any potential wrongdoing and the relevant actors are unknown. This is critical. Failure to successfully preserve relevant material could be viewed as a dereliction of the attorney's duties and, in some cases, obstructing justice.

In issuing preservation or 'hold' notices, the investigating attorneys should consider who should receive these notices (including the IT and records departments), what types of documents and data should be included, and how the investigation should be described. Where notices are sent to different jurisdictions, the investigating attorney may need to consider providing translations as well as addressing data privacy restrictions. The attorney implementing the litigation hold should record the distribution of notices and, where extra caution is warranted, have employees sign and return a copy of the notice or electronically acknowledge receipt so as to create a record. If the company has received a subpoena from law enforcement relating to the subject matter of the investigation, the subpoena will define the minimum universe of documents that require preservation, but counsel should consider whether additional material should be preserved for purposes of the internal investigation or otherwise.

The investigating attorneys should consult with the company's records management department to preserve any hard-copy files, including those stored off-site in archives. The investigating attorney should also instruct the information technology department to suspend any normal data destruction practices and to create and maintain a list of the relevant sources of data. Such sources

may include documents maintained on the company's servers and employees' hard drives, emails saved on exchange servers, data held on employees' home computers, and data saved on employees' work-issued mobile devices. To the greatest extent possible, the company should take steps on its own to preserve this electronic data rather than relying on individual employees to preserve their own documents. The company should also take steps to prevent individuals from destroying or altering potentially relevant data. In some cases the facts will warrant proactive data capturing steps, including forensic images of employee laptops or desktops. Document custodians should be designated as soon as the investigating attorneys reasonably believe such individuals may possess documents relevant to the investigation.

It bears mention that sometimes the document collection process itself can come under scrutiny, particularly if authorities come to believe that relevant (and potentially damaging) documents may have been destroyed. In some extreme cases, someone with first-hand knowledge of the investigation may be called to provide sworn testimony in a deposition or in court. Attorneys should accordingly plan and document the collection process with this worst-case scenario in mind, and make clear to their clients the importance of treating the collection process – sometimes viewed as a ministerial chore – with serious care and attention.

6.6.2 Collection

Once preservation measures have been implemented, the investigation can turn its attention to the collection of documents. Almost all investigations require judgement calls to be made on the scope of collected documents, including whether the investigation can be accomplished in whole or in part through collection within the company, or instead, requires collection from third parties. Company policies (e.g., codes of conduct) and local employment law also may impose limitations on the collection process. If the investigation contemplates the collection of personal health information, counsel should ensure that all data collection comports with the requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). In such circumstances, counsel should take appropriate measures to safeguard personal health data, including assessing whether entering into a Business Associate Contract is appropriate.[13]

For electronic data, the process of collecting data will often coincide with preserving it. Counsel should make sure that forensic copies of all relevant electronic data (including metadata) has been copied to a secure location, preferably with at least one backup maintained on a separate system. The data will then need to be loaded into a review platform for review. Evidence that has been collected in paper form will often be most easily reviewed by digitising it and loading it into the same review platform as the electronic documents that have been collected.

13 The HIPAA Rules generally require that covered entities enter into contracts with their business associates to ensure that the business associates will appropriately safeguard protected health information. See 45 C.F.R. Part 160 and Part 164.

The data vendor retained by the investigating counsel will provide the collection and hosting support to the company.

As with the preservation process, the steps taken in collecting documents should be recorded. In instances where requested documents cannot be located, the search efforts and results should also be documented.

Review 6.6.3

Regarding the review of the documents, the investigating attorneys should give thought to how to manage the volume and formatting of documents. Outside vendors are a useful resource for these matters, and consulting with them can often save time and money.

Where there is a large volume of documents to be searched, the key objective is to locate the responsive documents in a time-efficient manner. Search terms should be broad enough to include responsive materials, but narrow enough not to bog down review teams with a large proportion of unnecessary documents. To the extent certain custodians or groups of documents are more likely to contain relevant content, their review should be prioritised.

In recent years, great advances have been made in the use of predictive coding in e-discovery to more quickly identify relevant documents and reduce the number of non-responsive documents that need to be individually reviewed. In our experience, judicious use of predictive coding technologies are increasingly acceptable to regulators and prosecutors in the right context, so long as the specific methodologies and rationale for using those tools are clearly discussed with the authorities at the outset. Even in cases where a full human review of a document population is contemplated or required, predictive coding can be a useful tool for internal investigators in locating the most relevant documents quickly, before the full review is complete.

Taking these considerations into account, the investigating attorneys should draft a document review protocol that sets forth in as much detail as possible the purpose of the review, the responsive issues, and how documents should be tagged or marked. Devising the system of tags and codes is a critical step. Counsel should give careful consideration to how they may want to sort the data as the investigation progresses and devise codes that will make that work efficient. On the other hand, counsel should take care not to include so many codes that the review will be unduly slowed or overly confusing to reviewers.

If the need to produce documents to outside parties is likely, responsive documents should be reviewed to see if they are privileged and, if so, which privilege would apply. Disclosure of privileged material to a third party, even the government, can in some instances constitute a waiver of privilege, although steps can be taken to limit the scope of such a waiver.

See Chapter 36 on privilege

Discovery of documents will often require follow-up interviews, and information gleaned in interviews may reveal the need for additional search terms or custodians. Documents retrieved from one custodian may reveal that a previously unknown custodian may have responsive material. The document preservation

notice and review protocol should be updated as needed throughout the course of the investigation.

6.7 Documents located abroad

When documents are located in jurisdictions outside the United States, the first step is to the look at the relevant country's data privacy and bank secrecy laws (or whether blocking statutes or state secrecy laws are implicated), many of which may seem counter-intuitive to US practitioners. Under EU law, for instance, employees' personal data can only be collected and processed under certain conditions, and law firms must protect this data from misuse and respect certain rights of the individual data owners.[14] Some countries have procedural requirements (e.g., notification to a works council) that govern the processing, transfer, storage, maintenance and access to documents.[15] Given the heightened scrutiny surrounding personal information, counsel should take care to collect and store only what the investigation requires, and consider whether any special arrangements, such as a cross-border data transfer agreement, would help mitigate collateral risk.

In the past, corporate counsel has sometimes relied on these foreign laws to avoid producing documents located abroad to US authorities. Recently, DOJ officials have expressed increasing scepticism toward explanations that documents cannot be provided to the DOJ in the United States because of data privacy restrictions, and, by virtue of handling many cases implicating foreign laws, have themselves become knowledgeable about their limitations and exceptions. In the DOJ's view, '[c]orporations are often too quick to claim that they cannot retrieve overseas documents, emails or other evidence regarding individuals due to foreign data privacy laws. . . . A company that tries to hide culpable individuals or otherwise available evidence behind inaccurately expansive interpretations of foreign data protection laws places its cooperation credit at great risk.'[16] In 2015, the then head of the Criminal Division at the DOJ stated that while 'some foreign data privacy laws may limit or prohibit the disclosure of certain types of data or information,' the DOJ nonetheless will challenge what it perceives to be

14 See EU Data Protection Directive (Directive 95/46/EC), which has been adopted through national legislation by each EU member state. The General Data Protection Regulation adopted in April 2016 will supersede Directive 95/46/EC when it takes effect in April 2018. Other notable data privacy laws include Hong Kong: Personal Data (Privacy) Ordinance (Cap 486); Japan: the Act on the Protection of Personal Information (Law No. 57 of 2003); and Russia: the Russian Federal Law 'On Personal Data' (No. 152-FZ).

15 See, e.g., articles 91, 96 and 96a of the Austrian Labour Constitution Act (Arbeitsverfassungsgesetz – ArbVG).

16 Remarks by Principal Deputy Assistant Attorney General for the Criminal Division Marshall L. Miller at the Global Investigations Review conference, New York, N.Y., United States, 17 September 2014, available at https://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller.

'unfounded reliance on these laws' and encouraged companies to refrain from 'making broad "knee jerk" claims that large categories of information are protected from disclosure.'[17]

This is not to say that companies should disregard or be cavalier with foreign data privacy laws. But counsel should look for solutions to this issue. Where potential strategies exist – even creative ones – for obtaining relevant documents that are located abroad, United States authorities have clearly indicated they expect companies to do so to receive co-operation credit. This will almost always require coordination with skilled counsel in the relevant jurisdiction where the documents are located.

17 Remarks by Assistant Attorney General Leslie R. Caldwell at the Compliance Week Conference (19 May 2015), available at https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-compliance-week-conference.

7

Witness Interviews in Internal Investigations: The UK Perspective

Caroline Day and Louise Hodges[1]

7.1 Introduction

Witness interviews are a key part of most corporate investigations. While documentary evidence can provide the underlying facts of a case, it is often the accounts given by witnesses that deliver the context and detail of what has happened. They can provide vital background information, shed light on the motivations of those involved and allow for an individual's credibility to be assessed. However, the timing, preparation, record taking, content and use of the interviews need careful consideration.

Witness interviews can serve a number of purposes in the context of a corporate investigation, including:

- to scope the investigation;
- to understand the facts and issues;
- to understand accountability and defences; and
- to assess the credibility of individuals and their accounts.

Interviews in this context can present particular difficulties because of the myriad of employment, criminal, civil and regulatory issues that can arise, and the fact that the interests of the company and the witness are often not aligned. These interviews are typically conducted confidentially, premised on a need to maintain legal privilege and the duty of confidence owed between an employer and employee. This can often be at odds with the expectations of the authorities for the company to provide details of the witnesses' accounts. There is often a tension between a company's right to conduct its own enquiries into allegations of wrongdoing, including interviewing its employees, and the suggestion by the authorities

1 Caroline Day and Louise Hodges are partners at Kingsley Napley LLP.

that its enquiries could (depending on how they are conducted) be detrimental to a criminal or regulatory investigation. In addition, following recent court judgments the position surrounding legal privilege in the context of witness interviews has become more complex.

This chapter explores these issues, considers the practices that can be adopted when conducting interviews and highlights some of the benefits and risks of these different approaches. It considers the preparation and formalities that may be required for witness interviews in the United Kingdom, and identifies particular complexities that can arise in global investigations when multiple jurisdictions are involved.

Types of interviews 7.2

Broadly speaking, witness interviews in corporate investigations can be split into two categories, preliminary or scoping interviews, and substantive interviews. Generally, they should be distinguished from any employment or disciplinary interview.

Preliminary or scoping interviews may be appropriate at the outset of an investigation to seek background information, identify further sources of evidence, obtain a quick understanding and provide context to an allegation. These interviews will generally take place at the start of the investigation, and depending on the specific circumstances, may take place before any firm view has been reached on the terms of reference or extent of material that will be reviewed. They are more likely to be conducted with employees who may have knowledge of matters under investigation but are not at direct risk of any criticism. It may also be necessary to undertake interviews with whistleblowers at this stage.

See Chapter 19 on whistleblowers

Substantive interviews will generally take place after most, if not all, the relevant material has been reviewed. The purpose is to obtain a detailed understanding of what went on, to provide explanations of key documents in the case and, if necessary, to test the account given. These interviews will often be used to inform an understanding of any individual and corporate liability and any defences. The timing is important and can depend on a number of factors including the available evidence, whether the authorities are already involved and whether civil proceedings are contemplated.

Deciding whether authorities should be consulted 7.3

The decision about whether to consult the authorities in advance of a witness interview is not dictated by statute; no statutory framework explicitly requires it and in general terms a company may manage its internal affairs and make enquiries as it sees fit. Therefore, this decision often rests on whether there is an implicit obligation on the company to notify the authorities under its regulatory reporting regime, or whether it is in the interests of the company to co-operate with the authorities by notifying them of any forthcoming interviews.

Regulated firms may be obliged to report a violation or allegation of wrongdoing. For example, the Solicitors Regulatory Authority's (SRA) code of conduct requires a law firm to report any allegation of serious misconduct promptly, fully

co-operate with its investigation and report any material change about the firm.[2] Accountants may hold similar obligations under the requirements of their regulators. There are reporting requirements under the Listing Rules for those companies admitted to trading on a regulated market,[3] and those in the regulated sector are required to submit a suspicious activity report if they know or suspect (or have reasonable grounds for knowing or suspecting) that another person is engaging in money laundering or terrorist financing.[4] Financial institutions regulated by the UK Financial Conduct Authority (FCA) must under Principle 11 of the FCA's Principles for Businesses act in an open and co-operative manner and disclose anything relating to the firm of which the regulator would reasonably expect notice.

The FCA's expectations under Principle 11 extend to requiring a firm to consider notifying it of a decision to investigate conduct concerns at the earliest opportunity. Jamie Symington, Director in Enforcement at the FCA, suggested during a speech[5] that self-reporting is the bare minimum that is required and that a firm should discuss the scope of its investigation with the FCA as early as possible. He identified witness interviews as a key area of risk, suggesting that firms be alive to the possibility that their own investigation could prejudice or hinder a subsequent FCA investigation, and that firms should discuss this with the FCA before taking action. A firm should therefore consider its regulatory obligations when assessing if, and when, to consult its regulator regarding any proposed witness interviews.

During a speech at the 2nd Annual GIR Live London conference,[6] Mr Symington recognised that there are sometimes good reasons for firms to carry out their own investigations and confirmed that the FCA encourages this proactive approach and does not wish to interfere with a firm's legitimate procedures and controls. However, he reiterated that when conducting their own investigations, firms should ensure that they do not take steps that might prejudice or obstruct a subsequent FCA investigation and highlighted the importance of early communication in this regard.

The Serious Fraud Office (SFO) has similarly acknowledged that there are good and proper reasons for a company to carry out its own investigation[7] but has also referred to the potential dangers of an internal investigation 'churning up the crime scene', which could include the taking of first statements from witnesses in a way that influences their testimony.[8]

---

2 Solicitors Regulatory Authority Code of Conduct, Chapter 10.

3 Also see Prospectus Rules and Disclosure and Transparency Rules.

4 Part 7 Proceeds of Crime Act 2002 and Part 3 Terrorism Act 2000.

5 Speech by Jamie Symington, Director in Enforcement (Wholesale, Unauthorised Business and Intelligence), FCA, at the Pinsent Masons Regulatory Conference 2015 on 5 November 2015.

6 Speech by Jamie Symington, Director in Enforcement (Wholesale, Unauthorised Business and Intelligence), FCA at the 2nd Annual GIR Live, London, 28 April 2016.

7 Speech by Alun Milford, SFO General Counsel, at the 14th Annual Corporate Accountability Conference, Congress Centre, London, 9 June 2016 (as reported by GIR on 10 June 2016).

8 David Green QC, Director of the SFO, speaking at the GIR Roundtable: corporate internal investigations, 27 July 2015.

Where the authorities are not yet aware of the allegations under review, it is likely that preliminary enquiries will be necessary before the company is in a position to reach a view as to whether to self-report. Where this includes witness interviews it may be inappropriate for the authorities to be consulted in advance. This can create a tension between the authorities' expectations to be notified as well as the need for the company to bear in mind the risks of prejudicing a future investigation.

See Chapter 3 on self-reporting to the authorities

Where an investigating authority is already involved it is prudent for the company to consult it prior to undertaking interviews. Increasingly the SFO and the FCA have sought to impose restrictions on the conduct of interviews in corporate investigations or to prevent them from taking place. While a company cannot be prevented from undertaking its own interviews, there is risk of criticism if it proceeds without the consent of the authority, particularly where it could be suggested that it has prejudiced an investigation.

See Section 7.6

Providing details of the interviews to the authorities 7.4

The issues relating to co-operation with the authorities in the context of corporate investigations are explored in Chapters 9 and 10 on co-operating with authorities. When it comes to witness interviews, authorities often expect details of the interviews to be provided. It is therefore crucial to consider the purpose of the interview, its intended audience, record-keeping and, if appropriate, how this information is to be shared.

There is no statutory duty on a company to co-operate with the authorities with respect to its witness interviews. Instead there is published guidance in the form of codes of practice, speeches and guidelines. This varies between regulators but for the most part there is an expectation that details of witness accounts should be provided.

This issue is considered in the Code of Practice on Deferred Prosecution Agreements (the Code)[9] jointly issued by the SFO and the Crown Prosecution Service. The Code states at 2.8.2(i) that co-operation with the authorities will include identifying relevant witnesses, disclosing their accounts and the documents shown to them and, 'where practicable', making witnesses available for interview when requested. The SFO has made clear its expectation that for a deferred prosecution agreement (DPA) to be considered, co-operation must be forthcoming. David Green QC, Director of the SFO, noted in a recent speech that a DPA would not be available to companies under investigation unless they offer 'genuine and demonstrable co-operation'.[10] The authority has noted a shift in the level of co-operation being shown. Ben Morgan, Joint Head of Bribery and Corruption at the SFO, commented at a 2016 conference: 'There really is a pronounced difference now in the way companies are routinely approaching us – "we

9 SFO/CPS Deferred Prosecution Agreements Code of Practice, Crime and Courts Act 2013.

10 Speech by David Green QC, Director of the SFO, speaking at the International Bar Association's anti-corruption conference in Paris on 13 June 2017 (as reported by GIR on 13 June 2017).

think we've got a problem and we're willing to work with you to find out, and if necessary resolve it", not "there's nothing to see here, good luck finding it . . . ."'[11]

While the SFO has clearly set out its expectations to be told what witnesses have to say in interviews with particular emphasis on 'first accounts',[12] what is less clear is how the detail of the accounts should be imparted and the level of detail that is required. In the case of *SFO v. ICBC SB*[13] it was sufficient for oral reports of first-account witness evidence to be provided by the bank to the SFO to enable full co-operation to be established.[14] Mr Milford, general counsel at the SFO noted the bank's commitment to supply all relevant non-privileged material and provision of summaries of witness first accounts as an example of its co-operation.[15] Similarly, in the case of *SFO v. XYZ Ltd*[16] oral summaries were provided without the company's badge of 'genuine co-operation' being compromised.

Summaries of witness interviews were similarly supplied by Rolls-Royce in the context of its recent DPA.[17] In his judgment Sir Brian Leveson, President of the Queen's Bench Division, noted that the company had demonstrated 'extraordinary cooperation', referring to the disclosure of interview memoranda (on a limited waiver basis) as an example of this.[18] The judgment also made reference to the company 'co-operating with the SFO's requests in respect of the conduct of the internal investigation, to include the timing of and recording of interviews and reporting findings on a rolling basis.'[19] This was referenced further in a recent speech by Ben Morgan: "they made available to us written accounts of interviews that took place during the evidence gathering exercise, enabling us to understand both what had happened and the strength of the various accounts given about that."[20] While the SFO acknowledged its acceptance of summary witness accounts instead of transcripts in the DPAs for Standard Bank and Rolls-Royce,

11 Speech by Ben Morgan, Joint Head of Bribery and Corruption, SFO, at GIR Live New York, 15 September 2016, available at https://www.sfo.gov.uk/2016/09/15/ben-morgan-global-investigations-review-live/.

12 Speech by Alun Milford, SFO General Counsel, to an audience of compliance professionals at the European Compliance and Ethics Institute, Prague, on 29 March 2016.

13 *Serious Fraud Office v. Standard Bank Plc* (Now known as ICBC Standard Bank plc): Deferred Prosecution Agreement (Case No. U20150854).

14 Speech by Ben Morgan, Joint Head of Bribery and Corruption, SFO, at the Managing Risk and Mitigating Litigation Conference 2015 on 1 December 2015.

15 Speech by Alun Milford, SFO General Counsel, at the Handelsbatt Conference 2016, on 14 September 2016.

16 *SFO v. XYZ Limited*, Deferred Prosecution Agreement (Case No. U20150856).

17 *SFO v. Rolls-Royce Plc*, Deferred Prosecution Agreement (Case No. U20170036).

18 *SFO v. Rolls-Royce Plc*, Deferred Prosecution Agreement (Case No. U20170036) at [121].

19 *SFO v. Rolls-Royce Plc*, Deferred Prosecution Agreement (Case No. U20170036) at [121].

20 Speech by Ben Morgan, Joint Head of Bribery and Corruption, SFO, at at a seminar for General Counsel and Compliance Counsel from corporates and financial institutions, at Norton Rose Fulbright on 8 March 2017, available at: https://www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/.

at a conference in April 2017 Mr Milford refuted suggestions that it would be standard practice in all cases.[21]

In *(SFO) R v. Sweett Group PLC* (unreported), Sweett Group's refusal to hand over details of the witness interviews undertaken during its internal investigation was deemed unco-operative by the SFO. The level and extent of co-operation with the SFO will ultimately be determined case by case.

The FCA expects regulated firms to provide notification of any significant matters that occur in the context of an internal investigation, in accordance with its Principle 11 obligation. While this does not explicitly apply to witness interviews, the FCA Enforcement Guide makes clear that if the FCA is ultimately asked to rely on submissions or an investigation report in the context of its own decision-making powers, it would ordinarily expect the firm to provide the underlying material, which could include notes of witness interviews, in addition to the report itself.[22] While the level of information will undoubtedly differ from case to case, the FCA has indicated that an oral report may not be sufficient and that information should be shared in a transparent manner, with a proper record.[23] Furthermore, if an individual is suspended, a firm must submit a Form C explaining the reasons for suspension.[24]

The guidance surrounding co-operation with the authorities and what is expected is evolving. In cases where the company or its employees are at risk of further investigation, prosecution or civil action, the company will want to consider the benefits that early co-operation may bring. However, whether it is in the interests of the company to co-operate will depend on the facts of each case.

Identifying witnesses and the order of interviews 7.5

The company or its representatives, or both, should seek to interview all company personnel who were involved in the facts under investigation, including those who should have been involved by virtue of their position. Reporting lines of those involved should also be considered. The witness list may expand as more information becomes known, and therefore should be reviewed regularly.

Employees generally have a duty to co-operate and are likely to owe a duty of confidence towards their employer, and a failure to comply could result in disciplinary action.

See Chapter 19 on whistleblowers

Where there is a whistleblower, it may be preferable to interview him or her at the start of the process. Broadly, the order of other interviews should be based on the level of risk that the witness poses to the business, beginning with those who present the least risk to the company. For the most part this is likely to follow levels of seniority, starting with lower-level employees and leaving senior management

21 Speech by Alun Milford, SFO General Counsel, at GIR London Live, on 27 April 2017 (reported by GIR on 27 April 2017).

22 FCA Enforcement Guide, para. 3.26.

23 Speech by Jamie Symington, Director in Enforcement (Wholesale, Unauthorised Business and Intelligence), FCA, at the Pinsent Masons Regulatory Conference 2015 on 5 November 2015.

24 SUP 10.13 Changes to an approved person's details.

until later. Timing considerations sometimes mean witness interviews need to be taken out of the normal order. For instance, it is generally advisable to ensure that any employees who may be about to leave the company (either permanently or for temporary absence such as maternity leave) are interviewed beforehand and while they still owe a duty to the company to co-operate. In circumstances where there are a number of individuals to be interviewed, consideration should be given to the creation of a 'leavers list'.

See Section 7.6

The benefit of this approach is that the company may be better positioned to obtain an overall sense of the extent of the issues before focusing on particular areas of risk. Lower-level employees are generally more likely to communicate openly, although it is important that sensitive or confidential information is not referred to unless strictly necessary as there is risk that information may be shared.

While it may be appropriate to conduct early interviews with senior employees to obtain initial accounts (particularly where there is likely to be more than one opportunity to interview), generally members of senior management should be interviewed when the investigation is further advanced. Typically, senior employees are more likely to pose a greater risk from the perspective of corporate liability and therefore it is important that any potential risks are identified beforehand. Under the principle of identification, in the United Kingdom a company can be criminally responsible for the actions of those employees that represent the 'directing mind and will' of that company,[25] generally restricted to board directors, the managing director and other senior officers who carry out management functions on the company's behalf.[26] The principle of identification is explored in more detail in Chapter 1.

This can cause difficulties when interviewing board members and senior management who may be the 'client' for the purposes of the investigation but who may need to be interviewed in the context of their own involvement. For the most part this can be avoided by identifying the 'client' at the outset of the case as made up of a group of senior employees or board members with no involvement in matters under investigation. However, depending on the size of the company and the nature of the case, this is sometimes unavoidable and therefore the basis on which the interview is being conducted must be made clear to the witness.

See Chapter 5 on beginning an internal investigation at Section 5.2

See Section 7.8

There are a number of statutory exceptions to the principle of identification, and the government is currently examining the case for reform of the law on corporate liability for economic crime.[27] Under section 7 of the Bribery Act 2010 a corporate can be criminally liable for the acts of its employees unless it can show that it had adequate procedures in place to prevent bribery from taking place. Two new corporate offences of facilitating tax evasion under the Criminal Finances Act 2017 also adopt a failure-to-prevent model, with criminal liability attaching for the acts of persons acting on the company's behalf unless the corporate

25 *Lennards Carrying Co and Asiatic Petroleum* [1915] AC 705, *Bolton Engineering Co v. Graham* [1957] 1 QB 159 (*per* Denning LJ) and *R v. Andrews Weatherfoil* 56 Cr App R 31 CA.

26 *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153.

27 Call for evidence: Corporate and Economic Crime – 13 January 2017 to 31 March 2017.

can show it had reasonable prevention procedures in place. Similarly a corporate can be guilty of corporate manslaughter if the management or organisation of its activities causes a person's death, and amounts to a gross breach of a duty of care owed by the organisation to the deceased.[28] When the issues under investigation fall within the exceptions it can be difficult to identify the appropriate individual to interview on behalf of the company. Again, the purpose of the interview and the basis on which it is being conducted needs to be made clear from the outset.

See Chapter 5 on beginning an internal investigation

Senior employees are also more likely to owe fiduciary duties to the company and potentially be liable for breaches of those duties and become defendants in civil proceedings by the company. As a result, these interviews should generally take place when the company is in a better position to identify the extent of any breaches.

Relevant information could also be sourced through interviews with third parties including former employees, customers and contractors. The obvious benefit is that these witnesses may be more forthcoming where there is no risk of disciplinary proceedings. However, third parties cannot be required to attend an interview, and unless there is a contractual obligation requiring their attendance, they could refuse to attend. Even in circumstances where a contractual obligation exists this could be difficult to enforce, as could a confidentiality clause. The interview process itself is likely to notify the third party of the investigation and the subject matter under review and depending on the nature of the relationship, it may not be appropriate to interview him or her at that time, particularly when the decision on self-reporting is outstanding. The timing of these interviews would depend on the facts of each case.

When to interview 7.6

The timing of interviews can be influenced by a number of factors including the stage of the investigation and whether or not any record of interview would be covered by legal privilege. Scoping interviews usually take place at the outset of an investigation, most likely with a few individuals who have a general knowledge of the subject matter under investigation.

See Section 7.11, and Chapter 35 on privilege

Substantive interviews are likely to be most effective once the bulk of any document review has taken place. This will allow for any key documents to be identified and put to the witness, and for questions to focus on the areas of risk. Furthermore it is best to plan for only one interview; while there may be circumstances where a second or third interview is appropriate, it is by no means guaranteed that the witness would agree.

Timing of the interviews can pose particular difficulties when there are competing considerations. For example, it may be necessary to delay when the company has a claim for injunctive relief against individuals, to avoid assets being dissipated in advance of a freezing order being granted. However, it could be that there is only a limited amount of time to interview an employee who is leaving

28 Section 1 Corporate Manslaughter and Corporate Homicide Act 2007.

the company or the company may need to speak to an individual at short notice to assist in an assessment of whether to self-report. Clearly such factors need to be prioritised.

It is important to allow for a degree of flexibility as certain factors outside the company's control can dictate when an interview should take place. Where the corporate investigation is likely to remain an internal review there is little risk to the company conducting interviews to a timetable that suits it. However, where there is suspicion of a criminal or regulatory violation and a formal investigation has commenced, there are a number of risks associated with conducting interviews in parallel with these investigations.

As a general point, any interviews with individuals at risk of criminal exposure should be postponed until all evidence has been secured, to minimise the risk of evidence being destroyed. This is particularly important where a criminal or regulatory investigation is likely. Similar concerns apply where the individuals are potential defendants to civil proceedings by the company.

Both the SFO and the FCA place significant emphasis on the first accounts of witnesses, and take the view that they can help inform an understanding of what went on and allow for the accuracy or integrity of a witness to be tested.[29] However, depending on the facts of the case this view could be misplaced; the first account given by a witness is not necessarily always the best one, particularly in complex investigations that span a number of years and where there is extensive underlying material. The quality of a witness's evidence can often be improved having been given the opportunity to review the evidence. Nonetheless, the SFO and FCA have increasingly sought to place restrictions on interviews of key suspects in corporate investigations and may seek to prevent them.

In such circumstances it may be prudent for a company to seek to agree an approach with the authorities prior to conducting any interviews.

The authorities are also increasingly sensitive to the risks of witness contamination, and a company whose conduct of witness interviews has caused prejudice to a criminal or regulatory investigation could be subject to serious criticism. At best this could involve comment or views that are unhelpful for the company; at worst this could include allegations of perverting the course of justice. Jamie Symington, Director in Enforcement at the FCA, has observed that firms must take care not to take steps that might prejudice an FCA investigation and suggested that in certain circumstances it may prefer that a firm does not commission its own investigation, for example, in criminal investigations where alerting the suspects could have adverse consequences.[30] Mark Steward, Director of Enforcement and Oversight at the FCA, has commented on the importance of an 'independent public body investigation' being able to conduct itself without 'the crime scene being trampled

29 Speech by Alun Milford, General Counsel, SFO, speaking to an audience of compliance professionals at the European Compliance and Ethics Institute, Prague on 29 March 2016.

30 Speech by Jamie Symington, Director in Enforcement (Wholesale, Unauthorised Business and Intelligence), FCA at the 2nd Annual GIR Live London, 28 April 2016.

over.'[31] The SFO has similarly made clear that corporate investigations that 'trample over the crime scene' are unhelpful and that integrity of evidence, especially regarding witness accounts, should be respected.[32] As noted above, the Director of the SFO has commented that internal investigations may result in first statements of witnesses being taken, delivered or recorded in a form which may be less than full and accurate, as opposed to recording the account by way of a transcript.[33]

Witness interviews should always be conducted in a manner that minimises the risk of contamination or prejudice.

When a criminal or regulatory investigation is anticipated or already under way, a company may wish to consider engaging with the authorities at an early stage to avoid any criticism that might follow. However, engaging with the authorities may not necessarily be appropriate in every case and runs the risk of loss of control. Each case will need to be assessed on its specific facts and surrounding circumstances.

Planning for an interview 7.7

Interviews in the context of a corporate investigation can be conducted by various people: internal or external lawyers, accountants, forensic experts, specialist investigators, HR or compliance officers, and others. Careful thought should be given to who is best placed to undertake them.

As a general rule, where a company is engaged in a corporate investigation into allegations of criminal or regulatory misconduct, it is preferable to have lawyers (internal, external or both) present at interviews to take notes and identify the key risk areas, and to enable confidentiality and for any claim to privilege to be strengthened. Generally it is preferable for the same person or persons to conduct the interviews of those witnesses who provide similar types of information. This will allow for consistency of approach and for the credibility of witnesses to be more easily assessed. It is also preferable to have two interviewers present to allow for one to take notes while the other asks questions.

Where external counsel has been instructed they should conduct the interviews. External counsel often bring (and importantly are seen to bring) expertise, objectivity and independence, which can be very important when assessing the credibility of the investigation. Although it can bring a degree of formality that can make the experience more daunting for the witness, the use of external counsel will strengthen a claim to legal privilege.

See Section 7.11 and Chapter 35 on privilege

Where external counsel has not been instructed, the company may consider resourcing the process internally either by using compliance personnel, internal

31 Speech by Mark Steward, Director of Enforcement and Oversight at the FCA, at the 14th Annual Corporate Accountability Conference, Congress Centre, London, 9 June 2016 (as reported by GIR on 10 June 2016).

32 Speech by Ben Morgan, Joint Head of Bribery and Corruption at the SFO, at the Global Anti-Corruption and Compliance in Mining Conference 2015 on 20 May 2015.

33 David Green QC, Director of the SFO, speaking at the GIR Roundtable, 27 July 2015.

auditors or HR officers or by using in-house counsel. Either way, those conducting the interview should not have had any involvement in the allegations under review. While the use of non-lawyers may decrease the levels of concern among employees, in general they may be less skilled in conducting these types of interviews and less familiar with the issues that may arise. In-house counsel will have a good understanding of the business and legal advice given will generally be privileged in the United Kingdom. However, the protection of legal privilege will not apply to advice given by in-house counsel in the context of European Commission related investigations[34] and it may be necessary in those circumstances to engage an external lawyer.

See Section 7.11 and Chapter 35 on privilege

Where forensic experts (internal or external) are also engaged it may be prudent to involve them in interviews with key individuals. If so, it is generally advisable for these interviews to be conducted alongside internal or external lawyers to ensure that the contents can be covered by the company's confidentiality and privilege, as appropriate, and to strengthen a claim to this privilege.

Prior to the interview, a core bundle of documents relevant to the particular witness should be prepared. Consideration should be given to whether the witness is given access to documents, either before or during an interview, or as part of staged disclosure, and what documents, if any, should be put to the witness. Referring to documents can be a very useful tool to assist in refreshing a witness's memory and to allow for specific comment. Key documents can be put to provide a better understanding of its content and to give an opportunity for the witness to provide explanation.

In general, copies of confidential or sensitive documents should not be given to witnesses where there is a risk these could be shared or used contrary to the company's interests. In complex matters, providing pre-interview disclosure will enable the witness to prepare; however, where documents are provided to the witness, this should be done on a restricted and confidential basis with the requirement that they are either returned or destroyed at the conclusion of the interview. It is preferable that a witness is not given documents that he or she has not previously seen.

See Chapters 5 and 6 on beginning an internal investigation and Chapter 11 on production of information to the authorities

The provision of documents may give rise to data protection issues, particularly in light of the company's obligations under the data protection principles[35] and where multiple jurisdictions are involved.

A detailed interview plan can be useful to ensure that all relevant questions are put to the witness, although the interviewer should not feel restricted by this. In general, topics should be addressed in a chronological order that develops facts in a logical way.

Regarding the provision of topics in advance of an interview, it is generally helpful to indicate the main areas that may be covered to assist the witness to prepare, particularly where the subject matter is complex. However, giving a list of detailed questions is generally not appropriate, and a witness who has had the

34 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission*, Case C-550/07 P.

35 Schedule 1 Data Protection Act 1998.

opportunity to script his or her answers is less likely to be considered credible. Furthermore, questions are likely to evolve as the interview progresses. There is also a risk that the questions might be shared.

Interviewers should ask questions in a measured and courteous manner with a clear and professional tone. There is little point in adopting an aggressive approach or engaging in lengthy cross-examination; this is unlikely to be effective and could give rise to criticism, or employment or personal injury claims. A skilled interviewer will seek to put the witness at ease before addressing the key topics. Where there are two interviewers, different interviewing styles can often be effective.

Conducting the interview: formalities and separate counsel 7.8

Professional obligations can impact the way in which witness interviews are conducted. Solicitors hold a general duty to act in their client's best interests,[36] they must not take unfair advantage of a third party,[37] and they must not take unfair advantage of an opposing party's lack of legal knowledge where they have not instructed a lawyer.[38] These duties do not always align and it is therefore important to balance the competing requirements.

Counsel conducting the interview should be satisfied that the witness understands the basis on which he or she is being interviewed, the purpose of the interview and the use that could be made of the information provided, because this may impact its admissibility.

In the United States an *Upjohn* warning is given at the start of the interview. This practice is often adopted in many investigations in the United Kingdom, even where there is no involvement of US authorities at that time. The warning sets out that:

- The lawyers represent the company and not the employee/witness.
- Privilege in the interview belongs to the company and not the employee.
- The company might choose to waive its privilege and disclose matters discussed in interview to the authorities.

Upjohn warnings derive from the case of *Upjohn Co v. United States,*[39] where it was held that the privilege that attaches to communications between a company's lawyers and its employees is the company's privilege, and not that of its employees. While there is no formal requirement for these warnings to be given in the United Kingdom, it is considered best practice to do so.

The witness should be reminded of the confidential nature of the interview and be told that it is a fact-finding exercise. However, where a company has decided to waive privilege prior to the interview and provide details to the authorities, the *Upjohn* warning may need to be strengthened. The company could consider whether to give a more formal caution, similar to that given by the police when

36 Principle 4 of the SRA mandatory principles.

37 Chapter 11 SRA Code of Conduct.

38 Chapter 11 SRA Code of Conduct.

39 *Upjohn* Co. *v. United States,* 449 U.S. 383 (1981).

See Section 7.9

investigating suspects, although this would rarely be required. If necessary, the witness should be told that while not part of a disciplinary process, the information provided could inform a decision on whether to instigate disciplinary action.

The company should consider whether its own legal advisers can advise the witness or whether to offer to pay for separate independent legal counsel. Clearly a company cannot prevent its employees obtaining legal advice of their own volition and expense. However, it can control who can be present in an internal interview. If an authority investigation is under way, the witness may have contractual rights or rights under an insurance policy (D&O insurance) to fund independent counsel. Former employees may have an indemnification or contractual right as part of their exit package.

Those witnesses who appear to be at little risk of criminal or regulatory exposure are unlikely to need independent counsel to protect them against any risk of self-incrimination, and the provision of an *Upjohn* warning or a similarly worded preamble should suffice. However, a company may nonetheless offer separate legal advice to these witnesses if this would allay their concerns or ensure that appropriate advice is given (including from an employment or civil perspective). This may also assist preparation and enable them to give their best account. Moreover, it is often not easy to predict where risks may be at an early stage.

The provision of separate counsel can be particularly important where there may be a conflict of interest between the company and a witness. This can arise where a witness is at risk of criminal or regulatory investigation or where the company could be implicated in corporate wrongdoing. In these circumstances the interests of the company and the witness may not align and it would be prudent to consider suggesting independent counsel. While this might delay the interview to allow advice to be given, it ensures that the witness has had the opportunity to obtain his or her own legal advice, and depending on the facts, the use of separate counsel could make the interview more effective. However, the involvement of independent counsel could also result in the witness being less inclined to attend the interview or answer questions, although an employee would then be at risk of disciplinary action for not co-operating.

The decision when to offer independent counsel can also depend on the account given by the witness, and it may be appropriate to stop an interview if the witness gives an account that indicates that the company has a civil claim against them.

Ultimately it would be difficult for witnesses to assert that they had not been fully informed where they had been separately represented, or that the interviewer or company had taken an unfair advantage.

7.9 Conducting the interview: whether to caution the witness

Where a witness may be suspected of involvement in a criminal offence, a caution may be considered. A caution is used by police officers and other investigators

when conducting interviews of suspects to ensure that any resulting account (or refusal to answer questions) is admissible in criminal proceedings.[40]

Section 67(9) of the Police and Criminal Evidence Act 1984 (PACE) provides that 'persons other than police officers who are charged with the duty of investigating offences' shall have regard to the relevant provisions of the PACE Codes of Practice, and Code C 10.1 of the codes sets out the requirement to caution.

This duty applies to SFO investigators,[41] but is not restricted to state authorities and can also apply to private store detectives[42] and commercial investigators who are appointed by a company to investigate its employees for the commission of criminal offences.[43] Importantly, however, it does not apply in the context of an internal investigation where the sole purpose is to determine what recommendations should be made to an internal disciplinary panel.[44] It is therefore unlikely to apply in circumstances where an employer investigates allegations that could give rise to disciplinary action and where the sole purpose of the investigation was to inform the company how to respond.

Where criminal offences are being considered, section 67(9) would only apply if the investigator was charged with investigating or charging criminal offences at the time.[45] This scenario would arise in circumstances where the interviews had been delegated to those conducting the investigation and where they were effectively acting on behalf of a criminal authority. It would require the authorities to sanction the taking of a suspect's account with a view to it being used in a criminal trial. In light of the authorities' general reluctance for a company to conduct interviews with suspects, particularly when it involves obtaining first accounts, it is unlikely that this situation would arise, and therefore a caution is unlikely to be required.

Conducting the interview: record-keeping 7.10

A record can be kept of a witness interview in a number of ways. It could be audio recorded and transcribed. A verbatim record would exist, removing the risk of any challenge to the accuracy of what was said, and the recording would capture the tone and any pause or emphasis, which can often give context and allow for an overall assessment. However, it could affect the witness's account by adding an element of formality, potentially having an unsettling effect on the interviewee and making him or her less forthcoming. More importantly, there is significant uncertainty over whether legal privilege would apply to a recording, particularly where the interview has been conducted as a fact-finding exercise. Even where privilege can be properly asserted it is likely to be challenged by the authorities, and where a transcript exists the authorities are likely to request a copy.

See Section 7.11 and Chapter 35 on privilege

40 Code C, 10.1 PACE Codes of Practice.

41 *R v. Director of the Serious Fraud Office, ex p Saunders* [1988] Crim LR 837.

42 *Bayliss* (1993) 98 Cr App R 235.

43 *Twaites and Brown* (1990) 92 Cr App R 106.

44 *R v. Welcher* [2007] EWCA Crim 480.

45 *R v. Seelig* [1992] 1 WLR 148 and *Joy v. Federation against Copyright Theft* [1993] Crim LR 588

An alternative approach is for counsel to prepare a note of what the witness has said. Legal privilege is more likely to apply in circumstances where notes contain some form of legal comment, advice and analysis. This may include the lawyer's own impressions and assessment of the interview. Alternatively two sets of notes could be prepared, one containing the factual account and one containing the lawyer's own views. If so, at a minimum, the authorities are likely to seek a copy of the factual account.

See Section 7.11

The company will need to decide whether to provide the witness with a copy of the note. Where it is likely to rely on the witness's testimony in civil proceedings it may be helpful to agree a note at an early stage to limit any future challenge to its accuracy. This carries the risk that it may be passed on and any privilege would be waived, and may cause issues if the account is materially disputed.

Where proceedings are anticipated, there are some advantages in preparing a witness statement at an early stage. If the witness decides at a later date not to co-operate or for whatever reason he or she is no longer able to assist, the company may be able to rely on the evidence given, or compel the witness to attend and give evidence having already taken a record of the witness's evidence. However, even if privilege can be maintained, it is likely the authorities would nevertheless seek a copy.

7.11 Legal privilege in the context of witness interviews

Legal privilege in the context of witness interviews raises a number of complex issues and a claim to privilege will be closely scrutinised by the authorities. The SFO claims that it does not want to undermine legal privilege, which is respected as a legal principle and fundamental right. However, in a speech by Alun Milford in March 2016,[46] he made it very clear that the SFO will view 'false' or 'exaggerated' claims to privilege as unco-operative, and notwithstanding his acknowledgement that a claim may be well founded, where a company discloses details of witness accounts it will be viewed as a significant mark of co-operation. Similarly a company's decision to structure its investigation so as not to attract privilege will be viewed as significant co-operation.

During a speech in September 2016, Ben Morgan acknowledged that it was impossible to make a single statement about access to evidence (to include witness interviews) that would apply to any situation without further thought being necessary. He highlighted factors to be considered to include the circumstances during which the witness first account took place; the extent to which contemporary records, written summaries or oral summaries accord with or differ from the SFO's understanding of the case; the stage of any internal investigation at the time of self-reporting; and the quality and impact of other co-operative steps that the company may take.[47] It is clear, however, that if a company chooses not

46 Speech by Alun Milford, SFO General Counsel, to an audience of compliance professionals at the European Compliance and Ethics Institute, Prague on 29 March 2016.

47 Speech by Ben Morgan, Joint Head of Bribery and Corruption at the SFO at 3rd Annual GIR Live New York on 15 September 2016, available at https://www.sfo.gov.uk/2016/09/15/

to co-operate with the SFO (which could include withholding material on the grounds of privilege), it is more likely that the company would not be offered the opportunity to receive a DPA.

However, there is a risk that disclosing information relating to witness interviews could result in a waiver of privilege more generally. Ultimately the information could be shared with authorities in other jurisdictions or be disclosable in civil, or other, proceedings that may not be in the company's best interests. While this risk may in part be mitigated by a limited waiver agreement, this would not necessarily extend to other jurisdictions, and there is a risk that confidentiality may in due course be lost. The Law Society of England and Wales provides guidance to lawyers about their duty to act in the best interests of clients, including maintaining their claim to privilege.

The law surrounding legal privilege and records of interviews is complex and evolving. It has recently been made more complicated by the narrow interpretation of privilege that has been taken in two court decisions. The two cases are summarised below and are explored in more detail in Chapter 35 on privilege.

It was held in *The RBS Rights Issue Litigation*[48] that the interview notes prepared by the bank's legal representatives were not subject to legal advice privilege (it was accepted that litigation privilege did not apply). The court found that, for the purposes of legal advice privilege, the 'client' consists only of those employees authorised to seek and receive legal advice from the lawyer. In relation to interviews with witnesses, it found that privilege does not extend to information provided by employees and ex-employees outside of the client group. Furthermore, it was held that in order for the lawyers' working notes of the interviews to attract legal advice privilege, the notes must contain 'some attribute or addition such as to betray or at least give a clue as to the trend of advice being given to the client by its lawyer.'[49] The court held that the bank had failed to demonstrate this.

This judgment was followed in *Director of the SFO v. ENRC*.[50] The court rejected ENRC's argument that legal advice privilege applied to lawyers' notes of interviews, and found that the question of whether legal advice privilege applied was an evidential one as to whether the notes demonstrated the legal analysis and 'tenor' of the advice.[51] In her judgment Andrews J referred to examples of the type of evidence required to attract legal advice privilege, to include a qualitative assessment of the evidence or any thoughts about its importance or relevance to the inquiry, or indications of further areas of investigation that the author of the notes considered might be fruitful. It was noted in the judgment that the betrayal of further lines of investigation would not in itself have been sufficient to render the notes privileged.[52]

---

ben-morgan-global-investigations-review-live/.

48 *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

49 *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) at [107].

50 *Director of the SFO v. ENRC* [2017] EWHC 1017 (Ch).

51 *Director of the SFO v. ENRC* [2017] EWHC 1017 (Ch) at [97].

52 *Director of the SFO v. ENRC* [2017] EWHC 1017 (Ch)at [180].

Andrews J held that legal advice privilege would only apply to communications between the lawyer and those authorised by the company to obtain legal advice on its behalf, and therefore not to employees or former employees more widely.[53]

ENRC's claim for litigation privilege was also rejected by the court, which was not satisfied that on the facts of the case litigation was in reasonable contemplation at the pertinent times. In applying a decision in *USA v. Philip Morris*,[54] Andrews J stated that for litigation privilege to apply, the company must be 'aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility,'[55] and that the documents must have been created with the dominant purpose for use in the conduct of that likely litigation.[56] Importantly the court held that an SFO investigation was seen as a preliminary step and that a prosecution only becomes a real prospect once evidence is discovered to substantiate the allegation, or where the accusations appear to be true.[57]

At the time of writing and in the absence of any further judicial interpretation, those conducting internal investigations should therefore be alive to the fact that a claim to privilege of records of interviews with those outside of the client group is likely to be subject to challenge. Where the records could be said to form part of the lawyer's working papers in the context of advice, a claim to privilege would be strengthened if the notes contained sufficient legal analysis, assessment as to relevance and the 'tenor' of the legal advice. It would be for the company to provide evidence to substantiate its claim.

Where litigation is in reasonable contemplation, litigation privilege will attach to material that forms part of the continuum of the lawyer–client communications even where those documents do not expressly seek or convey legal advice.[58] For litigation privilege to apply, however, the dominant purpose of the interviews must be in reasonable contemplation of litigation. This will depend on the facts of the case, but where litigation is in contemplation, this should be documented to assist in defending any challenge to a claim for privilege.

See Chapter 35 on privilege

Factors that may strengthen a claim to privilege over interview notes include where, for example, notes arise from interviews with likely potential defence witnesses in contemplated litigation or where interviews are conducted with a view to assessing the potential risk the witness may pose in likely proceedings. Note, however, that in the *ENRC* decision, on the facts of that case it was determined that litigation privilege would not apply to material created for the dominant purpose of litigation where it was intended that the document would be shown to the other side.[59] In *ENRC* it appears that a number of the decisions reached are specific to the facts of that case.

53 *Director of the SFO v. ENRC* [2017] EWHC 1017 (Ch) at [180].
54 *USA v. Philip Morris* [2003] EWHC 3028 (Comm).
55 *USA v. Philip Morris* [2003] EWHC 3028 (Comm) at [46].
56 *Director of the SFO v. ENRC* [2017] EWHC 1017 (Ch) at [54].
57 *Director of the SFO v. ENRC* [2017] EWHC 1017 (Ch) at [150 to 163].
58 *Balabel v. Air India* [1988] 1 Ch 317.
59 *Director of the SFO v. ENRC* [2017] EWHC 1017 (Ch) at [170].

Both the *ENRC* and *The RBS Rights Issue Litigation* decisions have been subject to criticism. Leave to appeal has recently been granted by the Court of Appeal. Until further clarification is given, those conducting investigations may wish to consider the timing of witness interviews in the context of when the likelihood of litigation (civil or criminal) is clearer, in the absence of which there is a risk that claims to privilege of records of witness interviews will be challenged.

Where privilege can be established, the best position may be to ensure that any notes taken during interviews are done so as to strengthen a claim to privilege and to leave any decision on whether to waive privilege until the course of the investigation and interests of the authorities are clearer.

Conducting the interview: employee amnesty and self-incrimination 7.12

As a general point an employer cannot provide amnesty from criminal or regulatory action. Similarly an agreement cannot prevent disclosures to regulators or inhibit criminal investigations.

While in theory amnesty against internal disciplinary action could be offered, this is very rare. More commonly, discussions take place with a view to the employee leaving under the terms of a settlement agreement, which can include a financial settlement and avoids the employee being dismissed. Such discussions can take place 'without prejudice', or they may take place as 'protected conversations' and therefore should not take place during a witness interview. These discussions, providing they meet the required criteria, cannot be used as evidence in unfair dismissal proceedings,[60] although, unless the without prejudice rule can genuinely apply, they could be used in whistleblowing or discrimination claims.

See Chapter 13 on employee rights

While in theory it is possible for an employer to agree a certain course of action (for example, to retain an employee and waive the right to bring disciplinary action), this would not be advisable in circumstances where facts are not yet known or understood. If an amnesty is given, the employer would want to ensure that any waiver against disciplinary action related to closely defined and identifiable incidents only.

Employers also need to be wary of consistency. Where two employees have committed misconduct, allowing one employee to remain and dismissing another would support an unfair dismissal claim that the dismissed employee may bring. The employer would need to justify the difference in treatment, which may be easier to do when an employee has left under the terms of a settlement agreement.

An employee may also seek to claim privilege against self-incrimination and refuse to answer questions on that basis, particularly where he or she is advised by independent counsel. While there may be clear advantages to this approach from a criminal or regulatory perspective, this in itself would not provide a defence against dismissal. An employer could reach a decision to dismiss on the basis of the information that it had at that time. While it cannot compel employees to

60 Section 111A Employment Rights Act 1996.

answer questions, their failure to do so could be deemed to be unco-operative and in breach of the terms and conditions of employment, resulting in further grounds for disciplinary action. A dismissal for gross misconduct can still be fair in circumstances where a decision has been made not to prosecute, or where the employee has been acquitted of criminal charges for the same offence.[61] Acts that could constitute gross misconduct are broader than criminal offences and the requirement that gross misconduct be 'fair' is lower than the criminal burden of proof.[62]

In addition to employment considerations, it is always possible for an employer to agree not to pursue civil claims against an employee in return for information being provided. However, as set out above, this should generally not be offered until full facts have been established.

7.13 Considerations when interviewing former employees

In general, unless there is a contractual commitment to do so, former employees can simply refuse to attend a witness interview. It is important to bear this in mind when negotiating an employee's exit, although in reality once the employee has left there may be little a former employer can do to require attendance, even if it enjoys the benefit of a contractual commitment from the employee to co-operate in any future investigation or proceedings. Former employees regulated by the FCA have a duty under Statements of Principle and Code of Practice for Approved Persons (APER) Principle 4 to co-operate with the regulators.[63] It is unlikely that this provision would require them to assist with an internal investigation, and if asked, they could fairly argue that their duty was to the regulator.

Where a former employee is interviewed there are some protections available in respect of whistleblowing, discrimination or victimisation, should they arise in the conduct of the interview or how he or she is treated afterwards. An employer should be wary of giving assurances of anonymity to a former employee in respect of information given, although this could be given on a need-to-know basis. Anonymity should not be guaranteed where regulatory obligations exist or where it could inhibit any criminal investigation, and assurances that any statement provided would not be disclosed to criminal or regulatory authorities should not be given.

See Chapter 5 on beginning an internal investigation and Chapter 11 on production of information to the authorities

Data protection issues may also arise if the account or statement given by a former employee contains personal data.

61 *Okhiria v. Royal Mail* UKEAT/0054/14/LA.

62 A dismissal for gross misconduct is 'fair' if the employer believed that the employee was guilty of gross misconduct, if it had reasonable grounds on which to base that belief, and if it had carried out as much investigation as was reasonable in the circumstances of the particular case: *British Home Stores Ltd v. Burchell* [1978] UKEAT 108_78_2007. In a criminal trial the burden of proof required is to prove guilt 'beyond a reasonable doubt'.

63 The Statement of Principle 4 (see APER 2.1A.3 R) is in the following terms: 'An approved person must deal with the FCA, the PRA and other regulators in an open and cooperative way and must disclose appropriately any information of which the FCA or the PRA would reasonably expect notice.'

Considerations when interviewing employees abroad 7.14

Interviewing witnesses abroad can present particular difficulties in global investigations. Statutory employment law is generally of geographical rather than universal jurisdiction and, as a result, statutory employment laws of the jurisdiction where an employee is based will always apply, even if the employment contract is governed by English law. Nonetheless the governing law of the contract should also be considered as well as any rights or protections under that contract.

When planning interviews abroad it is crucial that the law and procedure relevant to those jurisdictions are considered. The employment documents (the staff handbook, for example) should be reviewed to ensure that procedures are followed. It is important to consider whether the employee or employer is covered by any regulatory rules within that jurisdiction (as well as the United Kingdom) to ensure compliance with any parallel reporting obligations.

It would be wise to engage local counsel to advise on local laws and local culture, which should be factored into the interview strategy. Clearly the interviews should comply with local laws, and in particular those relating to employment, data protection, privacy and privilege. While the English rules of privilege determine whether privilege applies in this jurisdiction, authorities from other jurisdictions may also have an interest, and advice should be sought on how privilege is determined in those jurisdictions.

A witness's procedural rights in the jurisdiction where he or she is based, as well as in the United Kingdom, should also be considered. Compliance with local laws as well as collective consultation and representation rules should be factored in. In addition, the employer should take advice on whether the employee abroad is covered by UK statutory employment rights.

Issues often arise regarding access to documents, particularly where there are restrictions on the movement of information from one jurisdiction to another.[64] Employees may also have a right to access and correct notes and files identifying them.[65] The applicable directives, regulations or rules should be considered in advance to ensure compliance with data protection laws. Data protection issues are considered in Chapter 5 on beginning an internal investigation.

Finally, maintaining confidentiality can be particularly difficult when interviewing witnesses abroad. Where witness interviews span a number of countries, the risk of information being shared or leaked is greater and measures should be put in place to ensure that confidentiality remains.

Key points 7.15

Witness interviews are a key part of most internal investigations and can provide vital information for the investigation. Internal investigation interviews can

64 Directive 95/46/EC on the Protection of Individuals with regard to the Processing of Personal Data sets limits on the collection and use of personal data within the EU. The provisions were implemented into UK legislation via the Data Protection Act 1998 (passed 16 July 1998).

65 The Data Subject's Right of Access to Data, Section IV, Article 12 Data Protection Directive 95/46/EC.

take the form of either preparatory interviews at the outset of an investigation or substantive interviews likely to take place once a review of relevant material has taken place.

There can be a tension between the right of a company to investigate allegations of wrongdoing and undertake witness interviews as part of its review, and the expectations of the authorities to be consulted prior to it doing so. Enforcement agencies may seek to restrict how the interviews are conducted or suggest that they be postponed until the authorities have conducted their own investigation. Witness interviews should always be conducted in a manner that minimises the risk of contamination or prejudice.

Enforcement agencies have suggested that a refusal to provide details of the accounts given by witnesses in internal investigations could be construed as unco-operative or a breach of regulatory requirements. The provision of this information and the form in which it would be provided needs to be balanced with the need to ensure confidentiality in an investigation and to maintain legal privilege.

Where a company is investigating allegations of criminal or regulatory misconduct, it is preferable to have lawyers (internal, external, or both) present at interviews to take notes and identify the key risk areas that may arise, and to enable confidentiality and for privilege to be asserted, as appropriate. Where external counsel has been engaged it is preferable for them to conduct the interviews; they often bring (and, importantly, are seen to bring) expertise, objectivity and independence. Preferably there should be two interviewers to ensure all relevant information is captured.

Interviews can be recorded in a number of ways: by recording and transcribing the interview; by counsel preparing notes of the interview; and with the preparation of a witness statement. Enforcement agencies are likely to seek details of the accounts provided, and consideration should be given to ensuring legal privilege is capable of being asserted. How an interview is recorded, the privilege that may attach to that record, and whether or not to provide details of the witness's account will depend on the circumstances of each case.

Legal privilege in the context of witness interviews raises a number of complex issues and a claim to privilege will be closely scrutinised by the authorities. Notes of interviews with witnesses who fall outside the 'client' group may attract litigation privilege if circumstances allow, although the parameters of this have been limited by the *ENRC* decision. There is a risk that disclosing information relating to witness interviews could result in a waiver of privilege more generally.

When conducting the interview, counsel should be satisfied that the witness understands the basis on which he or she is being interviewed, the purpose of the interview, and the use that could be made of the information provided. While there is no formal requirement to do so, it is best practice for the witness to be given an *Upjohn* warning at the outset and to remind the witness of confidentiality. Where a company has decided to waive privilege prior to the interview, the *Upjohn* warning may need to be strengthened. It is unlikely that a formal caution, similar to that given by the police when investigating suspects, would be required.

The company should consider whether its own legal advisers can give advice to the witness or whether to offer (and to pay for) separate independent counsel, particularly where there may be a conflict of interest between the company and the witness and where the witness is at risk of criminal or regulatory investigation, or where the company could be implicated in corporate wrongdoing.

In general, a company cannot provide a witness with amnesty from criminal or regulatory action. Similarly an agreement cannot prevent disclosures to regulators or inhibit criminal investigations. Amnesty against internal disciplinary action is rare and while it is always possible to agree not to pursue civil claims in return for information being provided, this should generally not be offered until the full facts have been established.

Interviewing witnesses abroad can present particular difficulties in global investigations. It is crucial that the law and procedure relevant to those jurisdictions are considered and that any relevant regulatory rules are complied with. It would be wise to engage local counsel to advise on local laws, regulatory rules and culture to ensure compliance. Any applicable directives or regulations surrounding access to documents should also be considered in advance to ensure compliance with data protection laws. Measures should be put in place to seek to ensure confidentiality.

8

Witness Interviews in Internal Investigations: The US Perspective

Keith Krakaur and Ryan Junck[1]

8.1 The purpose of witness interviews

Witness interviews form an integral part of most investigations, whether internal or regulator-facing, and an interviewer's ability to extract facts from witnesses is a critical part of any successful investigation. The purpose of witness interviews is multi-faceted but generally includes scoping the investigation, understanding the facts and issues at play, and assessing the accountability of individuals and possible defences for the company and its employees. Broadly speaking, witness interviews in internal investigations generally consist of preliminary interviews with individuals who are able to provide background facts and identify likely sources of information and documents, and substantive interviews focused on the key factual issues. This chapter will discuss issues to be considered when preparing for and conducting witness interviews in the United States or in relation to a US internal investigation.

8.2 Need to consult relevant authorities

Witness interviews may be conducted in the United States without consulting government authorities; however, when US-related investigations require interviewing witnesses in non-US jurisdictions, the investigation team should determine whether it is permissible under local laws to conduct witness interviews and whether restrictions or regulations apply to any interviews that are conducted. Labour laws and employment-context data protection laws may limit the investigation team's ability to conduct witness interviews in some jurisdictions. For

1 Keith Krakaur and Ryan Junck are partners at Skadden, Arps, Slate, Meagher & Flom (UK) LLP. The authors wish to acknowledge the contribution of Skadden associate Bora Rawcliffe in the preparation of this chapter.

example, labour laws in some jurisdictions, such as Finland and France, may require consulting with local employee representatives, including union committees or works councils, before initiating witness interviews.

Employee co-operation 8.3

US employment agreements and corporate policies typically obligate employees to co-operate with a company's investigations, and employees may face disciplinary action, including potential termination, for failing to co-operate. Although employees in the United States are free to obtain independent legal advice in the face of a potential interview, they are nonetheless obliged to co-operate with their employer and its counsel. Indeed, a recent appellate court decision affirmed an employer's right to terminate an employee for refusing to co-operate with an internal investigation.[2] This means companies have broad authority to dictate when and where interviews take place and to impose rules governing the attendance and participation of an employee's counsel. Depending on the situation, companies may provide legal representation for employees to ensure they have fully considered their legal exposure and are well prepared for interviews. A company may be required to advance legal fees and expenses to certain of its employees depending on the laws in a company's state of incorporation and its own by-laws or internal policies.

Identifying witnesses to interview 8.4

Investigators should begin identifying potential interviewees during the early stages of an investigation while document collection and review is under way. It may be beneficial to include lower-level employees in the interview plan because they may have basic factual information or insight into systems and controls that can provide context for the investigation. The initial list of interviewees need not be exhaustive as the first few preliminary interviews are likely to generate additional witness names.

Interviewers should be particularly cautious when deciding to interview third-party witnesses, such as former employees, customers or contractors. Such witnesses are not likely to be bound by the same confidentiality obligations as company personnel and may refuse to co-operate with the investigation unless they are contractually compelled to do so. With respect to former employees, interviewers should consider whether the employee left the company on unfavourable terms or otherwise has an incentive to disclose the existence of the investigation to other parties, including competitors, the media or enforcement authorities.

2 See *Gilman v. Marsh & McLennan Co., Inc.,* No. 15-0603-cv(L) (2d Cir. 2016) (holding that the employer was presumptively entitled to seek information from its own employees about suspicions of on-the job criminal conduct).

8.5 When to interview and in what order

When sequencing interviews, investigators often start with scoping interviews of individuals who have relevant background knowledge, who can explain relevant corporate processes and practices, and who can identify key personnel who may be involved in the allegations. Thereafter, investigators typically interview fact witnesses in ascending order of involvement in the alleged misconduct. However, investigators may consider interviewing the target or targets of the allegations early in the interview process if there is a high risk that other interviewees may tip them off, if they appear likely to leave the company in the short term or if the nature and timing of the investigation call for obtaining such information quickly.

If there is an identified whistleblower, he or she should be interviewed at the outset of the investigation to better understand the allegations, obtain key documentation and establish a dialogue. Such early discussions should be viewed as an opportunity to gain the whistleblower's trust and demonstrate the company's commitment to investigating the allegations.

See Chapter 20 on whistleblowers

8.6 Planning for an interview

When planning for an interview, investigators should carefully review relevant documents and prior witness statements. Interviewers should also determine which documents to question witnesses about and in what order. Typically, witnesses should be shown emails or parts of email chains where they are recipients, senders or otherwise copied on the chain to preserve the confidentiality of the communications. In some circumstances, it may be strategically beneficial to share a general interview agenda and documents to be discussed with the interviewees in advance of the interview. However, this practice may detract from the interviewer's flexibility to raise and explore new issues during the interview and increases the risk the interviewee will tip off the targets of the investigation or other key witnesses. In addition, this method gives witnesses ample opportunity to prepare their version of the story and removes any element of surprise that may help investigators uncover the facts. If, however, the subject matter of the investigation is already public and the witness is aware of the existence of the investigation, pre-interview review of documents to be discussed during the interview, in some instances, can be efficient.

8.7 Conducting the interview

Interviews are typically conducted by an attorney lead interviewer and a note-taker. Company management or in-house counsel may also participate in the interview if their participation is likely to encourage the witness to be more co-operative. However, it is not unusual for investigative counsel to request that no one from the company attend the interview to avoid the appearance of intimidating the witnesses.

Non-attorneys, such as in-house auditors or investigators, may also conduct witness interviews; however, non-attorneys must act under the direction and instruction of in-house or outside legal counsel to preserve the attorney–client

privilege applicable to investigations performed for the reason of providing legal advice to the company. Case law in the United States can vary significantly from court to court with respect to the application of the attorney–client privilege and the work-product doctrine to non-attorney communications and work-product. For example, some courts have taken a broad view of the attorney–client privilege, extending it to any 'communications intended to keep the attorney apprised of business matters' if those communications 'embody an implied request for legal advice based thereon.'[3] Other courts have adopted a more narrow interpretation. They have insisted on identifying a single primary purpose for any analysis of attorney–client privilege. 'Where business and legal advice are intertwined, the legal advice must predominate for the communication to be protected.'[4] Accordingly, when non-attorneys conduct witness interviews, companies should carefully consider whether the interviews and subsequent work-product are likely to be protected by the attorney–client privilege or the work-product doctrine.

Typically, witness interviews are not tape-recorded to avoid potential confidentiality and privilege issues. Instead, interviewers should be accompanied by one note-taker who takes careful notes and subsequently prepares a memorandum that summarises what was learned during the interview. The interview memorandum should include the interviewers' observations and impressions about the witness's statements and credibility. Interview memoranda should not be a verbatim account of the interview and interviewers should take care to explain in the memorandum that their work-product contains the mental impressions of counsel. In most cases, interviewers should also preserve their contemporaneous interview notes.

Companies and their counsel should take care when conducting interviews as part of potentially parallel US and UK investigations or prosecutions because the application of the attorney–client privilege or the work product doctrine may differ. For example, recent court decisions in the United Kingdom have held that notes and summaries prepared by counsel of employee and ex-employee witness interviews or investigation reports may not be privileged as a matter of English law.[5] Thus, even if certain documents would be privileged in other jurisdictions, such as in the United States, they may not be privileged under English law unless the communications were made for the purpose of obtaining information or advice in connection with existing or contemplated litigation and not in an investigative or inquisitorial context. Regard should also be had to the effect of the decisions in the English cases of *ENRC* and *The RBS Rights Issue Litigation*.)

3 *Simon v. G.D. Searle & Co.*, 816 F. 2d 397, 404 (8th Cir. 1987) (internal quotation marks omitted).

4 *Coleman v. ABC*, 106 F.R.D. 201, 206 (D.D.C. 1985); *In re Trans-Industries, Inc.*, Case No.: 1:10 MC 101, 2011 WL 1130431, *3 (N.D. Ohio 2011) ('In situations where there is mixed legal-business advice, the court must determine whether the predominant nature of the consultation was legal or business-oriented.').

5 See, e.g., *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd*, [2017] EWHC 1017 (QB); *RBS Rights Litigation*, [2016] EWHC 3161 (Ch).

8.7.1 Upjohn warnings and privilege issues

Before any substantive questioning begins, interviewers should introduce themselves to the witness and provide a background on the general subject matter of the investigation. During this introduction, a lawyer interviewing witnesses in the United States or witnesses connected to an actual or potential proceeding in the United States should always provide an *Upjohn* warning.[6] Importantly, the *Upjohn* warning informs a witness that no personal attorney–client relationship exists between the interviewer and the witness. This distinction is important to avoid potential conflict of interest issues that may arise if the witness later claims that the interview created an attorney–client privilege that belongs to the witness. In some instances, it may be appropriate to further advise interviewees in an internal investigation about the possibility that false statements made in interviews with the company's counsel could result in obstruction of justice charges.

See Chapter 14 on employee rights

Although *Upjohn* is not authoritative law outside the United States, providing an *Upjohn* warning at the start of witness interviews remains a best practice globally. For example, the Paris Bar Council has issued guidance instructing French counsel to inform interview witnesses before any interview that (1) the external counsel represents the legal entity, not the witness or any other individual and (2) the discussion is covered by the 'client–attorney privilege', which belongs exclusively to the legal entity, as opposed to the individual, and means that the entity can choose to share the substance of the interview with third parties, including regulators or prosecutors.

Upjohn warnings inform the interviewee: that the interviewers have been retained by the company (or other engaging entity such as the audit committee) to provide legal advice to the company in connection with the matter under investigation and do not represent the witness individually; that the interviewers are gathering facts related to the topic of the investigation for the purpose of providing legal advice to the company; that the investigation is protected by the attorney–client privilege and the attorney work-product doctrine; that the witness should keep the conversation confidential to preserve these privileges by not disclosing the substance of the interview to any third party, whether inside or outside the company; that the privilege belongs to the company; and that the company can waive the privilege at any time and decide to disclose the privileged information to third parties without the consent of the interviewee.

The note-taker should carefully document the *Upjohn* warning and related statements given to the witness in both the interview notes and the interview memorandum. Counsel may consider using a written *Upjohn* warning to reduce the risk of later disputes; however, this is not a common practice as a written warning may have a chilling effect on the witness. Counsel should ensure that interviewees acknowledge that they understand what has been explained to them during the *Upjohn* warning.

6 *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

Companies should be cautious if they use confidentiality agreements during internal investigations as such agreements may violate the whistleblower protection provisions of the Dodd-Frank Act regulations[7] if they contain clauses that may be interpreted to impede the witness from disclosing violations of law or regulations to the US government. This issue presented itself in a 2015 SEC enforcement action where the company required employees to agree to or, in some cases, sign a form confidentiality agreement during internal investigations that contained the following clause:

> *I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without prior authorization of the Law Department. I understand that unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.*

The SEC held that this provision violated SEC Rule 21F-17, which prohibits a company from taking 'any action to impede a whistleblower from communicating directly' with the SEC about a securities violation, 'including enforcing, or threatening to enforce, a confidentiality agreement'.[8] It was irrelevant to the SEC's determination that it was unaware of any instance in which the confidentiality statement prevented any employee from reporting a possible securities law violation to the SEC or that it was unaware of any instance in which the company sought to enforce the confidentiality statement to prevent an employee from reporting an alleged violation. The cease-and-desist order made clear that the confidentiality statement alone constituted a violation of Rule 21F-17. As a consequence, the company agreed to pay a US$130,000 fine and it amended its confidentiality agreements to inform employees that nothing in the company's confidentiality agreements prohibits them from reporting possible violations of laws or regulations.

The SEC is continuing to pursue violations of the whistleblower protection provisions. Most recently, the SEC found that a company violated the whistleblower provisions by entering a separation agreement with a former employee of a subsidiary, who had raised concerns about potential Foreign Corrupt Practices Act (FCPA) violations, that prevented the employee from communicating with the SEC by threatening a substantial fine for violating non-disclosure terms.[9] To settle the SEC allegations related to FCPA and whistleblower protection violations, the company agreed to pay approximately US$3 million in disgorgement

7 15 U.S.C. § 784-6.

8 Order Instituting Cease-And-Desist Proceedings, *In the Matter of KBR, Inc.*, No. 3-16466 (SEC 1 April 2015), available at www.sec.gov/litigation/admin/2015/34-74619.pdf.

9 Order Instituting Cease-And-Desist Proceedings, *In the Matter of Anheuser-Busch InBev SA/NV*, 3-17586 (SEC 28 September 2016), available at https://www.sec.gov/litigation/admin/2016/34-78957.pdf.

and interest, plus a penalty of just over US$3 million. The company also amended its separation agreements that imposed confidentiality restrictions to state:

> *I understand and acknowledge that notwithstanding any other provision in this Agreement, I am not prohibited or in any way restricted from reporting possible violations of law to a governmental agency or entity, and I am not required to inform the Company if I make such reports.*[10]

8.7.2 Preserving attorney–client privilege when non-attorneys or in-house counsel conduct witness interviews

When non-attorneys conduct witness interviews, those interviews are not, generally speaking, privileged.[11] Some legal precedent in the United States, however, suggests that witness interviews conducted by non-attorneys may be protected by the attorney–client privilege where the interviews were authorised by and conducted under the direction of the company's in-house or outside counsel.[12] Ideally, any witness interview would be conducted directly by an in-house or outside lawyer. If, however, in-house counsel direct non-attorneys to conduct witness interviews, they should ensure that they closely supervise the non-attorneys' activities and document that their activities are performed for the purpose of providing legal advice to the company. In-house counsel should become involved early in the assessment and investigation of allegations to define the scope of the investigation and provide direction on the interviews and document reviews to be conducted. All internal investigation-related communications should include language stating that the internal investigation is being conducted for the purpose of providing legal advice to the company.

Even interviews by in-house counsel may be deemed non-privileged if such counsel are viewed as acting in a business rather than a legal capacity.[13] Additionally, some US courts have not extended the attorney–client privilege to communications with non-US in-house counsel located in jurisdictions that do not require them to be licensed attorneys, or where local laws do not apply the attorney–client privilege to such communications.[14]

When feasible and appropriate, a company should consider using outside counsel to direct an investigation and conduct witness interviews. There is a greater likelihood of maintaining privilege protections in interviews conducted by outside counsel because they are more likely to be viewed by courts as conducting

10 Id.

11 See, e.g., *Wultz v. Bank of China,* 304 F.R.D. 384, 390-94 (S.D.N.Y. 2015).

12 *In re Kellogg Brown & Root, Inc*., 796 F.3d 137, 149 (D.C. Cir. 2015).

13 See *Faloney v. Wachovia Bank*, 254 F.R.D. 204, 209-10 (E.D. Pa. 2008).

14 See, e.g., *Wultz*, 304 F.R.D. 384 (finding that communications with Chinese in-house counsel who are not required to be licensed to practise law were not privileged even where the company had retained outside counsel because there was no evidence that any external US counsel actually directed or was otherwise consulted for legal advice regarding the investigation).

an investigation for the primary purpose of providing legal advice, as opposed to in-house counsel who often operate in a business capacity in their daily functions.

Addressing witness questions during the interview 8.7.3

It is common for witnesses to ask questions about the *Upjohn* warning, including whether they should retain a lawyer, whether they will be fired or disciplined if they do not co-operate and whether their employer will be informed of what they say during their interviews. Interviewers should anticipate such questions and consult with in-house counsel in advance of the interviews to develop a strategy for addressing these issues. In response to these questions, interviewers should explain that the employee is free to obtain personal legal advice but that the interviewer cannot advise the employee on whether to retain a lawyer since the interviewer does not represent the employee. Interviewers should also be prepared to explain the company's policy on co-operation with internal investigations if the policy requires employees to co-operate. Lastly, where employees ask whether their employer will be informed, interviewers should explain that, as attorneys for the company, they are required to report their findings to the client. Interviewers should also be careful to explain that the information gathered during the interviews belongs to the company and can be shared by the company with third parties such as enforcement authorities.

Witnesses may also ask to obtain, review, or revise any interview notes or memoranda summarising the interview, and local law in some jurisdictions outside the United States may require the interviewers to produce this information. Under US law, companies generally are not required to provide interviewees with copies of interview memoranda summarising their interview.[15] Interviewees also do not have a right to revise or correct interview notes. However, interviewees should be instructed that if they later remember additional information, they should contact the interviewing attorney to provide it.

In some jurisdictions, interviewees may request a form of protection before agreeing to be interviewed. Although an employer could agree to provide protection to an employee from the company's own disciplinary processes, the company should not agree that the employee's conduct or statements will not be reported to government authorities when deemed appropriate by the company. Neither should a company agree to give protection for conduct it does not know about or in relation to facts not yet fully investigated or understood. The company should also consider the impact that offering protection to one or more employees may have on the co-operation of other employees. For example, in the United Kingdom, entities subject to oversight by the Financial Conduct Authority are not permitted to give employees assurances that they will not be dismissed if the company concludes that they are no longer fit to continue employment. Local laws outside the United States may also curb a company's ability to grant protection or provide similar assurances.

15 See *Robinson v. Time Warner, Inc.*, 187 F.R.D. 144 (S.D.N.Y. 1999).

Employees involved in government investigations may also seek to enter into a joint defence or common interest agreement with the company or other employees. Certain employees involved in the alleged misconduct may share a common interest in working together. Indeed, in some situations, the company as well may share such an interest. In these situations, a joint defence or common interest agreement between counsel can help protect information that counsel choose to communicate with each other and prevent disclosure of communications among the parties to the agreement.

See Chapter 36 on privilege

Witnesses may also seek to rely on the privilege against self-incrimination and refuse to answer certain questions. In the United States, the Fifth Amendment's protection against self-incrimination does not apply in employee interviews conducted by a private employer, namely a non-state actor. This means an employer can take disciplinary action against an at-will employee for refusing to co-operate with an internal investigation. However, in some jurisdictions outside the United States, employees may refuse to respond to questions if they believe the answers would incriminate them.

Protection for potential defendants may also be subject to differences in substantive laws and jurisdictional limitations. For example, in the recent *United States v. Allen* case, the US Court of Appeals for the Second Circuit reversed the convictions of two UK-based traders, Anthony Allen and Paul Conti, charged with manipulating the London Interbank Offered Rate (LIBOR) because the US government sought to use their testimony provided in compelled interviews with the UK Financial Conduct Authority in the US criminal case. In this case, the US Department of Justice and the UK Financial Conduct Authority had carried out independent investigations of the LIBOR submissions process at Rabobank, where Allen and Conti worked. The FCA conducted compelled interviews of Allen and Conti, and a third trader without the DOJ's involvement. Later, the FCA sent transcripts of the interviews to the third trader's attorney. The third trader reviewed the testimony and later became a co-operating witness in the DOJ's investigation. He told the DOJ a different story than the one he had previously told his FCA interviewers. The DOJ sought to rely on the third trader's account to indict Allen and Conti. On appeal, the Second Circuit dismissed Allen and Conti's convictions and remanded the case with instruction to dismiss their indictments. The court held that the Fifth Amendment's protection against self-incrimination applies in American courtrooms 'even when the defendant's testimony was compelled by foreign officials.'[16] The court further emphasised that US authorities should ensure careful international coordination in multi-jurisdictional investigations to help avoid Fifth Amendment issues.

8.7.4 Practical considerations

After the interviewers have ensured the witness understands the implications of the *Upjohn* warning, interviewers should typically begin an interview by asking

16 *United States v. Allen*, Nos. 16-898, 16-939, at 38 (2d. Cir. 19 July 2017).

about the witness's background and job responsibilities. In most cases, interviewers should take care to ask questions in a civil, courteous and non-threatening manner to ensure full co-operation and candour from the witness.

To best determine what the witness knows about the subject matters at issue in the investigation, it may be helpful to start the interview by asking open-ended questions regarding general issues related to the investigation. Subsequently, the interviewer can drill down on each topic and reference documents to develop the facts, clarify ambiguities or contradictions, or refresh the witness's recollection.

At the end of the interview, interviewers should ask for any additional information or help in identifying additional witnesses with relevant knowledge. They should also reiterate the importance of keeping the interview confidential.

Where there is a risk of losing the witness's co-operation in the future, interviewers may consider asking the witness to sign a written statement that the company can seek to rely on in a future enforcement action or litigation if the witness's testimony cannot be procured. A witness statement made by an employee to in-house or outside counsel would most likely be protected by the attorney–client privilege if it includes a designation that the statement is a confidential communication made at the attorney's request for purposes of providing legal advice to the company. Verbatim witness statements, however, are unlikely to be protected by the attorney work-product doctrine, which protects an attorney's mental impressions and strategic preparation and not a witness's factual statements. Even so, under certain circumstances, so-called 'fact work-product' (as distinct from 'opinion work-product') may be entitled to protection to the extent the fact work-product reflects the thought processes of counsel.[17]

Considerations when interviewing employees abroad 8.7.5

When interviewing employees abroad, investigators should determine whether local laws permit witness interviews; whether interviewees have a right to legal or union representation or to refuse to co-operate with an internal investigation; whether a labour union must be notified; and whether employees have any procedural rights during internal investigations, including whether they can have access to interview topics in advance or whether they can review and revise interview notes and memoranda subsequent to the interview. Finally, where an investigation may lead to potential discipline of employees, investigators should consult with local employment counsel to ensure that information gathered at interviews can be used in a disciplinary hearing. Local employment and labour laws will also need to be carefully considered before disciplinary actions are taken.

Investigators should pay particular attention to local data protection and privacy laws, which may have a significant impact on their ability to collect and review documents and to interview witnesses. For example, the EU data protection regulations protect a fundamental right of EU citizens against the processing of their personal data and regulate the collection, use and transfer of an employee's

17 *See Murphy v. Kmart Corp.* 259 F.R.D. 421 (D.S.D. 2009).

personal information. Therefore, investigators may need to obtain an employee's consent before collecting and reviewing any documents, which may impact the investigators' ability to collect documents before investigation targets are tipped off. Investigators should also keep in mind that even in situations where processing and reviewing of personal data, such as emails, is permitted, data may only be transmitted to EU Member States, other specifically designated countries or countries that can demonstrate an adequate level of protection, and registered and approved companies.

9

Co-operating with the Authorities: The UK Perspective

Ali Sallaway, Matthew Bruce, Nicholas Williams and Ruby Hamid[1]

To co-operate or not to co-operate? 9.1

This chapter focuses on corporate co-operation with regulatory agencies and criminal authorities: where and when co-operation is required, its outcomes and its implications. It examines the increasing expectation that corporates should co-operate with investigations, the ever-expanding definition of 'co-operation' and factors in favour of and against it. The chapter looks at the current practice and guidance, and recent jurisprudence, with a particular focus on the meaning and application of co-operation in the context of investigations and prosecutions by the Serious Fraud Office (SFO), given that authority's clear stance that it will prosecute where the evidence allows unless corporates have genuinely and proactively co-operated.

Where co-operation is mandatory, the corporate has no option but to comply, or face criminal or disciplinary sanction. Examples of mandatory co-operation in the UK are:

- where there is a warrant to enter and search premises, and to seize material found therein;
- where a court issues a witness summons for a representative of the corporate to attend court, often with documents;
- where a compelled notice is issued, requiring the recipient to provide information or documents, or to attend for interview, by, for example:
  - the SFO under section 2 of the Criminal Justice Act 1987;
  - the Financial Conduct Authority (FCA) under section 165 of the Financial Services and Markets Act 2000 (FSMA) where the recipient is

1 Ali Sallaway, Matthew Bruce and Nicholas Williams are partners, and Ruby Hamid is a senior associate, at Freshfields Bruckhaus Deringer.

an authorised person, or under section 168 where the recipient is any other corporate;[2] and

- the requirement that an authorised firm (or person) must disclose appropriately to the FCA and the Prudential Regulatory Authority (PRA) anything relating to the firm those regulators would reasonably expect notice of.[3]

Where co-operation is voluntary, the debate becomes more interesting. A corporate might wish to co-operate with an authority for a number of reasons. Co-operation may result in a less serious outcome, for example, no action being taken, a regulatory as opposed to a criminal resolution, a deferred prosecution agreement (DPA), fewer charges, less serious charges, or the period of wrongdoing under investigation being reduced. Co-operation is relevant at every stage and will even assist as mitigation in respect of sentence or sanction in the event of a successful prosecution or enforcement action.

See Chapter 39 on protecting corporate reputation

A collaborative approach may enable a corporate to manage publicity and communications in conjunction with the authority and limit reputational damage. It may also provide the opportunity to influence the course of an investigation, to avoid an overly protracted process, and to limit the cost to business that an investigation might otherwise entail. An additional benefit in the criminal sphere is the possibility of entering into a DPA, avoiding a conviction and its collateral consequences. Of course, regulatory agencies and criminal authorities will say that co-operating fully on a voluntary basis is also the right thing to do for any good corporate citizen; and while that may be true, it underestimates the myriad and sometimes competing obligations on corporates to their many stakeholders, including shareholders, employees, partners, customers and the markets generally.

9.2 The status of the corporate and other initial considerations

The status of the corporate is key. Is it a victim or witness? Is it the target or the subject of the investigation? Is it currently a witness, but circumstances indicate that it is at risk of becoming a subject? Understanding status is essential to providing proper, informed guidance.

At the outset, establishing the status of the corporate enables the evaluation of potential liability. Is the corporate exposed to risk? Can that risk be mitigated by co-operation? Is immunity a possibility? A consideration of these issues should define how the approach to the authority is made and how the relationship is managed.

---

2 Where it appears to the FCA that there are circumstances suggesting that a person may be guilty of one of a number of criminal offences (including insider dealing, market abuse, money laundering or certain regulatory breaches under FSMA), it may appoint investigators to conduct an investigation under s.168 FSMA. Once that section is invoked, the investigators assume powers under s.171, s.172 or s.173 FSMA to compel information from non-authorised persons (i.e., corporates or individuals who are not authorised or supervised by the FCA) both in the form of documents and in interview. Where a criminal investigation has commenced, the powers of compulsion are wider than where the investigation is limited to a regulatory breach.

3 Principle 11, Principles for Businesses.

If the corporate is a witness, it may be subject to mandatory co-operation requirements, such as compelled requests for information as outlined in Section 9.1. Witnesses face a lower expectation from prosecutors and regulators of voluntary co-operation, in terms of offering up documents and information beyond the scope of specific requests, primarily because additional co-operation offers fewer direct benefits than it might for a suspect. While proactive co-operation may enhance a corporate's relationship with its regulator or enforcement body, and be consistent with its corporate governance values, a corporate may have good reasons to be circumspect in dealings with the authorities in an investigation. In particular, a corporate witness may have an ongoing commercial relationship with the corporate suspect. This is often the case for professional advisers, such as auditors, who are frequently compelled to provide information in the context of investigations into their clients. In these circumstances, the corporate witness will have to consider its obligations to its client, and also the potential for any disclosure to expose it to regulatory investigation or litigation.

Whether a witness or a suspect, co-operation without a proper understanding of the issues and underlying facts may be difficult. Accordingly, the desire or need to co-operate may trigger an internal investigation to establish the veracity of the allegation, at least on a preliminary basis. Consideration must be given to whether the regulator or criminal prosecutor would want or expect involvement in setting the scope of an internal investigation: its subject matter, its jurisdictional and chronological reach, and whether it is a superficial review or a deep exploration.

See Chapter 5 on beginning an internal investigation

The corporate should be mindful of any mandatory reporting obligations that arise as its knowledge of the allegation increases. Under the Proceeds of Crime Act 2002 (POCA), 'nominated persons' in the 'regulated sector' must report to the National Crime Agency (NCA) where they have reasonable ground for suspecting that another person is engaged in money laundering.[4] There may also be mandatory reporting or disclosure obligations that arise as matters unfold. For example, listed companies will need to consider their disclosure obligations to the market.[5]

Other initial considerations include legal privilege – invoking it where appropriate, but being sensitive to certain authorities' mistrust of a company's claim to privilege over, for example, first accounts of witnesses.

See Chapter 35 on privilege

Where possible, the likely strength of the evidence should be assessed as quickly as possible. Information obtained by a prosecutor during an investigation is generally admissible in criminal proceedings against the corporate.[6] A corporate and its advisers should, therefore, have regard to the potential impact of any documents or information they voluntarily disclose being used in proceedings against

4 s.330 of the Proceeds of Crime Act 2002.

5 See Part 7 of the Financial Services Act 2012.

6 Material described in para. 13(6) of Schedule 17 of the Crime and Courts Act 2013 can only be used in limited circumstances but there is no limitation in the use to which other material obtained by a prosecutor during the DPA negotiation period may be put against the corporate or anyone else so far as the rules of evidence permit. See the DPA Code of Practice paras. 4.4 and 4.5 at https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/.

them and the extent to which voluntary co-operation may undermine any defence that the corporate later wishes to mount.

9.3 Could the corporate be liable for the conduct?

Where criminal misconduct is suspected, the extent of the corporate's involvement in, or knowledge at the time of, the alleged misconduct will be a relevant factor in whether to co-operate.

See Chapter 1, Section 1.1.1

Where the allegation is confined to an individual in a junior role, the risk of investigation and prosecution of the corporate may be low on the basis that the 'directing mind and will'[7] of the corporate was not engaged. The category of persons who fulfil that definition is narrow and, while the exact parameters are uncertain, it is usually confined to office-holders, board members and very senior management – those who have the authority (whether derived from the articles and memorandum of association, or similar) to act as the corporation, rather than as its servant or agent. In these circumstances, the benefits to the corporate of voluntarily co-operating with regulatory and enforcement authorities (beyond its mandatory co-operation requirements) may be outweighed by the risks. By voluntarily identifying witnesses and documents beyond the narrow scope of the investigation, the corporate may invite the authorities to look more widely into the issues than necessary or than they otherwise would.

There are, however, some circumstances in which a special rule of attribution of liability applies – where the purpose of the legislation would be defeated if the usual hurdle to establishing corporate liability were required. The public interest in the legislation in question and the policy behind it are key to this. The court will look at the language and purpose of the statute and the particular offence to determine whose criminal act or knowledge was intended to count as that of the company. This special rule tends to be applied to administrative, regulatory or quasi-regulatory offences. Illustrative examples of offences where the court has held the special rule to apply include:

- licensing offences, including sale of video to a customer of inappropriate age; the offence was committed by a company but was carried out by a member of staff;[8]
- environmental offences,[9] including the creation of fraudulent records,[10] where the applicable statutory regime is a combination of offences requiring knowledge or intent and strict liability offences; and
- the requirement on a corporate to disclose its substantial holding of securities in a public issuer.[11] The individual who failed to make the disclosure was found to bind the corporate – absent that interpretation, the obligation to disclose would be rendered unenforceable.

7 *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153.

8 *Tesco v. Nattrass* (ibid.).

9 *Alphacell Ltd v. Woodward* [1972] AC 824.

10 *Environment Agency v. St Regis Paper Co. Ltd* [2012] 1 Cr. App. R.177.

11 *Meridian Global Funds v. Securities Commission* [1995] 2 AC 500 PC.

The Court of Appeal has rejected the argument that corporate liability could be founded on a basis other than identification, based on Lord Hoffman's opinion in the *Meridian* case. It held that the identification principles in *Tesco v. Nattrass* still stood and that Lord Hoffman was doing no more than adapting those principles to a very specific statutory duty.[12] The supremacy of the identification principle was also reaffirmed by the Court of Appeal in the *St Regis* case.[13]

If the corporate identifies evidence to suggest that the 'directing mind and will' of the company was involved in the misconduct, or there is involvement at a lower level in the company and there is a concern that a special rule of attribution might apply, it should consider the benefits of self-reporting before the regulatory or prosecuting body itself comes to this conclusion.

In addition, 'failure to prevent' type offences (such as section 7 of the Bribery Act 2010 and Part 3 of the Criminal Finances Act 2017) will have a wider application that is not dependent on the identification principle and this should be borne in mind.[14] In a regulatory context, the liability of a firm may also be wider. A firm will, of course, have liability for acts of its employees from a regulatory perspective. And senior executives of relevant regulated firms may be held accountable through the senior managers regime, which imposes a statutory 'duty of responsibility' on those holding senior management functions within such firms – leaving them liable to enforcement action if a breach occurs on their watch.

What does co-operation mean? 9.4

Definition and descriptions 9.4.1

Co-operation with authorities in criminal cases has traditionally been in the form of a guilty plea, and the offer to give evidence on behalf of the prosecution. Increasingly, co-operation is a more nuanced concept: self-reporting,[15] saving the

12 *Attorney General's Reference (No. 2 of 1999)* [2000] 2 Cr. App. R. 207, 217-218.

13 *Environment Agency v. St Regis Paper Co. Ltd* [2012] 1 Cr. App. R.177, paras. 10-11.

14 This is an expanding area of the law in England. The Criminal Finances Act 2017 introduced two new corporate offences relating to the failure to prevent the facilitation of tax evasion. In addition, in January 2017 the Ministry of Justice opened up a call for evidence on Corporate Liability for Economic Crime examining the case for reform, including the possibility of introducing further 'failure to prevent' type offences for corporates in the context of other economic crimes.

15 See, for example, speech by Matthew Wagstaff, Joint Head of Bribery & Corruption, at the 11th Annual Information Management/Investigations Compliance eDiscovery Conference on 18 May 2016 (https://www.sfo.gov.uk/2016/05/18/role-remit-sfo/): 'the fact of a genuine and pro-active self-report is clearly a factor which will weigh very heavily with any prosecutor who is considering the application of the public interest limb of [the Full Code Test as set out in the Code for Crown Prosecutors]'. See also *SFO v. Standard Bank plc*, Approved Judgment, Case No. U20150854, paras. 27-28: 'The second feature to which considerable weight must be attached is the fact that Standard Bank immediately reported itself to the authorities and adopted a genuinely proactive approach to the matter . . . . Credit must also be given for self-reporting which might otherwise have remained unknown to the prosecutor . . . . Were it not for the internal escalation and proactive approach of Standard Bank and Standard Bank Group that led to self-disclosure, the conduct at issue may not otherwise have come to the attention of the SFO.'

authority's time and resources,[16] a willingness to cede a good deal of control of an internal investigation or hand over voluntarily relevant evidence gathered or identified,[17] and genuine and consistent transparency[18] are referred to by courts and authorities as key aspects of co-operation.

In the fraud arena, the SFO under previous directors has championed co-operation, agreeing civil recovery orders with companies who self-reported. However, case law on co-operation with the SFO is scarce; inevitably little is known publicly about settlements that result in non-prosecution and the negotiations around a self-report will be confidential. Where a non-criminal settlement is the outcome of an SFO case, little may be said in a press release or in open court or about the detailed factual background and nothing is likely to be said about why the case was settled in that manner. Policy and guidance is general and principles-based and it can be difficult to glean insight on the process of co-operation.[19] For this reason, the public statements of the Director of the SFO and his senior staff are a valuable source of information about what co-operation means to the SFO, and how to achieve it.

See Chapter 23 on negotiating global settlements

Under 2013 legislation,[20] a DPA is available to a designated prosecutor as an alternative to a criminal prosecution. A court-approved DPA is a method of settling a case without a conviction, where a defendant has co-operated fully with the authority. The SFO concluded its first DPA in November 2015 with ICBC Standard Bank (Standard Bank). Since then, the SFO has used this case and its subsequent DPAs with XYZ Ltd and Rolls-Royce PLC and Rolls-Royce Energy

16 See, for example, speech by Alun Milford, SFO General Counsel, at the European Compliance and Ethics Institute, Prague, on 29 March 2016 (https://www.sfo.gov.uk/2016/03/29/speech-compliance-professionals/): 'The Standard Bank case shows how this can be made to work in practice. The bank first came to us within days of learning it had a problem. We discussed next steps with them and they conducted an internal investigation, gathering in information from across its various businesses. Their written report was thorough and it served as a helpful spring-board for our own independent investigation. Their conduct was an object lesson in how to co-operate. In return, we were able to complete our investigation within a shorter period of time than if we had not had their co-operation.'

17 See, for example, speech by Ben Morgan, then Joint Head of Bribery and Corruption at the SFO, at the Annual Anti Bribery and Corruption Forum on 29 October 2015 (https://www.sfo.gov.uk/2015/10/29/ben-morgan-at-the-annual-anti-bribery-corruption-forum/): 'The next question once you have decided to speak to us, and chosen your moment to do so, is what happens next. This is where the issue of co-operation really kicks in. We want you to engage with us on how investigation of what has happened takes place, and to respond to our interests in doing so.'

18 See, for example, speech by Ben Morgan, then Joint Head of Bribery and Corruption at the SFO, at the Global Anti-Corruption and Compliance in Mining Conference 2015 on 20 May 2015 (https://www.sfo.gov.uk/2015/05/20/compliance-and-cooperation/): 'Our stance is to ask for genuine cooperation with our investigation, not duplication of it. We don't expect you to keep us in the dark while you carry out extensive private investigations and some months or even years later present us with a package of your findings. . . . We expect you to engage with us early, and to work with us as we investigate, not to rush ahead and, whether intentionally or not, complicate the work we need to do.'

19 See, for example, SFO Operational Handbook.

20 Crime and Courts Act 2013.

Systems (together, Rolls-Royce) to extol the virtues of voluntary co-operation. The SFO has described Standard Bank's conduct as 'an object lesson in how to co-operate'[21] and it has referred to the 'exemplary co-operation'[22] of XYZ Ltd and the 'full and extensive' cooperation of Rolls-Royce.[23]

These recent cases, supported by public statements by the SFO, provide a map of what co-operation means in practice.[24]

Genuine and continual co-operation 9.4.2

Authorities expect co-operation to be genuine, proactive and continual. For the FCA, a firm's pattern of co-operation over the period leading up to the investigation, as well as during the investigation itself, is relevant. The FCA Handbook notes that: 'An important consideration before an enforcement investigation and/or enforcement action is taken forward is the nature of a firm's overall relationship with the FCA and whether, against that background, the use of enforcement tools is likely to further the FCA's aims and objectives. So, for any similar set of facts, using enforcement tools will be less likely if a firm has built up over time a strong track record of taking its senior management responsibilities seriously and been open and communicative with the FCA.'[25]

The Office of Fair Trading (OFT) is the predecessor to the Competition and Markets Authority (CMA) and adopted a similar approach with regards to cartel investigations. The OFT has stated that one condition for leniency is that '[t]he applicant must maintain continuous and complete co-operation throughout the investigation and until the conclusion of any action (including criminal proceedings and defending civil or criminal appeals) by the OFT arising as a result of the investigation'.[26]

Further, the Office of Financial Sanctions Implementation (OFSI) within HM Treasury, which has powers to impose potentially significant monetary penalties on companies and individuals for breaches of financial sanctions law, has noted in

21 See speech by Alun Milford, SFO General Counsel, at the European Compliance and Ethics Institute, Prague, on 29 March 2016 (https://www.sfo.gov.uk/2016/03/29/speech-compliance-professionals/).

22 See press release: www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/.

23 *SFO v. Rolls-Royce PLC and Rolls-Royce Energy Systems Inc* (together, *Rolls-Royce*) Case No. U20170036, para. 20.

24 The SFO has also entered into a DPA with Tesco Stores Limited to resolve criminal liability in connection with Tesco Stores Limited only and no other party. However, at the time of writing, very little information is publicly available about the background to that DPA as reporting restrictions are in place.

25 FCA Handbook, EG 2.12.1.

26 Para. 2.7(c) of 'Applications for leniency and no-action in cartel cases', guidance document OFT1495, July 2013 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf). The CMA Board has adopted this guidance, which has been retained unamended but does not take account of developments since its publication (see https://www.gov.uk/government/publications/leniency-and-no-action-applications-in-cartel-cases.).

its guidance: 'if we discover that parties have dealt with us in bad faith and if the case is not criminally prosecuted, we will normally impose a monetary penalty.'[27]

In the criminal sphere, both co-operation and remorse are mitigating features for which a defendant can expect a reduction in sentence. Where a DPA is under consideration, the key public interest factor against prosecution is co-operation: considerable weight will be given to a 'genuinely proactive approach adopted by [an organisation]'s management team when the offending is brought to their notice'.[28] Whether a DPA is in the public interest is a focus of the court in its assessment of the proposed agreement. As such, it is unsurprising that the SFO's expectations of continual co-operation are so high where a DPA is in play.

Co-operation will clearly be considered in the round, by reference to the company's broader attitude towards the investigation. Companies that make incorrect or unsubstantiated arguments about the underlying nature of the misconduct run a real risk of being deemed unco-operative, a point highlighted by the conduct of Sweett Group: the company was heavily criticised by the SFO and the court for apparently attempting to deliberately mislead the SFO, by attempting to obtain a letter characterising the offending payment its subsidiaries had made as a legal finder's fee under United Arab Emirates law.[29] On the other hand, companies that co-operate fully with the SFO can earn significant leniency. For example, in the *Rolls-Royce* case, the SFO offered, and the court approved, a DPA with a significant 50 per cent discount to the monetary penalty that would otherwise have been required. This represented the one-third discount that is the equivalent of what is usually available for an early guilty plea plus an additional 16.6 per cent in recognition of Rolls-Royce's 'extraordinary cooperation'.[30]

9.4.3 Prompt reporting to the SFO

A corporate should report to the SFO as promptly as possible, if it wishes to be considered as co-operating. How early a corporate self-reports is a factor the SFO may consider when deciding to offer a DPA.[31] This does not mean that corporates should report all allegations of criminal behaviour as soon as they become aware of them.[32] The corporate will need to consider and verify such allegations to a certain extent before deciding whether it is necessary and appropriate to take the serious step of reporting itself to the SFO. Reporting wrongdoing but failing to verify it, or reporting it knowing or believing it to be inaccurate, misleading or incomplete is a factor in favour of prosecution.[33] What level of investigation is required to 'verify' wrongdoing is undefined. The SFO has made clear that this is a judgement

27 'Monetary penalties for breaches of financial sanctions – guidance', OFSI, April 2017 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/605884/Monetary_penalties_for_breaches_of_financial_sanctions.pdf).

28 DPA Code of Practice, para. 2.8.2.

29 *R v. Sweett Group*, Sentencing Remarks.

30 *SFO v. Rolls-Royce*, Case No. U20170036, para. 19.

31 DPA Code of Practice, para. 2.9.2.

32 See Alun Milford's speech on 29 November 2016.

33 DPA Code of Practice, para. 2.8.1(vi).

for the corporate to make[34] with assistance from its advisers. The following factors should be taken into account:

- where possible, the alleged criminal conduct should be reported to the SFO before it otherwise becomes aware of it. As such, the corporate should be alert to the possibility of whistleblowers or other organisations or individuals (e.g., NGOs) approaching the SFO,[35] and should be conscious of the implications of any other reports that the corporate may have made to other authorities in the UK or overseas;
- the corporate is entitled to conduct an 'initial assessment' of the allegation but as soon as reasonable grounds to suspect wrongdoing in the way the company or those associated with it conduct business[36] are identified, they should be flagged to the SFO; and
- the SFO does not want corporates to wait until the end of a major internal investigation, months or years after an issue has come to light before approaching them.[37]

In the case of Standard Bank, the bank reported the alleged misconduct 'within a matter of days of it coming to its attention',[38] and, in passing sentence on the bank, the court noted that considerable weight was to be attached to the fact that it had 'immediately reported itself to the authorities and adopted a genuinely proactive approach to the matter'.[39] However, it seems likely that Standard Bank had mandatory reporting obligations under POCA given that the bank's solicitors had reported the matter to the Serious Organised Crime Agency (which was subsequently merged into the NCA) six days before the bank reported the matter to the SFO.[40]

In the case of XYZ, a global programme designed to improve compliance in the relevant subsidiary unearthed concerns about specific contracts; as a result, XYZ took immediate action by retaining a law firm to undertake an independent internal investigation.[41] Within a month of commencing the investigation, the law firm had informed the SFO that a self-report might be forthcoming. Six weeks later, the lawyers met with the SFO to confirm that XYZ would be making a self-report at the conclusion of the investigation. This was supplemented by continuing assistance and two further reports. The court commended 'the promptness of the self-report, the fully disclosed internal investigation and co-operation of XYZ'.[42]

34 See, for example, Ben Morgan's speech of 29 October 2015.

35 See, for example, Matthew Wagstaff's speech of 18 May 2016.

36 See, for example, Alun Milford's speech on 29 March 2016.

37 See, for example, Ben Morgan's speech of 20 May 2015.

38 *SFO v. Standard Bank plc*, Statement of Facts prepared pursuant to para. 6(1) of Schedule 17 to the Crime and Courts Act 2013, para. 4.

39 *SFO v. Standard Bank plc*, Approved Judgment, Case No. U20150854, para. 27.

40 Press release entitled 'SFO agrees first UK DPA with Standard Bank', 30 November 2015 (https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/).

41 *SFO v. XYZ Ltd*, Redacted approved Judgment, Case No. U20150856, para. 11.

42 Ibid. at para. 16.

A corporate is unlikely to get credit from the SFO for self-reporting where there is a sense that its hand has been forced, as was the case with the Sweett Group, who apparently only reported the conduct at issue to the SFO following a tip-off from the *Wall Street Journal* that it was about to publish a story.[43]

Likewise, a cartel member reporting and providing evidence of a cartel will not benefit from leniency if, for example, the CMA is already investigating the cartel, or if another cartel member reported the wrongdoing beforehand.[44]

In the absence of a self-report, a corporate will likely need to demonstrate a much greater level of subsequent co-operation to earn a comparable degree of leniency from the SFO. In the case of Rolls-Royce, the SFO acknowledged that the initial investigation was not triggered by a self-report. Even so, the 'extraordinary' co-operation offered by Rolls-Royce persuaded the SFO and the court not to 'distinguish between its assistance and that of corporates who have self-reported from the outset.' This was largely due to the fact that what Rolls-Royce subsequently reported during the course of the investigation was 'far more extensive (and of a different order)' than would have otherwise been exposed without the co-operation Rolls-Royce provided.[45]

9.4.4 Conducting an SFO-approved internal investigation

Once a self-report has been made, the SFO expects genuine and constructive co-operation. This means that, following a self-report, any internal investigation conducted by the corporate or its advisers should be done in conjunction with the SFO and with its approval.[46] The SFO will want to have a reasonable degree of involvement in the early stages of an internal investigation – to enable it to discuss work plans and timetabling and to give directions.[47] The SFO has made clear that it expects promises of co-operation to be backed up with actual co-operation. In the SFO's view, this requires corporates and their advisers to be open about the

43 See speech by Ben Morgan, then SFO Joint Head of Bribery and Corruption, at GIR Live conference in New York on 15 September 2016 (https://www.sfo.gov.uk/2016/09/15/ben-morgan-global-investigations-review-live/): 'I would note that there is one area that really does still need to improve, and that is the timing of reporting. What we are really looking for is companies to come to us having formed the view entirely independently that they should. A number have, recently, but we are still getting the other type of self-report, if I can call it that, from time to time – the one where the company's hand has been forced by other factors, and only then does it come in with a defensive move, professing to want to do the right thing after all. That is a bad start, and it needs to get better.'

44 Para. 2.9 of 'Applications for leniency and no-action in cartel cases', guidance document OFT1495, July 2013 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf).

45 *SFO v. Rolls-Royce*, Case No. U20170036, para. 22.

46 DPA Code of Practice, para. 2.9.2. See also, for example, speech by David Green QC, SFO Director, at the Cambridge Symposium on Economic Crime 2016 on 5 September 2016 (https://www.sfo.gov.uk/2016/09/05/cambridge-symposium-2016/): 'Cooperation covers not just prompt self-reporting but also ongoing assistance to our criminal investigation into the conduct of the company and the individuals who drove that conduct.'.

47 DPA Code of Practice, para. 2.9.2.

scope and methodology of any internal investigation, and not to 'rush ahead' and complicate the SFO's job.[48] The SFO does not want to be kept 'in the dark' while a corporate carries out 'extensive private investigations' and to be presented with findings 'some months or even years later'.[49] It was to Standard Bank's credit that it 'conducted a detailed internal investigation that had been sanctioned by the SFO and reported its findings'.[50] Rolls-Royce was also commended for reporting findings of its own internal investigation 'on a rolling basis'.[51] Sweett Group, on the other hand, was at one point formally notified by the SFO that it was considered unco-operative because of its continuing internal inquiry into the allegations.[52]

The SFO is at pains to emphasise that it is not averse to the involvement of external legal advisers in the investigation process. Indeed, it has noted that it is 'already building a track record with some law firms on how to manage investigations following a self-report.[53] However, the SFO is openly critical of lawyers who, in its view, deploy tactics that delay or otherwise disrupt the investigation process. Some practitioners would argue that the SFO is too suspicious and mistrusting in this regard and that this is the result of a small number of bad experiences where it has been overly reliant on external legal advisers acting for corporates.

Facilitating SFO access to documents and witnesses 9.4.5

The SFO is particularly concerned that the 'crime scene' be preserved,[54] which means properly preserving relevant documents and ensuring 'first accounts' from witnesses are not prejudiced.[55] Other regulatory and enforcement authorities, including the FCA, are increasingly adopting a similar stance. A co-operating company should do all it can to assist, rather than obstruct, the SFO's investigation and the desire to understand the scope of the wrongdoing and the potential for contagion will drive many companies in this direction in any event. In addition to providing timely and complete responses to mandatory document requests, this means:

See Chapter 3 on self-reporting

- proactively taking steps to preserve, and prevent destruction of, all relevant sources of documents (including back-up tapes);
- alerting the SFO to additional sources of documents of which they may not be aware;[56]

48 See Ben Morgan's speech of 20 May 2015. See also Matthew Wagstaff's speech of 18 May 2016.

49 See Ben Morgan's speech on 29 October 2015.

50 *SFO v. Standard Bank plc*, Approved Judgment, Case No. U20150854, para. 29.

51 *SFO v. Rolls-Royce*, Case No. U20170036, para. 121.

52 'SFO views Sweett Group as non-cooperative', Global Investigations Review, 12 November 2014 (http://globalinvestigationsreview.com/article/1016639/sfo-views-sweett-cooperative).

53 See Ben Morgan's speech on 29 October 2015.

54 Ben Morgan speaking at the Global Anti-Corruption and Compliance in Mining Conference on 20 May 2015 (https://www.sfo.gov.uk/2015/05/20/compliance-and-cooperation/).

55 DPA Code of Practice, para. 2.9.3.

56 See Ben Morgan's speech of 29 October 2015 where he gives the example of suggesting additional key-words that the SFO may not have identified.

- providing all information that the SFO requires to assess the forensic integrity of the data-gathering process (including records of the steps taken supported by witness statements);[57]
- not tipping off data custodians;[58]
- providing access to any document review platform being used by the corporate; and
- providing a copy of a report of any internal investigation completed, subject to any claims to legal privilege.

In practice, the level of co-operation requested may feel uncomfortable for a corporate – particularly one not in a regulated sector – unfamiliar with regulatory oversight. Co-operation may involve providing material from overseas, or material that appears to be on the margins of relevance to the investigation, with a willing and uncomplaining attitude. For example, the assistance provided by Standard Bank included providing shared documents collected from: email servers held in Africa, inboxes, hard drives and shared drives, paper files, CCTV images recorded in Africa and recordings of telephone conversations. The SFO would not have had access to much of this evidence had it not been provided voluntarily by the bank.[59] Similarly, XYZ identified and provided relevant information that extended the investigation beyond the SFO's original scope. Email caches were volunteered. Rolls-Royce agreed to provide the SFO with unfiltered access to its records – some 30 million documents – and permitted the SFO to conduct its own digital review to identify potentially privileged documents with any issues of privilege to be resolved by an independent counsel.

Some practitioners would argue that there should be a curb on the extent of the co-operation expected by the SFO and that corporates should do what they are legally required to do and thereafter exercise careful judgement as to the merits of co-operating further (e.g., there may be risks in identifying and providing material beyond what is sought through mandatory requests).

From a prosecutor's perspective, achieving best evidence is a key principle in a criminal prosecution. The first account of a witness is crucial, and the circumstances in which it is obtained can be critical to the credibility and efficacy of the evidence. Discrepancies between a first account and subsequent testimony can undermine the prosecution case. As such, the SFO places particular significance on obtaining first access to witnesses, or to notes or summaries of first accounts.[60]

57 See Alun Milford's speech of 29 March 2016.

58 See Matthew Wagstaff's speech of 18 May 2016.

59 *SFO v. Standard Bank plc,* Statement of Facts prepared pursuant to para. 6(1) of Schedule 17 to the Crime and Courts Act 2013, para. 4.

60 See, for example, Alun Milford's speech of 29 March 2016: 'Why are witness first accounts so important to us? The immediate point is that they simply help us understand quickly what went on. Of course we can and we will go to speak to witnesses ourselves but companies who tell us what they were told during the course of an internal investigation plainly help us in the course of our inquiries. There is a second reason why we want witness accounts. As I have previously made clear, people who give an account to an internal investigation are liable to be witnesses in

Many defence lawyers would take a different view, arguing that first accounts are not as helpful and reliable, and therefore as critical, as the SFO maintains. Nonetheless, a failure to co-operate with the SFO in this regard could jeopardise the offer of a DPA.[61] In certain circumstances, the SFO or the FCA may expect corporates not to interview witnesses before consulting with them,[62] or they may request that a company does not interview potential witnesses before a compelled interview has been carried out or a witness statement obtained. Where a corporate is able to interview witnesses, the SFO or the FCA may wish to dictate the order in which interviews are carried out, see materials or questions to be put to witnesses and receive copies of any work-product generated following each interview.

Privilege and the SFO 9.4.6

The legal professional privilege often claimed to protect from disclosure communications generated during the course of an investigation is becoming an increasingly vexed issue for the SFO. Public statements by the SFO make clear that it would prefer companies to structure internal investigations so that witness interviews do not attract legal professional privilege, and that it considers as a 'significant mark of co-operation a company's decision' to waive privilege over notes of witness interviews.[63] Rolls-Royce received credit for voluntarily disclosing, with limited waiver of privilege, memoranda from over 200 interviews conducted as part of its internal investigation.[64]

Standard Bank on the other hand is understood to have not provided notes (or referred to first account witness interviews in its internal investigation report to avoid waiving privilege). Instead, they provided oral summaries. The same was true of XYZ Ltd, which suggests the SFO may be flexible, in certain circumstances.

However, recent decisions in the English High Court in relation to privilege in investigations may lead the SFO and others to take a more robust stance on privilege, particularly in relation to witness interviews.[65] For example, in the 2016 *RBS Rights Issue Litigation*, the High Court rejected a claim of privilege over memoranda of employee interviews prepared by the bank's lawyers. 'Client' for the purposes of legal advice privilege was interpreted, by reference to *Three Rivers*

---

any criminal case we might bring. In considering the evidence witnesses might give us, we are duty-bound to assess its accuracy and integrity. So fundamental to prosecutors is that duty that it is set out in the Code for Crown Prosecutors. An important way in which accuracy or integrity is tested is by reference to first accounts. Plainly, if we do not have first accounts then our ability to assess witness credibility might be affected to the extent that we might not be able to call them as witnesses.'

61 DPA Code of Practice, para. 2.9.2.

62 The court in *SFO v. Rolls-Royce*, Case No. U20170036, para. 20(i) cited Rolls-Royce's deferring of internal interviews until the SFO had first completed its interview as evidence of their co-operation with SFO.

63 See Alun Milford's speech of 29 March 2016.

64 *SFO v. Rolls-Royce*, Case No. U20170036, para. 20(ii).

65 See, in particular, the decision of Mr Justice Hildyard in *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

District Council v. Governor of the Bank of England,[66] to cover only those individuals authorised to seek and receive advice from the lawyers. The employees interviewed by the lawyers were not, therefore, considered to be 'clients' of the bank's lawyers.[67] Based on the evidence available to it, the court also rejected the bank's claims that the notes in question were subject to legal advice privilege on the basis that they comprised lawyers' working papers.

At the same time, the SFO has indicated a willingness to challenge claims to privilege over such materials where it deems this appropriate.[68] It does not readily accept that records of interviews, or at least their factual content, are privileged on any basis. Moreover, the SFO increasingly looks to challenge claims to privilege where an interview is undertaken, in the absence of actual or contemplated litigation, with an employee who may be deemed to be outside the narrow definition of the 'client' for the purposes of legal advice privilege. In *Director of the SFO v. ENRC* the SFO successfully challenged claims of privilege over various documents produced by lawyers and forensic accountants in anticipation of a potential SFO investigation.[69] Notably, the High Court held that an SFO investigation was not, without more, 'adversarial litigation' for the purposes of litigation privilege. An appeal on the *ENRC* privilege claims remains outstanding.

Given these recent decisions on legal professional privilege and litigation privilege, and the SFO's clear willingness to challenge claims to privilege, corporates may increasingly voluntarily hand over documents to the SFO on agreed terms, rather than seek to claim privilege and risk it being rejected in the courts.

See Chapter 35 on privilege

9.5 Co-operation can lead to reduced penalties

Co-operation with authorities in criminal cases has always been rewarded with a more lenient outcome for a defendant: whether through the statutory recognition that a sentence should be reduced for a guilty plea at the earliest opportunity (the current guideline being a reduction of one-third),[70] through the passing of a less onerous type of sentence (a non-custodial as opposed to a custodial sentence), or through a lower multiplier being used to calculate a fine for a corporate. Conversely, attempts to conceal misconduct will be taken into account and result in a more severe sentence.[71]

66 *Three Rivers District Council v. Governor of the Bank of England* [2001] UKHL 16.

67 *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

68 'SFO chief takes on company lawyers', The Times, 5 February 2015 (http://www.thetimes.co.uk/tto/law/article4344807.ece).

69 *SFO v. ENRC* [2017] EWHC 1017 (QB) (8 May 2017).

70 s.144 Criminal Justice Act 2003, and the Sentencing Council Definitive Guideline on Reduction in Sentence for a Guilty Plea. See also Attorney General's Guidance on the acceptance of pleas: https://www.gov.uk/guidance/the-acceptance-of-pleas-and-the-prosecutors-role-in-the-sentencing-exercise.

71 See, for example, 'Fraud, Bribery and Money Laundering Offences Definitive Guideline' 1 October 2014, p. 50. (See also Chapter 25 on fines, disgorgement, etc.). See also speech by Ben Morgan, at a seminar for General Counsel and Compliance Counsel from corporates and financial institutions held at Norton Rose Fulbright LLP on 7 March 2017 (https://www.sfo.gov.

Individuals who plead guilty and offer significant voluntary co-operation with a prosecutor, may be entitled to a lesser sentence under section 73 of the Serious Crime and Police Act 2005 (SOCPA).[72] A defendant enters into an agreement with the authorities under SOCPA to provide certain assistance, the extent and nature of which is taken into account when he or she is sentenced. The assistance is often directed at obtaining evidence about other individuals, or establishing facts that advance the investigation. This approach is being used increasingly in fraud and organised crime cases. It has been used effectively by the FCA and has resulted in defendants avoiding immediate sentences of imprisonment.[73]

The likelihood of prosecution and the likely sanction in the event of conviction are important factors in any decision voluntarily to co-operate with an investigation by a regulatory or enforcement body. This is primarily because there is no guarantee that voluntary co-operation will result in a reduced sanction or complete immunity. The corporate and its advisers should not lose sight of the fact that, where there are allegations that criminal offences or regulatory breaches have been committed, the regulatory and enforcement bodies' primary role is to properly investigate and prosecute or otherwise sanction the offender.

The more serious the offence, the less likely it is that a DPA (as opposed to prosecution) will be considered to be in the public interest. However, in the *Rolls-Royce* case, the court acknowledged that, notwithstanding the gravity of the wrongdoing committed by Rolls-Royce, on the right terms it was in the interests of justice to resolve the conduct by way of a DPA rather than a trial.[74] The legislation requires any financial penalty that forms part of a DPA (the 'meat' of the sentence for a company) to be broadly comparable to a fine the court would have imposed following a guilty plea.[75] However, the current Director of the SFO has made clear in speeches that he would like greater flexibility to exist, such that a discount of greater than one-third could be available. The court appears to support the Director's view. In *SFO v. XYZ Ltd*, Sir Brian Leveson, President of the of the Queen's Bench Division, allowed a 50 per cent discount 'given that the admissions are far in advance of the first reasonable opportunity' and therefore represented additional mitigation.[76]

---

uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/): 'If the benefits of cooperating and receiving up to 50% discounts on penalty are to be understood, then it is only right that those who do not cooperate receive the most punitive sanction available under the Sentencing Council's Guidelines if they are convicted after trial.'

72 This applies where an offence specified under the Schedule to SOCPA has been committed. Prosecutors holding SOCPA powers include the CPS, FCA and SFO. See also CPS Guidance on SOCPA: http://www.cps.gov.uk/legal/s_to_u/socpa_agreements_-_note_for_those_representing_assisting_offenders/.

73 For example, *R v. Anjam Ahmed*; sentencing hearing at Southwark Crown Court, 22 June 2010; a SOCPA agreement was in place resulting in a suspended, rather than immediate, term of imprisonment. (See also Chapter 25 on fines, disgorgement, etc.).

74 *SFO v. Rolls-Royce*, Approved Judgment, Case No. U20170036, paras. 61-64.

75 Crime and Courts Act 2013, Schedule 17, para. 5(4).

76 *SFO v. XYZ Ltd*, Redacted Approved Judgment, Case No. U20150856, para. 57.

Similarly, in *SFO v. Rolls-Royce*, a discount of 50 per cent was allowed because Rolls-Royce had demonstrated 'extraordinary co-operation'.[77] This discount comprised a discretionary 16.7 per cent discount in recognition of Rolls-Royce's co-operation, in addition to the one-third discount that is normally available as part of a DPA.[78] This discount was considered appropriate even in circumstances where Rolls-Royce was accused of corrupt practices spanning 24 years in seven countries. Rolls-Royce's co-operation, however, was extensive, including close co-operation with the SFO over the conduct of its internal investigations, granting the SFO full prior access to documents and witnesses, consulting with the SFO over media coverage, and waiving privilege over documents connected to the internal investigation. In addition, Rolls-Royce had taken considerable steps to reform its anti-bribery corruption compliance programme. Various examples of this co-operation by Rolls-Royce were detailed by Leveson P as justification for approving the terms of the DPA, who stated he was satisfied that Rolls-Royce 'could not have done more to have exposed its own misconduct'.[79]

In the regulated space, co-operation can also lead to reduced penalties. Although regulated firms and individuals are required to co-operate with the FCA, the authority makes clear that proactive co-operation can benefit individuals or firms in a number of ways: this can include not pursuing enforcement action,[80] reduced charges or lighter sanctions being sought (something which may ultimately be reflected in the final notice). The FCA's Enforcement Guide makes clear that the settlement discount scheme allows a reduction in a financial penalty or period of suspension, restriction or condition that would otherwise be imposed, if agreement is reached at an early stage. Co-operation appears to be becoming ever more important. Recent changes introduced by the FCA allows a firm to settle aspects of a case and achieve a discount in respect of those aspects, while continuing to contest other aspects of the case. Timetables for settlement discussions will be set for efficiency and effectiveness and the FCA will expect firms and others to give it all reasonable assistance in this regard.

In the competition context, cartel members who self-report and provide information about the cartel can benefit from the CMA's leniency regime. To do so, they must be the first member to report the cartel and must do so before the CMA commences an investigation of its own volition. They must also fulfil certain immunity conditions, which include maintaining continuous and complete co-operation throughout the investigation and refraining from further participation in the cartel activity.[81]

Equally, the OFSI within HM Treasury, which may impose potentially significant monetary penalties on companies and individuals for breaches of financial

77 *SFO v. Rolls-Royce*, Approved Judgment, Case No. U20170036, para. 121.

78 See Appendix B, *SFO v. Rolls-Royce*, Approved Judgment, Case No. U20170036.

79 *SFO v. Rolls-Royce*, Approved Judgment, Case No. U20170036, para. 38.

80 See FCA Handbook, EG2 2.1.4.

81 https://www.gov.uk/guidance/cartels-confess-and-apply-for-leniency and https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf.

sanctions law, has published guidance that indicates that timely, voluntary and materially complete disclosure, made in good faith, will be a key mitigating factor when it is deciding the level of any penalty (including a potential penalty reduction of up to 50 per cent).[82]

Other options besides co-operation 9.6

In circumstances where no regulator or enforcement body is yet involved in, or aware of, an issue, whether to co-operate at all (i.e., whether to self-report) remains a judgement call for a corporate taking into account the factors described earlier.

Once a regulator or enforcement body is on the scene, co-operation in its various forms may, as described above, afford significant advantages for a corporate. However, there is still a balance to be struck.

On the one hand, it is important that a corporate does not entirely prostrate itself where that is not warranted, that it constantly keeps under review whether the investigating or prosecuting authority has a provable case, and that it does not admit to facts or enter pleas that it has committed wrongdoing without advice. If the corporate is on reasonable grounds evidentially, it may be well advised to maintain a robust stance in the course of an investigation and even to defend the case at trial. Moreover, other factors may impact the nature and extent of the co-operation that the corporate is prepared, or able, to entertain. For example, some aspects of the voluntary co-operation that an investigative or enforcement authority might expect could be problematic for a corporate where follow-on litigation is pending or threatened, and many corporates will be unwilling to be seen to abandon current or former employees who are themselves under scrutiny and to co-operate in their investigation and prosecution.

On the other hand, where the risk of a conviction (and its potential collateral consequences) cannot be entirely excluded, a guilty plea or a DPA may be more attractive. A DPA will only be available where a corporate is deemed to have been sufficiently co-operative and for both pleas and DPAs the extent of the corporate's co-operation will impact the sentencing or the fine. However, in the bribery space at least, the outcomes of the guilty plea in the *Sweett Group* case and the DPA in the *Standard Bank* case (both involving large fines with similar percentage reductions) have led commentators to consider whether fines would have been materially different in the event of a conviction after a trial. Also, a DPA is likely to include terms requiring co-operation with ongoing prosecutions and continuing disclosure obligations in respect of relevant matters (as seen with the DPAs in the *Standard Bank* case,[83] the *XYZ Ltd* case and the *Rolls-Royce* case).

82 'Monetary penalties for breaches of financial sanctions – guidance', OFSI, April 2017 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/605884/Monetary_penalties_for_breaches_of_financial_sanctions.pdf).

83 Deferred Prosecution Agreement between Standard Bank PLC (now ICBC Standard Bank PLC) and the Serious Fraud Office (https://www.sfo.gov.uk/cases/standard-bank-plc/).

9.7 Companies tend to co-operate for a number of reasons

With all of that said, corporates increasingly choose to co-operate with regulators and enforcement bodies, in some cases very extensively. In some cases, this is just a matter of being a good corporate citizen and maintaining integrity and credibility in the eyes of stakeholders, government and the general public. Sometimes there will be considerable stakeholder pressure (e.g., from a new board or shareholders). Sometimes there is an ongoing relationship with the investigating authority to think about.

In other cases, there may be significant strategic benefits to co-operating. Without some degree of co-operation, a corporate will have little control over, or ability to influence, a regulatory or criminal investigation. Co-operation will often mean the company has a better view of the investigation and a greater degree of communication with the investigating authority, and these may provide an opportunity to influence the course of the investigation, to offer up mitigation to adverse findings immediately and even to effect the discontinuance of an investigation. Co-operation that is thorough and genuine throughout may help resolve the issue in a non-adversarial way (such as through a DPA), while retaining some control over what admissions are made and what is said publicly by the relevant authority.

Certainly, few corporates will take lightly the financial implications of a prolonged investigation or the management time and business interruption it will entail. Nor can corporates afford to be dismissive of the impact a drawn-out process will have on the morale of employees and the risk of 'talent flight'. For many companies and their stakeholders, gaining clarity and certainty and being able to return to focusing on their day-to-day business will be an absolute priority.

Finally, no company will relish the prospect of a criminal conviction and the reputational impact this will have; and for many companies, there may be broader implications of a criminal conviction, such as debarment from public tendering.

9.8 Multi-agency and cross-border investigations

9.8.1 Overview

The ways regulators and criminal prosecutors choose to co-operate with each other are numerous and varied. There is undoubtedly an increasing desire for agency co-operation on domestic and international levels.

The extent of co-operation between regulators typically only becomes apparent in the event of public resolution of any wrongdoing.[84] For example, in the context of the *VimpelCom* case, Kara N Brockmeyer, Chief of the SEC Enforcement Division's FCPA Unit, described international co-operation among regulators as

84 In response to requests under the Freedom Information Act 2000, the SFO published some limited information as to the volume of referrals it had received, from both domestic and overseas authorities, between 2012 and 2017. Notably, with regard to bribery and corruption referrals, the Foreign and Commonwealth Office was the SFO's greatest source of referrals (https://www.sfo.gov.uk/publications/corporate-information/freedom-of-information).

'critical to holding companies responsible for all facets of a bribery scheme.'[85] In December 2014, the US authorities fined the US division of French infrastructure giant Alstom US$772 million in respect of bribery offences, and expressly acknowledged the assistance received from authorities in Indonesia, Switzerland, the United Kingdom, Germany, Italy, Singapore, Saudi Arabia, Cyprus and Taiwan, and the World Bank during their investigation.[86] The SFO commenced its own investigation into Alstom's UK operations, with information from Poland, Tunisia, Hungary and Lithuania, and sought to rely on the evidence of the US conviction in the UK proceedings. This example highlights the danger that one authority will use information from another to launch an investigation of its own.

Authorities work together in a number of different ways. There are informal channels of communication, agreements or memoranda of understanding (MOU), formal information gateways and treaties for mutual legal assistance (MLA). Nevertheless, authorities may assist each other passively, such as by sharing information they have gathered during their investigations or obtaining publicly available records, or by taking a rather more active role, such as by interviewing witnesses, providing logistical support to enable foreign authorities to conduct their own witness interviews and allowing secondments.[87]

Authorities share information, increasingly frequently and informally, on an 'intelligence only' basis. This has the advantage of speedily progressing an investigation by the exchange of, for example, banking, trading or company data without the delay associated with formal information channels. If the information is ultimately required for evidence in a criminal case, a formal route (i.e., a letter of request (LOR)) will be used to obtain the same information in evidential form.

Memoranda of understanding 9.8.2

Authorities commonly enter into MOU with authorities in other jurisdictions where both exercise similar functions, or are concerned with the same issues (e.g., the PRA and the FCA have entered into a number of MOU with equivalent authorities in other jurisdictions[88]). Some multi-party MOU exist, such as the

85 SEC press release: 'VimpelCom to pay $795 Million in Global Settlement for FCPA Violations', dated 18 February 2016 (https://www.sec.gov/news/pressrelease/2016-34.html).

86 DOJ press release: 'Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges', dated 22 December 2014 (https://www.fbi.gov/news/pressrel/press-releases/alstom-pleads-guilty-and-agrees-to-pay-772-million-criminal-penalty-to-resolve-foreign-bribery-charges).

87 See, for example, the text of a speech given by Assistant Attorney General Leslie R Caldwell in Bogotá, Colombia, on 12 April 2016, in which she stated that the Criminal Division of the DOJ contemporaneously had 'prosecutors stationed in at least 45 countries' (https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-catholic-university-colombia).

88 See, for example, the MOU between the Dubai Financial Services Authority and the PRA dated 12 June 2014 and the MOU between the Bank of Korea and the PRA & Bank of England dated 16 December 2014. Other examples include the MOU between the CFTC and FSA dated 17 November 2006 ('developed . . . in order to enhance their respective capabilities to address potential abusive or manipulative trading practices that may involve trading on UK and US derivatives exchanges') and the MOU between the SEC and the FCA dated

International Organization of Securities Commissions' Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, to which over 109 parties are presently signatories.[89] MOU are not legally binding, but declare a shared commitment and aim to provide useful guidelines enabling faster and more efficient information-sharing.

Confidentiality clauses feature in MOU and there are carve-outs where to provide the information requested would violate domestic law or interfere with ongoing domestic criminal proceedings, for example.

9.8.3 Information gateways

There exist a number of statutory powers available to investigatory, regulatory and prosecution bodies to supply and share information with each other, domestically and internationally. These are commonly known as 'information gateways' and have a statutory basis.[90]

For example, Part 9 of Enterprise Act 2002 prohibits the disclosure of information received by the CMA except, for example, where it is disclosing that information to another authority for the purpose of criminal proceedings. This gateway could be used in a LIBOR or FX-type investigation involving both criminal and competition issues.

There are limitations on the transmission of information. Any information so disclosed must be used only for the relevant purpose and the CMA must not make the disclosure unless it is satisfied that it is proportionate.[91] The CMA also must (so far as practicable) exclude from disclosure any information that is contrary to the public interest, commercial information that it believes might significantly harm the legitimate business interests of the undertaking to which it relates, or information relating to the private affairs of an individual, disclosure of which might significantly harm the individual's interests. Where the information is being transferred overseas additional limitations apply (e.g., seriousness of offence, appropriate local protection for the privilege against self-incrimination in criminal proceedings, storage of personal data).

9.8.4 Mutual legal assistance

Mutual legal assistance (MLA) is a formal method of co-operation between countries for obtaining assistance in the investigation or prosecution of criminal

22 July 2013 concerning the consultation, co-operation and exchange of information related to the supervision of the relevant entities in the asset management industry.

89 May 2002, revised May 2012. A list of current signatories can be found here: http://www.iosco.org/about/?subSection=mmou&subSection1=signatories.

90 For instance, the information gateway for the SFO is in section 3(5) of the Criminal Justice Act 1987, for the CMA in Part 9 of the Enterprise Act 2002 (EA02) and the FCA and the PRA within section 349 of FSMA 2000.

91 Ibid.

offences.[92] The nature of the assistance varies, but includes obtaining documentary evidence, conducting interviews, taking witness statements, requesting the execution of search warrants, freezing assets and producing bank documents.[93] Authorities will resort to MLA with their counterparties to receive evidence that cannot be gained through informal (and far quicker) means of co-operation, or where formal evidence is required. For instance, while one authority may ask another to obtain a witness statement, that authority will only be able to comply if the witness voluntarily agrees to give a statement. If that consent is not forthcoming, the requesting authority must instead resort to making an MLA request to compel the witness to provide evidence.

An important limitation for requests under legal assistance treaties is that the requesting country must comply not only with its own laws but with the requested country's laws: meaning that in practice, MLA requests can be resource-intensive to prepare and serve.[94] However, in the United Kingdom, the recent Unaoil application for judicial review shows that there is a high bar for successfully challenging MLA requests through this mechanism.[95] Unaoil unsuccessfully applied to challenge the SFO's MLA request to the Monaco authorities for assistance in carrying out dawn raids, interviews and seizure of materials in Monaco, arguing that the letter requesting assistance failed to disclose key information about the case. The court made clear that the duty of candour, which attaches to UK search warrants, did not apply to MLA requests and that questions around the fairness of the raids and seizures should be resolved in accordance with local law. A successful judicial review challenge therefore would likely have to show that the SFO had no reasonable grounds for suspicion at the time the MLA request was made or that there was some other breach of the Crime (International Cooperation) Act (CICA), which gives the authority the power to request assistance from international authorities.

92 In March 2017, the SFO published a response to a request made pursuant to the Freedom of Information Act listing the number of new and supplemental MLA requests it had executed on an annual basis between 2012 and 2017 (https://www.sfo.gov.uk/publications/corporate-information/freedom-of-information/). In 2016/17, the SFO accepted for execution 20 new MLA requests and 13 supplemental requests (down from 24 and 20 respectively in 2015/16).

93 Further guidance as to the types of assistance available from the UK authorities can be found in section 3 of the Home Office publication 'Requests for Mutual Legal Assistance in Criminal Matters: Guidelines for Authorities Outside of the United Kingdom – 2015' (12th edition – May 2015).

94 Recent steps have been taken to simplify the legal framework for co-operation between Member States of the European Union on criminal investigations. European investigation orders (EIOs) are judicial decisions taken in one Member State that are carried out by authorities in another. They relate to specific investigative measures to gather evidence in one Member State on behalf of another and allow for the sharing of evidence between Member States. EIOs were introduced into EU law through the EIO Directive 2014/41/EU and came into force in the United Kingdom on 31 July 2017 through the Criminal Justice (European Investigation Order) Regulations 2017, SI 2017/730.

95 *Unaenergy Group Holding Pte Ltd & Ors. v. The Director of the Serious Fraud Office* [2017] EWHC 600 (Admin).

Voluntary co-operation with an authority can result in requests for the corporate to obtain documents from overseas where it can, as a demonstration of its ongoing and genuine co-operation.

9.9 Strategies for dealing with multiple authorities

Companies should proceed on the assumption that authorities share or will share information and materials. It may be clear from the outset that an issue affecting a corporate operating in multiple jurisdictions would likely attract the attention of authorities in those countries. Alternatively, an authority may effectively be tipped off following a MLA request for assistance from a foreign authority and, on the basis of information provided pursuant to that request, commence its own investigation.

Accordingly, a coherent strategy for dealing with such attention should be formulated from the outset. The company may find it sensible to engage in an open and pragmatic dialogue with each authority regarding matters such as timetables and document requests and be proactive in encouraging the authorities to take the same approach with each other wherever possible.

The following additional points should be considered when dealing with multi-agency investigations:

- Consider what enquiries or internal investigation should be conducted. An internal investigation will enable a company to quantify potential risk and to develop a strategy to cope with concurrent investigations. It can, however, be difficult to structure an internal investigation so that material generated is privileged in each jurisdiction involved (if privilege is even recognised). Moreover, potential exposures in one jurisdiction might mean enquiries elsewhere need to be more circumspect.
- Ensure that an appropriate employee (most likely a member of the in-house legal team) is given specific responsibility for co-ordinating the corporate's response to the investigations. Where international authorities are involved, the corporate should consider whether to form an internal response team to include employees from all affected jurisdictions.
- When formulating a strategy for dealing with concurrent investigations, consider which authorities are likely to be more influential or proactive and consider adopting an approach that takes into account their likely priorities or concerns.
- Engage specialised legal counsel to interface with law enforcement, including, where subject to overseas investigations, instructing and seeking advice from local counsel as necessary. This is particularly important if complying with a request for information from one authority may leave employees at risk of breaching data protection laws in other jurisdictions.
- Make sure that consistent explanations and documents are given (including considering whether developing a narrative 'script' may be helpful), and, so far as possible, that consistent approaches are adopted across all investigations (including coordination with local counsel and any other relevant external advisers).

- Where relevant, attempt to adopt a standardised approach to privilege across all investigations (which may necessitate careful negotiation with all authorities if approaches to privilege in their jurisdictions differ considerably).
- When considering whether to enter into settlement discussions, consider whether it would be beneficial to engage with all authorities at the same time. This may not be possible in circumstances where authorities are at differing stages in their investigation timetables, but would have the benefit of managing negative impacts such as business interruption, and harm to reputation and share price, as well as removing the need for ongoing company resources to be dedicated to overseeing the concurrent investigations. Encourage a holistic approach to sanctions across multiple jurisdictions, so as to avoid multiple monitorships or duplicative reparation and, where possible, to minimise fines.

Conclusion 9.10

Corporates are increasingly expected to co-operate with regulatory agencies and criminal authorities, even when such co-operation is voluntary. The recent DPAs corporates have entered into with the SFO demonstrate this expectation.

Corporates are coming under pressure from the public, stakeholders and government to act as good corporate citizens. Maintaining credibility with capital markets can be an additional factor in a decision to co-operate.

Co-operation is relevant at every stage of an investigation, and for every outcome. It requires continual and genuine assistance, prompt reporting of wrongdoing, and access to hard copy materials, electronic data and potential witnesses.

The conduct of internal investigations, witness interviews and legal privilege are becoming fraught battlegrounds.

Corporates should expect the involvement of multiple agencies across multiple jurisdictions as the co-operation between agencies and authorities increases.

10

Co-operating with the Authorities: The US Perspective

F Joseph Warin, Winston Y Chan, Pedro G Soto and Kevin Yeh[1]

10.1 To co-operate or not to co-operate?

After a company learns that a government authority has begun an investigation into it, the company must decide whether to co-operate. That decision is laden with numerous considerations, and a decision either way involves many potential benefits, drawbacks and implications.

10.1.1 Defining co-operation: the Filip Factors, Yates Memorandum, Seaboard Factors and Sentencing Guidelines

The standards that guide the US Department of Justice's (DOJ) civil and criminal prosecution of companies are set out in the United States Attorneys' Manual's (USAM) Principles of Federal Prosecution of Business Organizations. That section of the USAM lists 10 factors – often called the 'Filip Factors', named after former Deputy Attorney General Mark Filip – that DOJ attorneys consider in determining whether to charge a company. These factors include the company's 'willingness to cooperate in the investigation of its agents' and its 'efforts . . . to cooperate with the relevant government agencies'.[2] In other words, whether and the extent to which a company co-operates with the government directly affects the DOJ's leniency considerations.

The potential benefits of co-operation are palpable. The USAM explains that '[c]ooperation is a mitigating factor, by which a corporation . . . can gain credit in

1 F Joseph Warin and Winston Y Chan are partners, and Pedro G Soto and Kevin Yeh are associates, at Gibson, Dunn & Crutcher LLP.

2 U.S. Dep't of Justice, United States Attorneys' Manual (USAM) § 9-28.300.

a case that otherwise is appropriate for indictment and prosecution.'[3] Such credit can lead to reduced charges and penalties, or avoidance of charges altogether.

Although the USAM does not formally define 'co-operation', it identifies how a company can be eligible for co-operation credit. Of utmost importance, 'the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct.'[4] These relevant facts include how and when the alleged misconduct occurred; who promoted or approved it; and who was responsible for committing it.[5]

Previously, companies could become eligible for co-operation credit by voluntarily disclosing misconduct even without identifying the individuals engaged in the wrongdoing or their specific misconduct. Although such efforts would not garner full credit, the partial credit companies received could be enough to avoid charges.[6]

This changed in September 2015, however, when Deputy Attorney General Sally Yates announced a 'substantial shift' from the DOJ's prior practice through the issuance of a DOJ-wide memorandum regarding 'Individual Accountability for Corporate Wrongdoing'.[7] Now popularly called the 'Yates Memorandum', the directive states that '[i]n order for a company to receive *any* consideration for cooperation under the [Filip Factors], the company must completely disclose to the Department all relevant facts about individual misconduct.'[8] In other words, '[c]ompanies cannot pick and choose what facts to disclose . . . the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct' to be eligible for any co-operation credit.[9] Though individual responsibility has always been a priority for the DOJ, the Yates Memorandum has more keenly focused prosecutorial efforts against responsible individuals. Moreover, it makes clear that no co-operation credit will be given

3 USAM § 9-28.700.

4 Id.

5 USAM § 9-28.720.

6 Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (10 September 2015), available at https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

7 Memorandum from the Deputy Att'y Gen. to the U.S. Dep't of Justice (9 September 2015), available at https://www.justice.gov/dag/file/769036/download.

8 Id. at 3 (original emphasis).

9 Id.; see also Marshall L. Miller, Principal Deputy Ass't Att'y Gen., Crim. Div., U.S. Dep't of Justice, Remarks before Global Investigations Review conference (17 September 2014), available at https://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller ('Voluntary disclosure of corporate misconduct does not constitute true cooperation, if the company avoids identifying the individuals who are criminally responsible. Even the identification of culpable individuals is not true cooperation, if the company fails to locate and provide facts and evidence at their disposal that implicate those individuals.').

if a company 'declines to learn' and share all relevant information available to it regarding individual misconduct.

The principles articulated in the Yates Memorandum are likely to remain in place under the Trump administration. The new Attorney General has made clear that '[t]he Department of Justice will continue to emphasize the importance of holding individuals accountable for corporate misconduct.'[10] Specifically with regard to co-operation, the attorney general noted that the DOJ, in making charging decisions, 'will continue to take into account whether companies . . . cooperate and self-disclose their wrongdoing.'

Co-operation can take many forms, including producing relevant documents, making employees available for interviews, proffering findings from internal investigations, and assisting in the analysis and synthesising of potentially voluminous evidence. Of course, post-Yates Memorandum, corporations must also attempt to identify all culpable individuals, timely produce all relevant information about individual misconduct and agree to continued co-operation even after resolving any charges against the company. The amount of credit earned will depend on the proactive nature of the co-operation, and the diligence, thoroughness and speed of any internal investigation. But the USAM also reiterates existing DOJ policy that waiver of attorney–client privilege or work-product protection is not required for credit so long as the relevant facts concerning misconduct are disclosed. Even so, this policy shift raises substantial issues about the extent to which the privilege or work-product protection can be preserved while satisfying the DOJ's demand for all relevant information.

Paradoxically, in practice, the Yates Memorandum may make it harder for the DOJ to pursue individuals, since the effect of the new policy may impede companies' ability to identify the source of any misconduct. Given that companies must now identify culpable individuals to receive any co-operation credit, the interests of employees with relevant information may no longer be aligned with those of the company. Whereas before, employees might have been willing to identify themselves or others as perpetrators of wrongdoing in return for assurances that the company will not name them to authorities, now the company must turn over any employees allegedly engaged in misconduct. As this policy filters through the business landscape, it may affect workplace morale and loyalty if employees now believe that their company will likely hand them over to authorities at the first sign of trouble. This is especially true if, pursuant to *Upjohn Co v. United States*,[11] employees are advised during interviews by company counsel that anything inculpatory the employees reveal could be disclosed to the DOJ. As a result, employees may be less willing to reveal misconduct, potentially diminishing the effectiveness of compliance and self-disclosure programmes, even as companies now carry

10 Jefferson B. Sessions III, Att'y Gen., U.S. Dep't of Justice, Remarks as prepared for delivery at Ethics and Compliance Initiative Annual Conference (24 April 2017), available at https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual.

11 *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

greater responsibility to ferret out and report wrongdoing. As James Cole, Yates's predecessor at DOJ, has noted, 'When you play it out, [the Yates Memorandum] is not necessarily better for the government and it's certainly not better for corporations and counsel.'[12]

Despite this greater responsibility on the part of companies to make 'extensive efforts' in their internal investigations, one official has cautioned that the DOJ will often conduct its own parallel investigation 'to pressure test' a company's efforts, and if the DOJ concludes through its own investigation that the internal investigation's efforts 'spread corporate talking points rather than secure facts related to individual culpability the company will pay a price when they ask for cooperation credit.'[13] Any attempt to co-operate and seek credit should be taken on diligently and with the full commitment of all involved.

Like the DOJ, the US Securities and Exchange Commission (SEC) also offers corporate co-operation credit. In October 2001, the SEC issued a report of investigation and statement – popularly called the 'Seaboard Report' after the company that was the subject of the report and whose co-operation in an SEC investigation led to its not being charged – articulating a framework for evaluating co-operation and determining whether, and to what extent, companies should receive leniency. The SEC considers four 'Seaboard factors' in determining the appropriate amount of credit: (1) self-policing, (2) self-reporting, (3) remediation and (4) co-operation. To the SEC, co-operation entails 'providing the Commission staff with all information relevant to the underlying violations and the company's remedial efforts.'[14] As with the DOJ's Filip Factors, co-operation is but one consideration among others that the SEC considers in determining the appropriate disposition in a case, and it echoes the DOJ's requirement of providing the agency with all facts relevant to the alleged misconduct. Depending on the extent to which the company meets the Seaboard factors, it may be eligible to receive a co-operation agreement, deferred prosecution agreement or non-prosecution agreement.[15]

Finally, the US Sentencing Guidelines, which set forth recommended sentencing ranges for federal offences, also provide credit for companies that co-operate with authorities, in the form of recommended reductions in monetary penalties. A business that has 'fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct' can receive a partial reduction; a company that has self-reported within a reasonable time after becoming aware of misconduct, but before the government learns of it or has begun investigating, and that has fully co-operated in the investigation

12 Former deputy AG James Cole says DOJ's new white-collar crime policy is 'impractical', Am. Bar Ass'n (November 2015), available at www.americanbar.org/news/abanews/aba-news-archives/2015/11/former_deputy_agjam.html.

13 Miller, above at footnote 9.

14 Enforcement Cooperation Program, U.S. Securities & Exch. Comm'n (20 September 2016), available at https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml.

15 Id.

can potentially eliminate all penalties.[16] The penalties avoided in exchange for co-operation can be significant.

The Sentencing Guidelines make clear, however, that 'cooperation must be both timely and thorough': to be timely, the company must co-operate as soon as it is notified of an investigation, and to be thorough, the company must disclose 'all pertinent information' sufficient for authorities to identify the nature and extent of the offence, and the responsible individuals.[17]

The US Attorney General recently revised the DOJ's charging and sentencing policy, and directed federal prosecutors to 'charge and pursue the most serious, readily provable offense,' which '[b]y definition . . . are those that carry the most substantial guidelines sentence, including mandatory minimum sentences.'[18] Any exception to the policy must be approved by a United States Attorney or Assistant Attorney General (or his or her designate) and the reasons documented.[19] The policy notes that '[i]n most cases, recommending a sentence within the advisory guideline range will be appropriate,' but departures and variances must also be approved and the reasons documented.[20] Whereas previous policy emphasised that charging decisions 'must always be made in the context of "an individualized assessment of the extent to which particular charges fit the specific circumstances of the case . . . and due consideration should be given to the defendant's substantial assistance in an investigation or prosecution,"'[21] the new policy makes no mention of these factors. It remains to be seen how this policy revision will affect corporate investigations, but, as with the Yates Memorandum, this change may make it harder for the DOJ to pursue wrongdoing and secure co-operation from companies and individuals by dramatically increasing the stakes of self-disclosure and co-operation.

10.1.2 Vicarious liability

In general in the United States, and in accordance with traditional principles of *respondeat superior*, a company is liable for the acts of its agents, including its employees, officers and directors, provided that such acts were undertaken within the scope of their employment and intended, at least in part, to benefit the company.[22] Companies may also be liable for the conduct of certain affiliates, business partners and third parties acting on the company's behalf. Importantly, when a company merges with or acquires another company, as a general matter, the successor company assumes its predecessor company's civil and criminal liability.

16 U.S.S.G. § 8C2.5(g)(2). There is no reduction, however, for a company that co-operates but does not accept its responsibility for criminal conduct.

17 U.S.S.G. § 8C2.5 application note 13.

18 Memorandum from the Att'y Gen. for All Federal Prosecutors (10 May 2017), available at https://www.justice.gov/opa/press-release/file/965896/download.

19 Id.

20 Id.

21 Memorandum from the Att'y Gen. to All Federal Prosecutors (19 May 2010), available at http://courthousenews.com/wp-content/uploads/2017/01/holdermemo.pdf.

22 See, e.g., *Standard Oil Co. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962).

In principle, the DOJ has made clear that the *respondeat superior* standard ought not to impose strict liability on companies for an individual's behaviour. The USAM states that 'it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee. . . . [A] prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.'[23]

In practice, however, US authorities have made sweeping assertions of liability under *respondeat superior* and other theories of corporate responsibility, such as the so-called *Park* or collective-knowledge doctrines.[24] Indeed, in some instances, the government has pursued investigations against, and has imposed significant penalties on, corporations for the behaviour of their affiliates or agents without asserting that the parent company authorised, directed or controlled the corrupt conduct, nor that it even had knowledge of such conduct.

Status of the parties involved in the investigation 10.1.3

A company's status in an investigation is one of the critical considerations in determining whether it should co-operate with enforcement authorities and, if so, the proper nature and degree of such co-operation. There are four statuses of persons (companies and individuals) whom enforcement authorities typically request co-operation from: victim, witness, subject and target.

Victims are ordinarily those who have been harmed by the conduct being investigated and face little, if any, legal exposure.

Witnesses are those who may have information that enforcement authorities believe might be relevant to establishing facts regarding the alleged misconduct or implicating particular individuals or entities. Witnesses are seldom exposed to liability arising from their testimony, but an important exception applies for issues of perjury or obstruction of justice if a witness knowingly provides incorrect information during an investigation.

Subjects comprise the first status that may involve a significant risk of being implicated. The subject of an investigation is 'a person whose conduct is within the scope of [a] grand jury's investigation'.[25] Typically falling somewhere between a target and a witness, a subject is someone or some entity that enforcement

23 USAM § 9-28.500.

24 Under the *Park* doctrine, which has generally been applied only in cases involving the U.S. Federal Food, Drug, and Cosmetic Act (FDCA), the government may charge a company official for alleged violations of the FDCA without having to prove that the official participated in or was even aware of the alleged violations if the official was in a position of authority to prevent or correct them but failed to do so. See *United States v. Park*, 421 U.S. 658, 671–72 (1975). Under the 'collective knowledge' doctrine, some courts have held that a company's knowledge is the totality of what all of its employees knew within the scope of their employment – so the knowledge of one employee, or the combined knowledge of multiple employees, can be imputed to the entire company. See *United States v. Bank of New England*, 821 F.2d 844, 855 (1st Cir. 1987).

25 USAM § 9-11.151.

authorities are unwilling to rule out as potentially culpable, even if the authorities have not yet decided as much.

The fourth status corresponds to targets. Designation as a target provides a clear warning of a company or individual's legal exposure. Under the USAM, a target is 'a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.'[26]

Each status triggers different initial concerns regarding the potential exposure and relative burdens of co-operation. The status can help companies or individuals anticipate the extent to, and manner in which, they co-operate, taking into account the various theories of corporate or vicarious liability that may create legal exposure. For instance, while it is generally advisable for victims or witnesses to do so as well, companies or individuals that are subjects or targets of investigations should always seek the advice of counsel before co-operating with, or speaking to, enforcement authorities.

The critical point with regard to particular statuses in investigations is that while they may inform the decision of whether to co-operate, these statuses do not provide legal protection to their holders – a seemingly innocent status such as that of victim or witness is not determinative with regard to possible liability for misconduct. There is little, for instance, to preclude an enforcement authority from using a company's statements offered in a witness capacity against the company in a future prosecution should additional evidence uncover misconduct by that company that shifts its status from witness to subject.

In addition to the issue of potential liability, there can be other significant costs to co-operation. Co-operation may be burdensome for both corporate witnesses and victims, as it may entail production of confidential documents, making employees available for interviews or as witnesses in potentially lengthy legal proceedings. Once a complaint is brought to the attention of the authorities, control over the course of the investigation and resulting litigation is largely lost. Similarly, co-operation by a victim may lead to negative publicity. For example, the victim of a fraud by another company – if it co-operates and testifies to its victimisation – may be viewed as having inadequate internal controls or auditing, harming its reputation with customers and investors. Furthermore, a company that is otherwise a victim of wrongdoing might nevertheless be subject to shareholder lawsuits if there is an allegation that the harm suffered by the company was due to management or board negligence.

For these reasons, regardless of their perceived status, companies should consult with counsel to assess whether co-operation is in their best interest and, if so, how to go about it. In the case of witnesses in particular, counsel should determine whether a limited internal investigation should be conducted to ensure that co-operation will not result in disclosure of incriminating or otherwise sensitive or embarrassing information.

26 Id.

Key benefits and drawbacks to co-operation 10.1.4

Co-operation frequently entails significant resource expenditures for companies, and though co-operation has real benefits, these must be balanced against its demands, as well the possibility that the government may not unearth sufficient evidence to establish misconduct without the company's co-operation.[27]

Reduced or no charges and penalties 10.1.4.1

The single most compelling reason that companies (and individuals) co-operate with the government is to obtain leniency, namely, to reduce or escape entirely potential charges and penalties. At least one study has found that co-operating with the government results in lower penalties.[28] And companies that do not co-operate have received significantly harsher treatment by enforcement authorities.[29]

Equally important, co-operation that results in reduced or no charges may also avoid the collateral consequences of an adjudged violation. Collateral consequences from admitting to wrongdoing, such as administrative bars or suspension from public procurement programmes, can be especially damaging in certain industries – such as healthcare, defence and construction – in which government contracts may account for a significant portion of a company's revenues. For example, federal procurement rules provide for debarment or suspension of a company from contracting with the US government upon a conviction of or a

27 See USAM § 9-28.720 ('If there is insufficient evidence to warrant indictment, after appropriate investigation has been completed, . . . then the corporation should not be indicted, irrespective of whether it has earned cooperation credit.').

28 See, e.g., Alan Crawford, Research Shows It Pays To Cooperate With Financial Investigations, Impact (June 2014), available at http://pac.org/wp-content/uploads/Impact_06_2014.pdf. For instance, the Dutch telecommunications company VimpelCom Ltd paid US$460 million to the DOJ to settle alleged FCPA violations, instead of the suggested guideline range of US$836 million to US$1.67 billion, due to the company's full co-operation with the DOJ. U.S. Dep't of Justice, 'VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme', Press Release (18 February 2016), available at https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million. Similarly, the DOJ gave American software company PTC Inc. partial co-operation credit for disclosing all known relevant facts regarding alleged FCPA violations by its employees, but did not extend it full credit because 'at the time of its initial disclosure, [PTC] failed to disclose relevant facts that it had learned.' U.S. Dep't of Justice, 'PTC Inc. Subsidiaries Agree to Pay More Than $14 Million to Resolve Foreign Bribery Charges', Press Release (16 February 2016), available at https://www.justice.gov/opa/pr/ptc-inc-subsidiaries-agree-pay-more-14-million-resolve-foreign-bribery-charges.

29 For instance, French power and transportation company Alstom S.A. was sentenced in 2015 to pay a criminal fine in excess of $772 million for FCPA violations. The DOJ noted that '[t]he sentence, which is the largest criminal fine ever imposed in an FCPA case, reflects a number of factors, including: Alstom's failure to voluntarily disclose the misconduct . . . [and] Alstom's refusal to fully cooperate with the department's investigation for several years . . . .' U.S. Dep't of Justice, 'Alstom Sentenced to Pay $772 Million Criminal Fine to Resolve Foreign Bribery Charges', Press Release (13 November 2015), available at https://www.justice.gov/opa/pr/alstom-sentenced-pay-772-million-criminal-fine-resolve-foreign-bribery-charges.

civil judgment for a number of offences, including bribery, or any offence 'indicating a lack of business integrity or business honesty. . . .'[30] Moreover, federal disbarment or suspension may automatically trigger a cascade of similar consequences at the state or local,[31] and international,[32] levels, and can lead to follow-on private litigation. Successful co-operation can therefore help companies avoid these possible domino effects.

10.1.4.2 Shaping the government's investigation

Co-operation affords the company greater control over any investigation into its alleged misconduct. As an initial matter, the enforcement agency may be inclined to delay or forgo its own investigation in favour of an internal investigation if the company credibly conducts a thorough internal investigation and fully reports its findings to the agency. But even if the agency conducts its own separate investigation, through co-operation, the corporation can more easily learn what the agency has discovered, shape the way the agency views evidence as part of an ongoing dialogue, and develop a rapport with investigators. This affords the company greater certainty about and influence over the government's investigation and any subsequent negotiation to resolve the allegations. The company effectively becomes a participant in the investigation, hopefully allowing it to have meaningful input into the speed and extent of the process, as well as to shape its resolution.

Conversely, declining to co-operate may increase uncertainty and render the company unable to influence the government's investigation and, ultimately, charges. Deciding against co-operation creates information asymmetry with the agency because the corporation has more limited insight into whom or what the agency is actually investigating, or the scope of any such investigation. By co-operating, however, the company is also placing itself at the mercy of the government: the company cannot selectively disclose or hide certain information because, once detected, the company loses credibility and may even face

30 2 C.F.R. § 180.800 (2005).

31 See, e.g., Mass. Gen. Laws Ann. ch. 29, § 29F(c)(2) ('Notwithstanding any other provision of this section, any contractor debarred or suspended by any agency of the United States shall by reason of such debarment or suspension be simultaneously debarred or suspended under this section, with respect to non-federally aided contracts; the secretary or the commissioner may determine in writing that special circumstances exist which justify contracting with the affected contractor.'); Md. Code Ann., State Fin. & Proc. § 16-203(c) ('A person may be debarred from entering into a contract with the State if the person, an officer, partner, controlling stockholder or principal of that person, or any other person substantially involved in that person's contracting activities has been debarred from federal contracts under the Federal Acquisition Regulations, as provided in 48 C.F.R. Chapter 1.'); 62 Pa. Cons. Stat. Ann. § 531(b)(9) ('Debarment by any agency or department of the Federal Government or by any other state.'); N.J. Admin. Code § 17:19- 3.1(a)(13) ('Debarment or disqualification by any other agency of government').

32 See, e.g., The World Bank, Guidelines: Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers § 1.16 (January 2011), available at http://documents.worldbank.org/curated/en/634571468152711050/pdf/586680BR0procu0IC0dislosed010170110.pdf (explaining the World Bank's disbarment guidelines).

obstruction of justice charges, undermining efforts to achieve a favourable resolution. A company that opts to self-report a potential violation effectively has committed itself to a path of robust co-operation, on an extended timeline that may require it to agree to the lengthy tolling of applicable statutes of limitation.

Financial cost 10.1.4.3

Co-operation – with an attendant internal investigation that is thorough, whose results are reported to the government – may result in less investigation on the government's part, potentially saving costs and penalties for a company over the long term. Under the Yates Memorandum, a company must conduct some level of internal investigation if it wishes to receive any co-operation credit. Because a company is generally better placed to quickly identify the source of any alleged misconduct, conducting a targeted internal investigation will likely be more cost-efficient than refusing to co-operate, which could result in the government's engaging in an unfocused fishing expedition. Furthermore, if the company is performing poorly financially, co-operation, coupled with an 'inability to pay' argument,[33] can lead to the government's willingness to minimise fines, avoiding putting the company out of business.

But the financial costs of co-operation can often be substantial. Co-operation will require proactive internal investigations, and the DOJ's heavy focus on individual culpability may also require earlier involvement of separate counsel for individual employees and officers, whose fees may need to be indemnified by the corporation. In addition, as Deputy Attorney General Yates explained, 'a company should not assume that its cooperation ends as soon as it settles its case with the government. . . . [C]orporate plea agreements and settlement agreements will include a provision that requires the companies to continue providing relevant information to the government about any individuals implicated in the wrongdoing. A company's failure to continue cooperating against individuals will be considered a material breach of the agreement and grounds for revocation or stipulated penalties.'[34] In other words, a co-operating company has effectively committed itself to being at the government's disposal for an indeterminate period and for whatever needs it may have, including for separate but derivative investigations.

Disruption to business 10.1.4.4

Any government investigation is likely to be disruptive to a company's operations and can even affect its share price.[35] Working under the glare of an investigation can cause severe and prolonged uncertainty, especially if high-ranking executives are targets. Investigations can also be damaging for public relations, and failure to co-operate may lead to loss of investor and consumer confidence. This issue is especially significant for companies that particularly rely on customers' trust for

33 U.S.S.G. § 8C3.3.

34 Yates, above at footnote 6.

35 See, e.g., USAM § 9-28.700 ('a protracted government investigation . . . could disrupt the corporation's business operations or even depress its stock price').

business success. Despite an ongoing investigation, taking a co-operative posture may mitigate public relations or market impacts by conveying a strong message that the company has a corporate culture of compliance, does not tolerate misconduct, and plays by the rules.

Of course, refusing to co-operate with the government is unlikely to avoid the business disruption of an investigation. The USAM does make it clear that 'the decision not to co-operate 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.'[36] But if a company is unwilling to assist the government, the government is likely to use its subpoena power anyway. The pall of the investigation would remain, but employees, investors and the public may speculate about why the company refuses to co-operate, potentially causing uncertainty about the company's culpability and the ramifications of the investigation. Refusing to co-operate may also increase the likelihood of talent fleeing the company because of the insecurity of employees' positions, as well as potential decreases in morale and productivity.

10.1.4.5 Exposure to civil litigation

Co-operation and any attendant admission of wrongdoing may expose the company, directors and officers to the risk of follow-on civil litigation. First, because a company must reveal all facts concerning misconduct to the government, co-operation may result in disclosure and a general waiver of otherwise privileged information. Second, depending on the particular circumstances, even after co-operation, a company may still need to accept lesser charges or admit to certain facts as a condition to settlement.

Co-operating companies thus become exposed to follow-on actions because plaintiffs – whether through class actions or derivative actions – can piggyback on the findings from government investigations and company admissions. In certain types of cases, for example antitrust cases that provide for treble civil damages and joint and several liability, the cost of co-operating and admitting any facts or guilt may greatly outweigh any benefits from reduced fines. Indeed, given the proliferation of cross-border investigations, the costs of co-operation are magnified by the likelihood of liability across multiple jurisdictions, both from penalties imposed by regulators and from separate private litigation in those jurisdictions. In other words, it may make financial sense to refuse to co-operate, deny liability and hold on to the possibility that the company may be absolved at trial.

10.2 Authority programmes to encourage and reward co-operation

10.2.1 The antitrust leniency programme

A number of US agencies have special policies with regard to co-operation and self-disclosure. A notable example is the DOJ Antitrust Division's corporate leniency programme, under which a company that engaged in cartel conduct

36 Id.

that is the first to self-report and fully co-operate with the DOJ's investigation will receive full leniency and avoid any charges against it and any co-operating employees, assuming other criteria are met.[37] Additionally, leniency applicants are only liable for actual damages in follow-on civil litigation instead of the usual treble damages and joint-and-several liability imposed under the antitrust laws. The programme has been immensely successful, in large part because it has unambiguous benefits and requirements, and gives assurances to any potential applicants. Indeed, Antitrust Division officials have attributed the programme's success to the transparency and predictability of its implementation.[38]

The FCPA pilot programme 10.2.2

In the same spirit, in April 2016, the DOJ announced a new pilot programme for Foreign Corrupt Practices Act (FCPA) enforcement.[39] While the original programme was designed to last only one year, in March 2017, the DOJ announced that the programme would 'continue in full force' until the DOJ can evaluate its 'utility and efficacy' and determine 'whether to extend it, and what revisions, if any, [the DOJ] should make to it.'[40] The aim of the programme is to encourage companies to voluntarily self-disclose potential FCPA violations, increase co-operation with the DOJ, and remediate flaws in the companies' internal controls and compliance programmes.[41]

In order to be eligible for credit under this programme, a company must satisfy three elements. First, the company must voluntarily report all relevant facts regarding the misconduct 'within a reasonably prompt time after becoming aware' of the offence and 'prior to any imminent threat of disclosure or government investigation.'[42] Second, the company must offer 'full cooperation', which includes, among other things, disclosing all relevant facts and the identity of the individuals involved (as per the Yates Memorandum), and providing timely updates on the results of the internal investigation.[43] Third, the company must undertake timely and appropriate remediation, including through implementation of an ethics and compliance programme and discipline of employees responsible for

37 Scott D. Hammond & Belinda A. Barnett, Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (19 November 2008), available at https://www.justice.gov/atr/file/810001/download.

38 Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Cracking Cartels with Leniency Programs (18 October 2005), available at https://www.justice.gov/atr/speech/cracking-cartels-leniency-programs.

39 U.S. Dep't of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (5 April 2016), at 2.

40 Kenneth A. Blanco, Acting Ass't Att'y Gen., Crim. Div., U.S. Dep't of Justice, Remarks as prepared for delivery at the American Bar Association National Institute on White Collar Crime (10 March 2017), available at https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national.

41 Foreign Corrupt Practices Act Enforcement Plan and Guidance, above at footnote 39.

42 Id. at 4 (quoting U.S.S.G. § 8C2.5(g)(1)).

43 Id. at 5.

the misconduct.[44] If a company meets all three requirements and disgorges all profits received from the alleged violation, it may receive up to a 50 per cent reduction off the applicable minimum fines under the Sentencing Guidelines, no monitor may need to be appointed if an effective compliance programme has been implemented,[45] and the DOJ will consider a declination of prosecution.[46] For companies that fully co-operate and effectively remediate but failed to self-disclose the violation voluntarily, the maximum credit will be up to 25 per cent.[47]

Notably, this programme does not provide the same degree of certainty regarding the benefits of co-operation as other programmes, such as the antitrust leniency programme. For instance, the FCPA programme provides that companies that meet all criteria 'may' receive 'up to' 50 per cent credit. Likewise, the government 'will consider' a declination of prosecution.[48] By contrast, full co-operation in the antitrust realm for the first to self-report participation in a conspiracy will result in full leniency and avoidance of all charges.

To date, the DOJ has announced seven declinations under the programme.[49] In one such declination involving Nortek, Inc, the DOJ noted that it had 'closed [its] inquiry into this matter. . . . despite the bribery by employees of the Company's subsidiary in China'.[50] In outlining the reasons for its declination, the DOJ highlighted 'the fact that Nortek's internal audit function identified the misconduct, Nortek's prompt voluntary self-disclosure, the thorough investigation undertaken by the Company, its fulsome cooperation in this matter (including by identifying all individuals involved in or responsible for the misconduct and by providing all facts relating to that misconduct to the Department) and its agreement to continue to cooperate in any ongoing investigation of individuals . . . .'[51] The DOJ also highlighted 'the steps that the Company has taken to enhance its compliance program and its internal accounting controls, [and] the Company's full remediation (including terminating the employment of all five individuals involved in the China misconduct, which included two high-level executives of the China subsidiary) . . . .'[52] Finally, the DOJ noted that Nortek 'will be disgorging to the SEC the full amount of disgorgement as determined by the SEC.'[53]

---

44 Id. at 7–8.

45 Id. at 8.

46 Id. at 9 ('[w]here those same conditions are met, the Fraud Section's FCPA Unit will consider a declination of prosecution').

47 Id. at 8.

48 Id. at 8–9.

49 As of 4 October 2017, the DOJ had reported declinations in relation to: Nortek, Inc., Akamai Technologies, Inc., Johnson Controls, Inc., HMT LLC, NCH Corporation, Linde North America Inc., and CDM Smith, Inc. See Declinations, U.S. Dep't of Justice, available at https://www.justice.gov/criminal-fraud/pilot-program/declinations (last accessed 4 October 2017).

50 Letter from Daniel Kahn, Deputy Chief, Fraud Section, Crim. Div., U.S. Dep't of Justice to Luke Cadigan (3 June 2016), available at https://www.justice.gov/criminal-fraud/file/865406/download.

51 Id.

52 Id.

53 Id.

Special challenges with cross-border investigations 10.3

A noteworthy trend with regard to large-scale investigations of corporate wrongdoing is the significant increase in coordination between law enforcement authorities across different jurisdictions. This co-operation has traditionally occurred through a variety of formal channels such as mutual legal assistance treaties, memoranda of understanding, or subject-specific agreements between countries.[54] Yet, these formal channels are by no means the exclusive method of collaboration between governments. International enforcement authorities are increasingly sharing relevant information with their foreign counterparts through more informal channels of communication. Governments are not only sharing leads on potential misconduct, they are also sharing investigative strategies, offering each other wider access to individuals and evidence within their borders, and coordinating their enforcement efforts.[55]

Indeed, governments are touting this collaboration. As the Joint Head of Bribery and Corruption at the United Kingdom's Serious Fraud Office noted: '[W]e have excellent links with our US colleagues so are very likely to hear about anything that touches our jurisdiction that emerges from that route too.'[56] Similarly, a senior DOJ official explained: '[W]e are capitalizing on the cooperative relationships we have developed with foreign prosecutors, law enforcement and regulatory agencies to better access evidence and individuals located overseas. Even more significantly, we have dramatically increased our coordination with foreign partners when they are looking at similar or overlapping criminal conduct – so that when we engage in parallel investigations, they complement, rather than compete with, each other.'[57] One manifestation of the level of co-operation

54 See, e.g., U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations § 4.2 (April 1995), available at https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations; American Bar Association, International Antitrust Cooperation Handbook 37 (2004) (discussing antitrust co-operation agreements between the United States and other countries).

55 See, e.g., Miller, above at footnote 9. See also U.S. Dep't of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (5 April 2016) ("The Department is strengthening its coordination with foreign counterparts in the effort to hold corrupt individuals and companies accountable. Law enforcement around the globe has increasingly been working collaboratively . . . . We are sharing leads with our international law enforcement counterparts, and they are sharing them with us. We are also coordinating to more effectively share documents and witnesses.')

56 Ben Morgan, Joint Head of Bribery and Corruption, Serious Fraud Office, Remarks at the Annual Anti Bribery & Corruption Forum (19 October 2015).

57 Miller, above at footnote 9. See also Jeremy P. Evans & Andrew R. Booth, What Price Cooperation? The Ever Increasing Cost of Global Antitrust Cases, Bloomberg Law Reports 2 (2010), available at https://www.paulhastings.com/docs/default-source/PDFs/1772.pdf. ('Enforcement agencies cooperate with one another and admissions, testimony, and documents produced to one will be shared across borders.')

between the DOJ and its UK counterparts is the anticipated detailing of a DOJ prosecutor to the UK's Financial Conduct Authority and Serious Fraud Office.[58]

One of the key advantages of informal co-operation from the enforcement authorities' perspective is that they can dispense with costly and burdensome bureaucratic processes, such as letters rogatory, which typically require involvement of various ministries and courts. At the same time, this growth in informal co-operation between international authorities poses an additional challenge to companies that may be considering whether to co-operate with authorities: depending on their confidentiality policies, co-operation in one country may mean unwittingly sharing information with authorities elsewhere, though authorities may nevertheless have to grapple with their ability to use such information depending on any legal limitations with respect to their admissibility before an adjudicatory body.[59]

Companies under investigation in one country for conduct that has a reasonable nexus to another should evaluate whether to co-operate, and if appropriate, co-operate, on the understanding that the relevant governments may be sharing information or coordinating their investigations, even covertly. Proceeding under this assumption should trigger several precautionary steps. To begin, companies should assess the confidentiality policies in, and level of co-operation (formal or informal) between, the relevant jurisdictions with regard to investigating misconduct. Then companies must keep in mind that waiver of privilege in response to one government's inquiry may result in waiver regarding the same subject matter in an investigation by another. Moreover, companies should consider whether certain foreign regulators may be more interested in related but not identical issues than their counterparts. It may be, for instance, that whereas a particular regulator is interested in the bribery component of particular conduct, another is more interested in the competition aspect. Importantly, companies should be aware of the differing investigative timelines and burdens of co-operation across various jurisdictions to the extent these may increase the total cost or legal exposure from co-operation. For these reasons, companies should calibrate their co-operation accordingly.

The increase in multi-jurisdictional investigations and international law enforcement collaboration suggests that companies should consider retaining local counsel in each jurisdiction where they know or suspect that regulators are likely to share information and could coordinate their respective investigations. Companies should also retain global counsel with experience in multi-jurisdictional investigations to coordinate with the various local counsel,

58 Trevor N. McFadden, Acting Principal Deputy Ass't Att'y Gen., Crim. Div., U.S. Dep't of Justice, Remarks as prepared for delivery at American Conference Institute's 7th Brazil Summit on Anti-Corruption (24 May 2017), available at https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-american.

59 See, e.g., *United States v. Allen*, 864 F.3d 63, 101 (2d Cir. 2017) ('The Fifth Amendment's prohibition on the use of compelled testimony in American criminal proceedings applies even when a foreign sovereign has compelled the testimony.').

and ensure a consistent, coherent defence that does not create additional exposure abroad or as to other sets of issues.

Other options besides co-operation 10.4

Companies that decide not to co-operate will very likely forgo the leniency that enforcement authorities typically offer co-operating entities. Yet, there may be circumstances in which co-operation is not likely to prevent prosecution or significantly reduce the applicable penalty. Indeed, the DOJ has made clear that '[t]he 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.'[60]

In those instances where the prospect of co-operation appears fruitless or when co-operation and the attendant consequences effectively may threaten the viability of the company, the best strategy may be not to co-operate. Declining to co-operate may also curb other adverse consequences of co-operation, such as the possibility of debarment, suspension, or exclusion, and the risk of follow-on private litigation. Where the allegations are particularly egregious but the company vehemently denies them, refusing to co-operate and forcing the government to prove its case in court can preserve employee morale and secure the benefit of the doubt from customers and investors.

If a company opts not to co-operate, it retains a few options with regard to the ongoing investigation and possible prosecution.

First, the company may request a meeting with enforcement authorities to explain why particular conduct is outside their jurisdiction, or why the allegations, even if true, do not amount to a violation of law. This may require sharing some information, but is well short of full co-operation.

Second, depending on the particular circumstances, if the enforcement authorities were to pursue charges, the putative defendant could challenge the jurisdiction of the court to adjudicate the matter. Indeed, a number of defendants charged with FCPA violations have successfully mounted such challenges.[61]

Third, and finally, companies may always contest the charges on their merits – by providing alternative explanations of the relevant facts or challenging the adequacy of the evidence. One particularly dramatic example is the DOJ's prosecution of FedEx Corporation for purportedly conspiring to ship illegal prescription drugs for online pharmacies. Two years after the indictment was filed, FedEx refused to settle the charges and went to trial – and the DOJ voluntarily dismissed its charges just four days into what should have been a seven-week trial, apparently owing to insufficient evidence. In contrast, a number of other companies facing similar charges settled for various large sums: United Parcel Service

60 USAM § 9-28.720.

61 See, e.g., *United States v. Sidorenko*, 102 F. Supp. 3d 1124 (N.D. Cal. 2015); *U.S. S.E.C. v. Sharef*, 924 F. Supp. 2d. 539 (S.D.N.Y. 2013).

said it 'made a business decision' to end the government investigation by making a US$40 million forfeiture payment, and Google, Walgreens Company, and CVS Caremark Corporation have paid fines up to US$500 million.[62]

Similarly, in 2014 the DOJ charged Pacific Gas and Electric Company (PG&E) with 12 criminal counts arising out of the investigation that followed a 2010 gas pipeline explosion that killed eight people and caused substantial property damage. PG&E refused to plead guilty, and in August 2016, the trial jury returned a guilty verdict as to half of the charges, subjecting the company to a potential fine of US$3 million – far less than the US$562 million in penalties sought by the DOJ at the start of the trial.[63]

62 Dan Levine & David Ingram, U.S. prosecutors launch review of failed FedEx drug case, Reuters (15 July 2016), available at www.reuters.com/article/us-fedex-doj-idUSKCN0ZV0GO; FedEx stresses record of cooperating with feds in lawsuit, Bloomberg News (15 May 2015); Thomas Catan, Google Forks Over Settlement On Rx Ads, Wall St. J. (25 August 2011), available at www.wsj.com/articles/SB10001424053111904787404576528332418595052.

63 Richard Gonzales, Utility Giant PG&E Convicted of Violating Gas Pipeline Safety Laws, NPR (9 August 2016), available at www.npr.org/sections/thetwo-way/2016/08/09/489401025/utility-giant-pg-e-convicted-of-violating-gas-pipeline-safety-laws. At sentencing, the court imposed on PG&E the maximum fine of US$3 million, five years of probation, submission to a corporate compliance and ethics monitorship, 10,000 hours of community service, and the requirement to spend up to US$3 million to inform the public about PG&E's misconduct in print and television advertisements. Press Release, U.S. Dep't of Justice, 'PG&E Ordered To Develop Compliance And Ethics Program As Part Of Its Sentence For Engaging In Criminal Conduct' (26 January 2017), available at https://www.justice.gov/usao-ndca/pr/pge-ordered-develop-compliance-and-ethics-program-part-its-sentence-engaging-criminal.

11

Production of Information to the Authorities

Hector Gonzalez, Rebecca Kahan Waldman, Caroline Black and William Fotherby[1]

Introduction 11.1

There are many situations in which a company may face a choice, or a demand, to disclose documents and information to a law enforcement authority or regulator, ranging from responding to a raid on corporate and individual premises, to compliance with a subpoena or other compulsory process, to the voluntary provision of information during a self-disclosure. The types of information and the circumstances in which a company is obliged – or even able – to produce relevant documents is circumscribed by various laws. For example, a company must address concerns regarding confidentiality, employee privacy, data protection and legal privilege (and, in certain jurisdictions, bank secrecy restrictions or blocking statutes). This becomes additionally complicated in cross-border cases where multiple legal regimes may apply and may conflict with one another. Add to this the not uncommon scenario of authorities from different countries seeking the same (or slightly different) information and it becomes a legal and practical minefield. This chapter cannot hope to cover the immense number of variables that a company may face in these circumstances, but it does seek to provide practical guidance on some of the most important points.

1 Hector Gonzalez, Rebecca Kahan Waldman and Caroline Black are partners, and William Fotherby is an associate, at Dechert LLP.

11.2 Production of documents to the authorities

11.2.1 Formal requests for disclosure (and related document hold issues)

11.2.1.1 Commonly used powers (UK)

Most regulatory and enforcement authorities have formal powers to compel individuals and companies to produce documents and provide information.

In the area of financial crime and corruption involving the United Kingdom, the most likely authority to be seeking to investigate and prosecute will be the Serious Fraud Office (SFO). It has powers to seek the production of documents and information at both a pre-investigation stage in relation to corruption cases under section 2A of the Criminal Justice Act 1987, and, once it opens a formal investigation, under section 2 of the same Act. These powers can be exercised against companies and individuals to produce documents and information, including by way of compelled interview where there is no right to silence (although the individual cannot be later prosecuted regarding matters arising from the interview, unless the information is found to be false). A failure to provide the documents and information within the time specified in the production notice is a criminal offence, unless the recipient can show that it had a reasonable excuse not to comply (such as an injunction preventing production).

In the field of financial markets regulation, the Financial Conduct Authority (FCA) has powers to compel the production of documents, contained in Part 11 of the Financial Services and Markets Act 2000 (FSMA). The key provision is section 165, which is set out here as an example of how information-gathering powers are conferred:

> *165 Authority's power to require information: authorised persons etc.*
> *(1) The Authority may, by notice in writing given to an authorised person, require him–*
> *(a) to provide specified information or information of a specified description; or*
> *(b) to produce specified documents or documents of a specified description.*
> *(2) The information or documents must be provided or produced–*
> *(a) before the end of such reasonable period as may be specified; and*
> *(b) at such place as may be specified.*
> *(3) An officer who has written authorisation from the Authority to do so may require an authorised person without delay–*
> *(a) to provide the officer with specified information or information of a specified description; or*
> *(b) to produce to him specified documents or documents of a specified description.*
> *(4) This section applies only to information and documents reasonably required in connection with the exercise by the Authority of functions conferred on it by or under this Act.*
> *(5) The Authority may require any information provided under this section to be provided in such form as it may reasonably require.*

(6) The Authority may require–

(a) any information provided, whether in a document or otherwise, to be verified in such manner, or

(b) any document produced to be authenticated in such manner, as it may reasonably require.

'Authorised person' is defined in section 31 of FSMA and means, very broadly, a person providing a regulated financial service.

The FCA has set out its policy in relation to its exercise of enforcement powers under the FSMA (and other legislation) in its Enforcement Guide.[2] The Enforcement Guide is useful as it not only sets out the FCA's approach to its task as the United Kingdom's financial markets regulator, but also it reflects the general approach of UK regulators to their document production powers.

In paragraphs 4.8 and 4.9 of the Enforcement Guide, the FCA states that its standard practice is to use its statutory powers to require the production of documents, the provision of information or the answering of questions in interview. The FCA suggests that this is for reasons of fairness, transparency and efficiency. The Enforcement Guide goes on to suggest, however, that it will sometimes be appropriate to depart from this standard practice, as it relates to document production, in cases:

- involving third parties with no professional connection with the financial services industry, such as the victims of an alleged fraud or misconduct, in which case, the FCA will usually seek information voluntarily;
- where the FCA has been asked by an overseas or EEA regulator to obtain documents on their behalf, in which case the FCA will discuss with the overseas regulator the most appropriate approach.

In the second scenario, it is important to consider the effect of regimes and jurisdictional protections colliding. For example, how might the US right to silence mesh with the UK compelled disclosure regime? The Enforcement Guide states that the FCA will make it clear to the company or individual concerned whether it requires him, her or it to produce information or answer questions under FSMA or whether the provision of information is voluntary.[3] See Chapters 15 to 18 on representing individuals in interviews and in cross-border proceedings.

Similar (but unique) powers also lie in the hands of the Competition and Markets Authority, the National Crime Agency, police, Her Majesty's Revenue and Customs, and the Health and Safety Executive. Many of these authorities may also apply for and obtain search warrants and use these powers more often than their US counterparts do.

See Section 11.3

2 Financial Conduct Authority, Enforcement Guide (January 2016).

3 Whether the FCA compels testimony from an individual can have an impact on whether that information can be used in connection with a criminal proceeding in the United States. Recently, the Second Circuit Court of Appeals held that testimony compelled by the FCA cannot be used against a defendant in a criminal prosecution. See *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017).

11.2.1.2 Commonly used powers (US)

In the United States, most federal agencies, including the United States Department of Justice (DOJ), the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC), may issue subpoenas (or administrative orders) and compel individuals and companies to produce documents and testimony.[4] In the case of the DOJ, a subpoena may compel the production of documents in connection with either a civil or criminal investigation.[5] The CFTC's regulations provide that:

> *The Commission or any member of the Commission or of its staff who, by order of the Commission, has been authorized to issue subpoenas in the course of a particular investigation may issue a subpoena directing the person named therein to appear before a designated person at a specified time and place to testify or to produce documentary evidence, or both, relating to any matter under investigation.*[6]

Additionally, state agencies and each state's attorney general can compel the production of documents and testimony. As an example, Section 352 of the New York General Business Law permits the attorney general to commence an investigation of an individual or corporation and to seek documents and testimony in connection with that investigation. The Securities Act, the Securities Exchange Act, the Investment Advisers Act, and the Investment Company Act all permit the SEC to issue subpoenas in connection with an ongoing investigation of misconduct.[7] Before a subpoena can be issued, the staff of the SEC must obtain a formal order of investigation.[8]

Criminal offences for refusing to comply with a request, providing false or misleading statements, or concealing documents, generally supplement such powers.[9]

---

4 Other federal agencies such as the Consumer Financial Protection Bureau and the Federal Trade Commission are authorised to issue subpoenas. Other agencies are required to seek the assistance of the United States Attorney's Office in seeking documents and testimony. For a discussion of the use of administrative subpoenas, see https://www.justice.gov/archive/olp/rpt_to_congress.htm#f23.

5 For information regarding criminal matters, see Section 9-13 of the U.S. Attorneys' Manual (USAM). The Civil Division is authorised to issue subpoenas by a number of statutes.

6 17 C.F.R. § 11.4(a).

7 Section 19(c) of the Securities Act of 1933, 15 U.S.C. § 77s(c); Section 21(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(b); Section 209(b) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b–9(b); and Section 42(b) of the Investment Company Act of 1940, 15 U.S.C. § 80a–41(b).

8 For information regarding procedures for obtaining a formal order of investigation, see sections 2.2.3-2.3.4 of the Enforcement Manual of the Securities and Exchange Commission Division of Enforcement, available at https://www.sec.gov/divisions/enforce/enforcementmanual.pdf (4 June 2015).

9 18 U.S.C. §§ 401, 1001; see also 7 U.S.C. §§ 9, 13(a)(3). Rule 17 of the Federal Rules of Criminal Procedures, governs subpoenas, including grand jury subpoenas and Rule 17(g) authorises federal courts to exercise its contempt powers for non-compliance ('The court (other

Scope and timing 11.2.1.3

In practice, a company can do little to resist complying with a formal request for disclosure without resorting to court proceedings to challenge the validity or scope of the request. However, it can likely negotiate with the relevant authority regarding the scope of documents responsive to the request and the production date to limit the scope of the request to what is proportionate and reasonable.

Broadly drawn requests are unfortunately not uncommon, as investigators seek to ensure the requests will capture all relevant information. Early engagement with the relevant authority will typically ensure that both parties can agree on scope and a timetable for production: a request looking back over a long period, or even without any time limit, could involve a time- and resource-intensive review and expensive production exercise. This may not be in the interests of the prosecuting agency or the company if a more targeted request could produce the information. Whether an agreement to narrow the scope of the request is possible is likely to depend, in large part, on factors outside the company's control – such as the nature and scope of the authority's investigation (which the authority may be unwilling to share and is likely to base on information and evidence outside the company's knowledge). However, the company and its legal advisers should nonetheless seek a reasonable, proportionate and practically achievable production: for example, by seeking to agree to produce documents relating to X project, between Y–Z dates and if necessary to produce the documents in tranches.

It becomes increasingly difficult to manage the response to multiple authorities particularly if they are in different countries and have different areas of focus. Similarly, a company must consider whether the production notice extends to materials held overseas.

See Section 11.2.3

See Section 11.2.4

Practical steps on receipt 11.2.1.4

Upon receipt of a document request, a company should immediately issue a document retention (or hold) notice (DRN) (if one is not already in place). The issuing of a DRN will assist the company to demonstrate that it has taken steps to preserve all potentially relevant documents in existence at the date of the request. The DRN should track the terms of the production notice, and be sent to all personnel who may have responsive documents, including the IT department and records department. The term 'document' should be widely drawn to include any paper or electronic records present on any media belonging to the company or its employees, including corporate information located off-site. The company may also need to manage complicated issues around data privacy and personal media.

See Chapters 13 and 14 on employee rights

The DRN should confirm that employees must not delete, alter, conceal or otherwise destroy company documents. Simultaneously, the company should take steps to secure and preserve all relevant information held on the company's servers

than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district.').

and back-up tapes, including through external providers. It should also immediately suspend routine document and data destruction processes.

Most authorities will have their own technical standards, which the collection and production of electronically stored information must meet. It is therefore likely that a company seeking to respond to a subpoena or production notice will want to consider instructing a forensic IT specialist company to assist with the collection and production efforts. This will have the added benefit of ensuring that a company can demonstrate the independence of this analysis, that it is taking clear co-operative steps, and protects employees, as far as possible, from having to give evidence in any subsequent proceedings.

11.2.2 Informal requests for disclosure: voluntary production and co-operation

A company may wish to consider voluntarily providing documents to an authority as part of a self-report or to demonstrate its co-operation with an investigation. Government investigators and investigating authorities regularly hold out the possibility of co-operation credit to companies to encourage them to provide information about their own misconduct.

From February 2014, deferred prosecution agreements (DPAs) have been available in the United Kingdom to the SFO and Crown Prosecution Service (CPS) for disposing of corporate criminal conduct relating broadly to economic crime (including, in particular, fraud, corruption and money laundering).[10] The current Director of the SFO, David Green QC, and the English courts have emphasised that one of the most important factors for a DPA is early reporting and co-operation by the company. Co-operation should be 'genuinely proactive'.[11] This includes the voluntary production of relevant documents, the importance of which has been demonstrated in the recent DPA case of *SFO v. Rolls-Royce PLC*,[12] discussed later in this chapter.

In the United States, too, the authorities have routinely emphasised that they will consider self-reporting and co-operation with government investigations as a key factor when determining whether to charge a corporation.[13] Under the DOJ's FCPA Pilot Program,[14] 'for a company to receive credit for volun-

10 DPAs were introduced by s.45 and Sch. 17 of the Crime and Courts Act 2013.

11 Crown Prosecution Service and Serious Fraud Office, Deferred Prosecution Agreements Code of Practice – Crime and Courts Act 2013, 11 February 2014, at para. 2.8.2(i).

12 *Serious Fraud Office v. Rolls-Royce PLC and Rolls-Royce Energy Systems Inc* (U20170036). Rolls-Royce first came to the attention of the SFO in early 2012, when a whistleblower raised concerns about Rolls-Royce's business in China and Indonesia. After a lengthy investigation, Rolls-Royce accepted responsibility for criminal offending over 24 years, across seven different countries. Ultimately, Rolls-Royce was granted a DPA, and paid approximately £800 million in financial penalties to authorities in the UK, US and Brazil.

13 See e.g. memorandum dated 5 July 2007 from Paul J. McNulty re Principles of Federal Prosecution of Business Organizations available at https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/ mcnulty_memo.pdf

14 In March 2017, DOJ announced that the Pilot Program, which was originally intended to terminate on 5 April 2017, will remain in place while DOJ continues to evaluate the program.

tary self-disclosure of wrongdoing' the disclosure will have to be made 'prior to an imminent threat of disclosure or government investigations' and 'within a reasonably prompt time after becoming aware of the offense'. Moreover, the company will have to disclose 'all relevant facts known to it, including all relevant facts about the individuals involved in any FCPA violation.'[15] Voluntarily producing documents to an investigating authority, without the need for a formal request, helps demonstrate a truly proactive approach by the company. There may also be more room to negotiate the scope of the voluntary disclosure than where a company receives a formal request.

Timing is important, both for a potential DPA and in relation to anti-cartel regimes, which often provide an amnesty only to the first discloser.[16]

As has been noted above, the FCA's standard practice is to rely on its statutory powers to require the production of documents. While there is merit in adopting this policy, and it does avoid the risks to companies of voluntarily disclosing documents to the FCA set out below, nothing prevents the FCA from seeking voluntary production. Principle 11 of the FCA's Principles for Businesses states that: 'A firm must deal with its regulators in an open and co-operative way, and must disclose to the appropriate regulator appropriately anything relating to the firm of which that regulator would reasonably expect notice.' A materially identical provision is included in the Prudential Regulation Authority's (PRA) Rulebook as Fundamental Rule 7. While this chapter focuses on the approach of the FCA, it is worth remembering that the PRA has similar enforcement powers (and is using them with increasing frequency). Both regulators interpret these obligations to proactively bring matters to their attention widely, and are prepared to take enforcement action against firms and individuals for failures to discharge these obligations (even in the absence of other underlying failings). Prudential Group (fined £30 million for failing to inform the FSA of its proposed acquisition of AIA until after it had been leaked to the media), Goldman Sachs (fined £17.5 million for not disclosing an SEC investigation into its staff and members of The Goldman Sachs Group), and the Co-operative Bank (issued a final notice for failing to notify the PRA without delay of two intended personnel changes in senior positions) are recent examples. This places regulated firms in a different position from other corporates: it reduces the scope for the decision whether to self-report or not.

Principle 11 is mainly intended as a supervision tool and sets out a broad duty of co-operation that the FCA often relies on to oblige the production of documents prior to formal investigations being commenced (sometimes, but

---

See remarks prepared for delivery by Kenneth A. Blanco, Acting Assistant Attorney Gen. Kenneth A. Blanco Speaks at the American Bar Association National Institute on White Collar Crime (10 March 2017), available at https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-associationnational.

15 US Department of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance, 5 April 2016, at p. 4.

16 See e.g. European Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, Official Journal C 298, 8 December 2006, p. 17.

not always, for the purpose of deciding whether an investigation should be commenced and, if so, in respect of which firms and individuals). The FCA's view of what is meant by being open and co-operative within Principle 11 is set out in the FCA Handbook, in the 'Supervision' section (referred to as SUP). SUP 2.3 provides that 'open and co-operative' includes a regulated entity making itself readily available for meetings with the FCA, giving the FCA reasonable access to records, producing documents as requested, and answering questions truthfully, fully and promptly. Where a formal investigation has been commenced, the FCA would not seek to rely on Principle 11 as a substitute for its other statutory powers that compel production. While it would be a clear breach of Principle 11 to fail to comply with a statutory request for the production of documents, a failure to comply with a voluntary request for the production of documents would not, of itself, result in disciplinary proceedings. The Enforcement Guide does state, in the context of co-operation, that:

> *The FCA will not bring disciplinary proceedings against a person for failing to be open and co-operative with the FCA simply because, during an investigation, they choose not to attend or answer questions at a purely voluntary interview. However, there may be circumstances in which an adverse inference may be drawn from the reluctance of a person (whether or not they are a firm or individual) to participate in a voluntary interview. If a person provides the FCA with misleading or untrue information, the FCA may consider taking action against them.*[17]

The Enforcement Guide further provides that if a person does not comply with a requirement imposed by the exercise of statutory powers, he or she may be held to be in contempt of court. The FCA may also choose to bring proceedings for breach of Principle 11.[18] Therefore, while there is no guidance indicating that a failure to produce documents voluntarily (as opposed to attending a voluntary interview) would result in an adverse inference being drawn, a decision by a company not to produce documents voluntarily in any particular case should not be made without careful forethought and proper advice on the potential consequences.

As this suggests, the Enforcement Guide recognises the importance of an open and co-operative relationship with the firms it regulates to the effective regulation of the UK financial system. When deciding whether to exercise its enforcement powers, the FCA considers, among a number of factors, the level of co-operation demonstrated by a firm. When weighing the level of co-operation, the FCA considers whether the firm has been open and communicative with it.

Voluntarily disclosing documents carries a risk that the authority may not give any meaningful credit and may nonetheless decide to prosecute or expand an investigation already under way. Therefore, the company should weigh the

17 See Enforcement Guide, at para. 4.7.3.

18 Ibid. at para. 4.7.4.

likelihood of the authority being able to serve a formal request for disclosure in the relevant jurisdiction.

In some instances, a formal notice for disclosure will be preferred: for example, where a company has obligations of confidentiality, preventing voluntary disclosure. The most common examples being lawyers and financial institutions who could both face an action for breach of confidence for supplying documents or information without a formal regulatory request. In some self-reporting circumstances, it may be appropriate for a company to seek such a notice from the relevant authority to ensure that it does not open itself up to civil action. The notice should be narrowly drawn, in consultation with the regulator, and should not affect the company's co-operation credit. Likewise, in some situations, the company may prefer to ask to be provided with a formal document request to demonstrate that they have been compelled to produce the documents to the authorities and have not done so voluntarily.

See Section 11.2.4.6, and Chapters 35 and 36 on privilege

Production of information to multiple authorities 11.2.3

The increasingly complex and multi-jurisdictional nature of investigations means that a company may face requests for formal disclosure from more than one authority. This could be authorities with different mandates within the same jurisdiction, or authorities with similar mandates from different jurisdictions. In either case, multi-authority investigations demand holistic strategies and systems to allow a company to keep track of evidence disclosed to (or seized by) different authorities. A company may also want to consider if there is any strategic advantage to disclosing to one authority before another. However, recent large-scale global investigations into the manipulation of LIBOR and foreign exchange rates demonstrate the ever increasing levels of intra- and international co-operation between regulators.[19] Practical steps a company can take when faced with multiple requests for formal disclosure include:

- early engagement with each authority, to communicate expectations and practical difficulties of responding to multiple requests;
- identifying and prioritising information that is commonly responsive to the requests rather than focusing on responding to each individual request in isolation;
- maintaining clear production schedules; and
- ensuring a system for Bates numbering[20] for each authority.

19 In 2015, Deutsche Bank AG entered into a DPA with the DOJ and settlements with the US Commodity Futures Trading Commission, the Department of Financial Services and the FCA, in connection with its role in manipulating LIBOR rates. DB Group, a subsidiary of Deutsche Bank, also pleaded guilty to wire fraud for its role. Together, Deutsche Bank and its subsidiary agreed to pay over US$2 billion in penalties to US authorities and US$344 million to the FCA – then the second-largest fine in the FCA's history.

20 Bates numbering is a method of indexing legal documents for easy identification and retrieval.

11.2.4 Documents and data outside the jurisdiction

11.2.4.1 Voluntary production

In cross-border fraud or corruption cases, not all of a company's documents will be located or even accessible in the same jurisdiction as the investigating authority. A company should consider what documents are stored overseas, and which of these it should provide to investigators. A company in receipt of a formal production notice will need to assess whether the notice extends to documents outside the jurisdiction, and, if so, the extent to which the company has 'custody or control' over documents held by subsidiaries or overseas branches.[21] The board of a parent company will not necessarily control the management of a subsidiary.[22] Where production is voluntary, a company may take a more holistic view of the investigation and production (subject to local law restrictions). The extent to which it may want to voluntarily disclose information may depend on the ability of the investigating authority to obtain that information itself. However, given the increasing co-operation between authorities on the international stage, careful voluntary production of material is likely to be preferable, and vital if the company seeks co-operation credit.

11.2.4.2 Mutual legal assistance

In the United Kingdom, sections 7–9 of the Crime (International Co-operation) Act 2003 (CICA) govern requests to obtain evidence from abroad in relation to a prosecution or investigation taking place in the United Kingdom, shaping the mutual legal assistance (MLA) powers of UK authorities. Under CICA, an MLA request can only be made if it appears to the investigating authority that an offence has been committed or there are reasonable grounds for suspecting that an offence has been committed, and either proceedings in respect of that offence have been instituted or the offence is being investigated.[23] The request must relate to the obtaining of evidence 'for use in the proceedings or investigation'.[24] But, it could allow an investigating agency to have foreign law enforcement officers launch raids, arrest suspects or conduct interviews on its behalf.[25] If the implementation of an MLA request in the requested state requires a court order, then the court in the requested state is likely to apply the relevant principles in its own jurisdiction to satisfy itself that the requested order is justified.

Note that among the vast majority of EU Member States, European investigation orders (EIOs) now allow streamlined access to evidence and information in

21 Production notices seeking documents held outside the jurisdiction of the investigating authority are complicated. For example, the authors take the view that a request made under s.165 of FSMA captures documents in a company's custody or control outside the United Kingdom, while a request under s.2 of the Criminal Justice Act does not.

22 For the United Kingdom see *Lonrho v. Shell Petroleum* [1980] 1 WLR 627.

23 Crime (International Co-operation) Act 2003, s.7(5).

24 Ibid., s.7(2).

25 See e.g. Reuters, 'Monaco raids Unaoil offices over global oil corruption probe', available at http://uk.reuters.com/article/uk-oil-companies-corruption-idUKKCN0WY3KM.

criminal investigations. EIOs work on the basis of mutual recognition, and judicial authorities can use them to request assistance with 'any investigative measure' (although the EIO itself will identify a number of investigative activities that it does not permit). More specifically, the EIO:

- replaces the previous fragmented legal framework for obtaining evidence within Europe by providing a single instrument;
- imposes a strict 30-day deadline for the Member State to accept the request, and 90 days to comply;
- limits the reasons for which the Member State can refuse the request;
- introduces a standard form; and
- prioritises the necessity and proportionality of the measure as part of the rights of the defence.

EIOs were created by EU Directive 2014/41/EU, which came into force in the United Kingdom on 31 July 2017 (transposed through the Criminal Justice (European Investigation Order) Regulations 2017). The United Kingdom has opted into the EIO regime even though it has chosen to exit the European Union.

The MLA process can be cumbersome, but is a very real threat in the event a company does not co-operate. A company should also not overlook the significant scope for informal direct investigator-to-investigator co-operation. Agencies such as Interpol have dedicated programmes to share information between, and support investigations by, investigating agencies in different countries. Communications between the SFO and DOJ are frequent. The FCA, specifically, has a broad discretion to assist foreign regulators. This discretion is set out in section 169 of FSMA. The statutory power is supplemented by relevant FCA policy. Subsection 169(4) sets out the considerations in the FCA's decision as to whether to assist a foreign regulator. It provides:

> *(4) In deciding whether or not to exercise its investigative power, the regulator may take into account in particular:*
>
> *(a) whether in the country or territory of the overseas regulator concerned, corresponding assistance would be given to a United Kingdom regulatory authority;*
>
> *(b) whether the case concerns the breach of a law, or other requirement, which has no close parallel in the United Kingdom or involves the assertion of a jurisdiction not recognised by the United Kingdom;*
>
> *(c) the seriousness of the case and its importance to persons in the United Kingdom;*
>
> *(d) whether it is otherwise appropriate in the public interest to give the assistance sought.*

In an early decision on this section, *Financial Services Authority v. Amro International*,[26] the Court of Appeal held that there was nothing in section 169 that required the FCA's predecessor body to satisfy itself of the correctness of what it was being asked to investigate or gather by way of information. At the SEC's behest, the FCA could seek any document that it reasonably considered relevant to the investigation the SEC was conducting. The Court of Appeal made clear that the only requirements the FCA must meet were contained in the statute. The Court of Appeal also noted that in exercising these powers, the stricter rules attaching to the drafting of a subpoena did not apply and the description of the documents sought would be acceptable provided the recipient could identify the documents he or she was required to produce.

In addition to the FCA's statutory powers, a number of memoranda of understanding are in place between UK regulators and their overseas counterparts (most notably the SEC and other US regulators) concerning co-operation and information sharing. Recent years have seen significant co-operation between the SEC and the FCA and its cognate agencies.

See Section 11.2.3

Similarly, the United States has entered into mutual legal assistance treaties (MLATs) with various countries, which can be used for the sharing of information and taking of evidence abroad.[27] Some US authorities also have memoranda of understanding in place with sister agencies outside the United States, which can allow for inter-agency sharing of documents.

11.2.4.3 Data protection

Responding to an investigation (and conducting an internal investigation) will require data about individuals to be processed. Such an exercise will engage a number of data protection considerations.[28] A company cannot assume that complying with the data protection requirements in the investigated jurisdiction will mean compliance with overseas data protection laws. European jurisdictions such as France and Germany, for example, have demanding standards for informed consent to a given process. Data protection laws may also prevent the transfer of personal information outside the country of origin: under the UK's Data Protection Act 1998, a company cannot transfer data to countries outside the European Economic Area unless that country ensures an adequate level of protection for the rights of data subjects in relation to the processing of personal data. In Europe, the European Union's General Data Protection Regulation (GDPR)

26 *Financial Services Authority v. Amro International* [2010] EWCA Civ 123.

27 www.state.gov/j/inl/rls/nrcrpt/2012/vol2/184110.htm.

28 The United States does not have a comprehensive, federal data protection law. There are, however, numerous state and federal laws that govern the treatment of personal data. At the federal level, there are protections for, among other things, data collected from children, from financial institutions and that includes medical information. See, e.g., Federal Trade Commission Act, 15 U.S.C. §§ 41-58; Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-6506; Financial Services Modernization Act (Gramm-Leach-Bliley Act), 15 U.S.C. §§ 6801-6827; Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1301 et. seq (and the rules and regulations promulgated thereunder); Fair Credit Reporting Act, 15 U.S.C. § 1681.

is scheduled to come into force on 25 May 2018. Whatever the implications of Brexit for the United Kingdom, the GDPR applies to data controllers and processers outside the EU who offer goods and services to EU consumers. The GDPR introduces a limited derogation to its principles based on 'legitimate interests', which could cover transfers to foreign regulators, but does require prior notification to the relevant data protection authority. However, as a consequence of the Sapin II law, a new body, France's National Anti-Corruption Agency now has specific responsibility for the enforcement of the Blocking Statute, signalling that the French authorities are looking to actively enforce this legislation.

Blocking statutes 11.2.4.4

Blocking statutes prevent the disclosure of certain documents for the purpose of legal proceedings in a foreign jurisdiction, except pursuant to procedures set out in an international treaty or agreement. Article 1bis of the French Blocking Statute provides:

> *[I]t is prohibited for any person to request, to investigate or to communicate in writing, orally or by any other means, documents or information relating to economic, commercial, industrial, financial or technical matters leading to the establishment of proof with a view to foreign administrative or judicial proceedings or as a part of such proceedings.*

There has historically been very little enforcement of the French Blocking Statute – with some companies choosing to ignore it completely. However, as a consequence of the Sapin II law, a new French national anti-corruption agency will be given specific responsibility for the enforcement of the Blocking Statute, signalling that the French authorities are looking to actively enforce this legislation. Similarly, Article 271 of the Swiss Criminal Code prohibits a person performing an 'official act' on behalf of a foreign authority on Swiss soil. This can block the collection of evidence located in Switzerland intended for use in proceedings outside the country.

A decision to refuse to disclose documents or information due to a blocking statute may not be respected by the requesting authority[29] and could affect any co-operation credit available – leaving the company between a rock and a hard place. This demands early and detailed dialogue with the relevant authority alongside expert local counsel advice who can educate the regulators about the relevant laws and any potential workarounds for production of information.

Bank secrecy 11.2.4.5

Bank secrecy laws prohibit banking officials from releasing confidential information about a customer to third parties outside of financial institutions, unless

29 For a recent English case dealing with the French blocking statute, see *Secretary of State for Health v. Servier Laboratories*; *National Grid Electricity Transmission v. ABB* [2014] WLR 4383.

compelled by law. Sometimes, such a disclosure is criminalised.[30] A bank under investigation may seek to rely on this secrecy. It should also be cautious not to infringe this secrecy inadvertently in providing information to a regulator. Note, though, that a historic deference to the banking secrecy rules of foreign jurisdictions, premised on comity or respect for the acts of foreign governments, may slowly be eroding. Even Switzerland, in recent times, has stripped away a number of its many layers of secrecy through international agreements,[31] and, in our experience, has become, in practice, more willing to co-operate with requests for information.

11.2.4.6 State secrets

Sending data outside a jurisdiction may be contrary to state secrecy laws. Some jurisdictions, such as China, have wide definitions of what amounts to a state secret. The Law of the People's Republic of China on Guarding State Secrets, at Article 8, defines state secrets to include 'secrets in national economic and social development' and 'secrets concerning science and technology'. Similarly, Kazakhstan treats some geological data as a state secret. The consequences of violation can be serious. Article 111 of the Chinese Criminal Law makes violating state secrets a capital crime. In countries such as China, where many companies are state-owned, this is not straightforward. Again, locating expert local counsel is a must.

State secrecy laws may also restrict certain categories of documents to authorised eyes only. This is particularly pertinent for defence companies. Withholding production of such documents will require careful negotiation. Remember that the investigating agency is likely to have authorised persons of its own, who can review the documents. Finding a practical way for these to be produced by external lawyers (where prior authorisation is unlikely) will likely be more difficult and undoubtedly will increase the time it will take to respond to a request for documents and may require the review of documents 'in country' instead of producing the documents to the US authorities. Another potential workaround is production of information through MLATs and MOUs that allow a company to first produce documents to a local authority and thereby comply with the relevant regulations.

11.2.4.7 Whose rules of privilege apply?

It may not be clear whose rules of privilege apply when a company discloses in one jurisdiction documents created in another. English courts will generally apply English law to the question: theoretically, an unprivileged document in its country of origin could be privileged in England and *vice versa*. In the United States, there is no general rule, although government agencies will generally apply privilege

30 See most famously Article 47 of the Swiss Federal Act on Banks and Savings Banks (1934).

31 See e.g. Switzerland's entrance, in October 2013, to the Multilateral Convention on Mutual Administrative Assistance on Tax Matters, and agreement to increase transparency and exchange financial information with approximately 60 other countries.

principles broadly, although subject to certain procedural requirements, such as the production of privilege logs.

Companies should also be aware that some countries do not have developed principles of legal privilege and special care is required in creating or sending otherwise-privileged documents to such jurisdictions. Likewise, in some jurisdictions privilege does not extend to communications with in-house counsel and the role of internal counsel may be held by someone who is not an attorney, and therefore privilege may not be recognised in connection with their communications.

Further complications come when dealing with international regulatory bodies. In *Akzo Nobel*, for example, the European Court of Justice held that the law of the European Union superseded that of the relevant national jurisdictions; therefore, in competition cases internal counsel's advice will not be privileged – nor will that of external legal advisers who are not EU-qualified lawyers.[32]

Documents obtained through dawn raids, arrest and search 11.3

During a raid (or execution of a search warrant) on corporate premises, it is important to seek to obtain and understand the terms of the warrant. Check simple facts such as the premises' address, date and relevant powers and authorisations. If appropriate, a company may challenge the scope of the warrant (if it is unduly wide or based on erroneous facts or information). Importantly, the company and its advisers should ensure during the raid that documents outside the terms of the warrant are not seized (unless taken under relevant search and sift powers,[33] or as can be justified under ancillary legislation[34]) and take care both during the raid and afterwards to protect legally privileged materials. In the United States, it is nearly impossible to challenge the scope of a warrant that calls for the immediate search of a specific location. More likely, a company would have to seek to suppress evidence obtained pursuant to a warrant in a later proceeding. There may, however, be opportunities to challenge the scope of a warrant seeking electronically stored information before the data is actually collected and produced.[35] As an example, where a company is asked to execute a warrant on behalf of the government, such as when a service provider is asked to collect electronic information of a third party, there may be additional opportunities for a company to challenge the scope of a subpoena. Recently, Microsoft was successful in challenging

32 *Akzo Nobel Chemicals v. European Commission* (Case C-550/07, European Court of Justice, 14 September 2010). Here, the Court held that internal company communications with in-house lawyers subject to a European Commission investigation were not covered by legal professional privilege, as, for the purposes of such an investigation, an in-house lawyer was not sufficiently independent.

33 For the United Kingdom, see s.50 of the Criminal Justice and Police Act 2001.

34 See s.19(5) of the Police and Criminal Evidence Act 1984.

35 See *In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, F893 F.3d 197 (2d Cir. 2016) (finding that the government could not compel Microsoft to collect data held outside of the United States that was requested in a warrant issued pursuant to the Stored Communications Act).

the scope of a warrant issued pursuant to the Stored Communications Act.[36] Specifically, Microsoft was served with a warrant seeking data held on servers in Ireland. It challenged the collection of the relevant information, arguing that it was not permitted to make the collection based on data privacy laws in the jurisdiction where the data was held. A US Court of Appeals agreed, finding that the Stored Communications Act (the law pursuant to which the warrant was issued) could not be used to compel collection of data outside the United States. There has been significant disagreement with this ruling, even within the court that affirmed the initial decision,[37] and courts have required service providers including Google and Yahoo! to respond to warrants requiring the production of data held outside the United States.[38]

It is likely that the vast majority of documents obtained during a search will be electronic. It is important to agree to a process with the authorities for dealing with any electronic media that is privileged. In the United Kingdom, most investigative agencies have developed sophisticated procedures in this area. The SFO's policy and system for dealing with material covered by legal professional privilege (LPP) is explained in its Operational Handbook:[39]

> *When the SFO requires the production of material, or seizes material pursuant to its statutory powers, all material which is potentially protected by LPP must be treated with great care to:*
>
> - *Minimise the risk that LPP material is seen or seized by an SFO investigator or a lawyer involved in the investigation.*

36 Id.

37 See *In re Warrant to Search a Certain Email Account Controlled & Maintained by Microsoft Corp.*, 855 F.3d 53 (2d Cir. 2017), 2017 WL 362765 (2d Cir. 24 January 2017) (denying request for rehearing *en banc* but incorporating dissenting opinions explaining disagreement with original finding that Microsoft could not be compelled to produce data held in Ireland).

38 See e.g. *In re Search Warrant No. 16–960–M–01 to Google*, 2017 WL 471564 (E.D. Pa. 3 Feb. 2017) (ordering Google to comply with search warrants seeking data held on servers outside of the United States); *In re Info. Associated with One Yahoo Email Address that is Stored at Premises Controlled by Yahoo*, No. 17-M-1234, 2017 WL 706307 (E.D. Wis. 21 February 2017) (determining that a court can compel a service provider within its jurisdiction to disclose data within its control regardless of where the data is located); *Matter of Search of Content that is Stored at Premises Controlled by Google*, 2017 WL 1487625 (N.D. Cal. 25 April 2017) (compelling producing of data held on servers outside of the United States but distinguishing situation from Microsoft case because Google's storage of data outside the United States was not related to the location of the account holder).

39 See the unsuccessful challenge to this procedure in *R (McKenzie) v. Director of the Serious Fraud Office* [2016] EWHC 102 in which the essential question was whether, as a matter of law, the process for isolating files that may contain LPP material into an electronic folder for review by an independent lawyer must itself be carried out by individuals who are independent of the seizing body. The court held that the procedure set out in the SFO's Handbook for isolating material potentially subject to LPP, for the purpose of making it available to an independent lawyer for review, was lawful.

- *Ensure that any LPP material which is seized is properly isolated and promptly returned to the owner without having been seen by an SFO investigator or a lawyer involved in the investigation.*
- *Ensure that any dispute relating to LPP is resolved in advance of the material being seen by an SFO investigator or a lawyer involved in the investigation.*
- *Ensure that where an SFO investigator or a lawyer involved in the investigation inadvertently sees LPP material, measures are in place to ensure that the investigation and any subsequent prosecution is not adversely affected as a result. Care must always be taken that LPP material is not viewed by the SFO staff involved in the investigation.* [Original emphasis.]

The Operational Handbook then sets out a procedure for dealing specifically with electronic material that may be privileged. Under this procedure, the SFO will first notify the company's lawyers if it believes that IT assets it has seized might contain privileged material (in practice, it is prudent for the company's lawyers to advise the SFO of the potential existence of privileged material at an early stage). A list of search terms should be agreed (including names of lawyers, relevant firms, etc.) to enable the identification and isolation of the material for review by independent counsel. Independent counsel will review the material using search software and return only non-privileged material to the SFO investigative team to examine. It is normally possible to have productive discussions with investigators to determine the relevant search terms that might identify privileged material. It is then possible to make representations on the client's behalf to independent counsel about the extent of privilege. This procedure updates and works alongside the well-established 'blue-bagging' approach used for hard-copy materials that may be privileged, by which authorities will send seized documents that may be potentially privileged, sealed in an opaque bag, to the custody of an independent legal adviser (usually a barrister) for review.

The DOJ has utilised three different procedures for reviewing potentially privileged information, each of which requires a 'neutral' third-party to first review potentially privileged data.[40] In certain instances the court may review the data on its own. A court may also appoint a 'special master' to handle the review of privileged information. In other instances, a team of individuals referred to as a 'taint team' may be used to review the files. When a taint team is used, an ethical wall will be placed between the individuals who review the documents and those who are actually participating in the investigation. Importantly, courts have had differing reactions to the use of taint teams and may not always conclude that the procedures implemented to screen materials were sufficient.

40 See Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations available at https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf.

11.4 Disclosure of results of internal investigation

In most instances, a company will have to make expansive disclosures regarding its internal investigations to get full co-operation credit. The DOJ has issued guidance through the Yates Memorandum[41] and the FCPA Pilot Program[42] that explicitly states that companies will have to self-report on both the results of internal investigations and on individual misconduct to receive any co-operation credit. Whether such thorough disclosures are in the best interest of the company is something that will need to be determined in a timely manner.

11.4.1 Self-reporting of misconduct not yet known to regulators

A company's decision as to whether to self-report is often complicated. There may be opportunities for a company to internally address misconduct without it coming to light. However, it can be very difficult for a company to keep its misdeeds from being disclosed to the relevant authorities. Whistleblower rewards provide incentives for employees to report misconduct. Federal statute provides protections for whistleblowers,[43] and the SEC has recently imposed financial penalties on financial institutions that attempt to prohibit employees from seeking those bounties.[44] Disgruntled employees can report corporate misconduct as retaliation, to attempt to prevent prosecution of themselves or simply because they do not feel that the corporate is handling the issue appropriately via its internal process. In the United Kingdom, broadly speaking, those working in the field of financial services are subject to suspicious activity reporting obligations. This means that banks, accountants and transactional lawyers must make reports to the authorities of suspicions of money laundering (including acquiring assets which may be tainted by fraud or corruption). A failure to make a report is a criminal offence – as is tipping off the subject of the report (which in some instances may be the individual's own client). Investigative journalism and NGOs also continue to be important sources of information for regulators – as the recent 'Panama Papers' scandal has shown.[45]

A failure to self-report misconduct before it becomes otherwise known to the authorities can have a significant impact on the resolution of the corporate investigation. The US Attorneys' Manual (USAM) (which governs the conduct

41 Memorandum dated 9 September 2015 from Sally Quillian Yates re Individual Accountability for Corporate Wrongdoing available at https://www.justice.gov/dag/file/769036/download.

42 Memorandum dated 5 April 2016 re The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance available at https://www.justice.gov/opa/file/838386/download.

43 See Section 922(h) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C.A. § 78u-6(h)(1)(A) (2010).

44 See https://www.sec.gov/news/pressrelease/2017-14.html (announcing penalty imposed on Blackrock Inc. based on its inclusion of language in separation agreements requiring former employees to waive any incentives they might be entitled to for reporting the company's misconduct); https://www.sec.gov/news/pressrelease/2017-24.html (announcing penalty imposed on HomeStreet Inc. for improper accounting and steps taken to impede whistleblowers).

45 The Panama Papers are available through the ICIJ's (The International Consortium of Investigative Journalists) dedicated website: https://panamapapers.icij.org/.

of assistant US Attorneys during the course of civil and criminal investigations, including FCPA investigations) has been revised to provide that:[46]

> *Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure, both as an independent factor and in evaluating the company's overall cooperation and the adequacy of the corporation's compliance program and its management's commitment to the compliance program. However, prosecution may be appropriate notwithstanding a corporation's voluntary disclosure. Such a determination should be based on a consideration of all the factors set forth in these Principles.*

As we have already noted, under the FCPA Pilot Program, 'for a company to receive credit for voluntary self-disclosure of wrongdoing', the disclosure will have to be made 'prior to an imminent threat of disclosure or government investigations' and 'within a reasonably prompt time after becoming aware of the offense'. Moreover, the company will have to disclose 'all relevant facts known to it, including all relevant facts about the individuals involved in any FCPA violation.'

The Deferred Prosecution Agreements Code of Practice (DPA Code) issued by the SFO and CPS[47] indicates that, to be eligible for a DPA, a company will likely have to report voluntarily any misconduct within a reasonable time of becoming aware of it – and prior to it becoming known to the authorities. In fact, in both of the previous DPA cases,[48] the companies self-reported their misconduct to the SFO in circumstances where the SFO had no prior knowledge of the misconduct and, in all likelihood, would not have learnt about the misconduct if the company had not self-reported.

But, in the recent *Rolls-Royce* case, the company did not self-report to the SFO the conduct that led to the SFO's investigation. Instead, the SFO became aware of the need for an investigation through internet postings by a whistleblower. The fact that Rolls-Royce did not self-report weighed against the SFO offering a DPA; yet, Rolls-Royce chose to co-operate fully with the investigation after the SFO approached them, and undertook its own internal investigation (in close consultation with the SFO). In total, Rolls-Royce collected over 30 million documents and subjected them to electronic document review as part of this investigation. One of the main features of Rolls-Royce's co-operation was that it provided all materials requested by the SFO voluntarily, without the SFO having to compel it to provide information. Rolls-Royce also chose not to perform any legal professional privilege review over the documents (instead allowing independent counsel resolve issues of privilege), and worked with the SFO as the SFO used sophisticated search techniques to interrogate the data. This led to the SFO uncovering information that may not have otherwise come to its attention. Ultimately, SFO

46 USAM 9-28.900 (internal citations omitted).

47 Para. 2.8.2(i) DPA Code.

48 *SFO v. Standard Bank plc* (U20150854) and *SFO v. XYZ Ltd* (U20150856).

counsel described the extent of Rolls-Royce's co-operation with the investigation as 'extraordinary'.

While the decision to provide documents voluntarily to the SFO was one of a number of measures taken by Rolls-Royce to demonstrate its co-operation with the investigation, this decision was of fundamental importance to the court when deciding to approve the DPA. Rolls-Royce's voluntary disclosure of investigation documents therefore mitigated its failure to voluntarily disclose misconduct.

11.4.2 Production of reports of investigation

To obtain co-operation credit, prosecuting and government agencies require that companies provide the complete factual findings of an internal investigation, including relevant source documents. The USAM recognises 'the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct.'[49] The Yates Memorandum notes that:

> *[T]o be eligible for <u>any</u> credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their positions, status or seniority, and provide to the Department all facts relating to that misconduct.* [Emphasis added.]

The FCPA Pilot Program requires that to receive credit for voluntary self-disclosure, a company must disclose all relevant facts. Similarly, the DPA Code provides that co-operation will include 'providing a report in respect of any internal investigation including source documents.'[50]

Careful consideration should be given to the manner of disclosure of information. In the United States, the consideration for credit is that the relevant facts are disclosed. The format of the disclosure is irrelevant. The USAM makes clear that a company does not have to waive privilege to receive co-operation credit.[51] If a company chooses not to waive relevant privileges, it is unlikely to be able to share the investigative reports prepared by counsel conducting the investigation. Instead, it will have to carefully craft presentations that disclose only non-privileged facts. Preparation of such reports can be time-consuming and costly. Further, in preparing any written presentation materials the company will have to ensure that neither the mental impressions nor advice of counsel are included. Because there can be no claim that the materials are privileged, a company should also expect that they will have to produce presentation materials in any related civil litigation.

In the United Kingdom, there is currently much debate over the production of the first accounts of witnesses, which may have been taken by investigating attorneys. The SFO's preference is that these are taken so that legal privilege does not apply. It also indicates that it does not consider all privilege claims over interview

49 See USAM 9-28.720 ('Cooperation: Disclosing the Relevant Facts').

50 Para. 2.8.2(i) DPA Code.

51 See USAM 9-28.720.

materials to be made out under English law and is actively challenging such assertions. Where a valid claim for privilege exists, co-operation credit will be given for the disclosure of interview memoranda. A failure to disclose will be considered co-operation neutral. As Alun Milford, SFO General Counsel, has recently said, '[i]f a company's assertion of privilege is well-made out, then we will not hold that against the company: to do otherwise would be inconsistent with the substantive protection privilege offers.'[52] In two of the UK cases in which the court has approved DPAs, the company made oral disclosure only of the content of witness interviews.[53] However, Rolls-Royce chose to provide the interview memoranda to the SFO – even though it considered the memoranda to be privileged – on the basis of a limited waiver of privilege. This was another way Rolls-Royce used the voluntary disclosure of documents to counterbalance its failure to voluntarily disclose the misconduct. Other materials voluntarily provided to the SFO by Rolls-Royce included regular reports on the findings of the internal investigations; unfiltered access to the 'digital repositories or email containers' for over 100 past and present employees; general access to hard copy documents at Rolls-Royce; and key documents identified by the internal investigations. Finally, Rolls-Royce held off interviewing potential witnesses until the SFO had the chance to do so. How a company makes its employees available to investigating authorities is important, and this chapter will now turn to this issue.

Identification of witnesses to authorities 11.4.3

In connection with its initial assessments of whether to co-operate with authorities, companies will have to consider the implications of disclosing information about key employees. As noted above, US and UK authorities have indicated that co-operation will require disclosure of facts relevant to the misconduct of individual employees.

In the United States, authorities have recently made clear that obtaining facts relevant to individual prosecutions is a top priority. In the Yates Memorandum, the DOJ stated that '[o]ne of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.' It went on to identify and discuss in detail six key steps to strengthen the DOJ's pursuit of individual wrongdoing including:

52 Alun Milford, SFO General Counsel, 'Speech to compliance professionals' (Speech given to the European Compliance and Ethics Institute, Prague, 29 March 2016).

53 See e.g. *SFO v. XYZ* (Preliminary Judgment) Crown Court, Southwark, U20150856 (20 April 2016): '[C]o-operation includes identifying relevant witnesses, disclosing their accounts and the documents shown to them: see para. 2.8.2(i) of the DPA Code of Practice. Where practicable it will involve making witnesses available for interview when requested. In that regard, XYZ provided oral summaries of first accounts of interviewees, facilitated the interview of current employees, and provided timely and complete responses to requests for information and material, save for those subject to a proper claim of legal professional privilege.'

> *1. To be eligible for <u>any</u> co-operation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct.'* [Original emphasis.]
>
> . . .
>
> *2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.*

These principles have been incorporated into the USAM and into the FCPA Pilot Program. Additionally, the 'unequivocal co-operation' necessary to be eligible for a DPA in the United Kingdom includes identifying relevant witnesses, disclosing their accounts of the alleged misconduct and any documents shown to them and, where practicable, making those witnesses available for interviews by investigators[54] – together with ongoing co-operation with the authorities.

Once the individuals have been identified to the government or prosecuting authorities it may be difficult, if not impossible, for those individuals to continue working for the company. A company may feel pressure to terminate the employee or place that individual on leave, which could have a significant impact on the operations of a business unit. Even if the company does not terminate an employee under investigation, targets of a government investigation are likely to engage their own counsel who may advise the employee to stop co-operating with its employer – leading to a 'walk or talk' decision. Depending on the nature of any employment agreement, a company may have to advance the individual the fees and costs associated with individual representation. Also, since 2004, the United Kingdom has imposed an extensive Code of Practice for Disciplinary and Grievance Procedures on employers, which sets out standards of procedural fairness that a UK employer should comply with if it takes action that will detrimentally affect an employee's employment.[55]

See Chapters 13 and 14 on employee rights

11.5 Privilege considerations

In the United States, certain portions of internal investigations are protected by the attorney–client privilege and the work-product doctrine, and courts routinely uphold those privileges.[56] This can be true even where the purpose of an investigation is to ensure regulatory compliance, or where non-lawyers are involved in key parts of the investigation.[57]

Generally, the attorney–client privilege entitles a party to withhold from production (1) communications, (2) with an attorney, his or her subordinate or

54 DPA Code, para. 2.8.2(i).

55 ACAS 'Code of Practice on Disciplinary and Grievance Procedures' (2015) available at www.acas.org.uk/media/pdf/f/m/Acas-Code-of-Practice-1-on-disciplinary-and-grievance-procedures.pdf.

56 See *In re Kellogg Brown & Root, Inc.,* 756 F.3d 754 (D.C. Cir. 2014).

57 Id. at 760 ('In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance programme required by statute or regulation, or was otherwise conducted pursuant to company policy.') (citation omitted).

agent, (3) made in confidence, (4) for the primary purpose of securing an opinion of law, legal services or assistance in a legal proceeding. It applies to corporations as well as individuals, and therefore protects communications between corporate employees and a corporation's in-house and outside legal counsel on matters within the scope of the employees' corporate responsibilities. Communications between non-legal corporate employees can also be privileged where an attorney neither authors nor receives the communication, if the communication contains or refers to previously transmitted legal advice or identifies specific legal advice that the non-attorneys will seek from attorneys in the near future. Additionally, the work-product doctrine protects documents and tangible things, otherwise discoverable, prepared in anticipation of litigation and in connection with a threatened or pending government investigation. The doctrine can apply to documents prepared by both attorneys and non-attorneys. Attorney notes, research, and compilations of background materials, memoranda, investigative reports, witness statements; and materials prepared by non-legal personnel such as investigators are examples of the types of documents that may be protected. Work-product containing an attorney's mental impressions is referred to as 'opinion' work-product and is afforded greater protection than other 'ordinary' work-product.

In the United Kingdom, privilege attaches to (1) confidential communications between a lawyer and his or her client for the purpose of seeking and receiving legal advice in a relevant legal context, including factual reporting (legal professional privilege), and (2) confidential communications between a lawyer and his or her client and/or a third party or between a client and a third party, provided that such communications have been created for the dominant purpose of obtaining legal advice, evidence or information in preparation for actual litigation, or litigation that is 'reasonably in prospect' (litigation privilege). English case law has long called into question the availability of litigation privilege for documents created during a regulatory investigation. In *Rawlinson and Hunter Trustees SA v. Akers*,[58] the Court of Appeal upheld a High Court decision that:

> *The mere fact that a document is produced for the purpose of obtaining information or advice in connection with pending or contemplated litigation, or of conducting or aiding in the conduct of such litigation, is not sufficient to found a claim for litigation privilege. It is only if such purpose is one which can properly be characterised as the dominant purpose that such claim for litigation privilege can properly be sustained.*

In the recent decision of *Property Alliance Group Limited v. The Royal Bank of Scotland*,[59] the High Court confirmed that the test remained an objective assessment of the dominant purpose of collecting the information. In that case, where one party sought to obtain evidence for litigation, and misled the other parties to

58 [2014] EWCA Civ 136.

59 *Property Alliance Group Limited v. The Royal Bank of Scotland* [2016] 4 WLR 3 at [41]–[42].

a meeting to do so, the Court performed the objective assessment from the misled parties' point of view.

A key consideration is therefore the reason for the creation of the document. The Court of Appeal in *Rawlinson and Hunter Trustees* confirmed that where documents are created for multiple purposes, those purposes will not necessarily be independent of each other. However, the burden is on the party claiming privilege to demonstrate that the purposes are related and that the dominant purpose was for use in the conduct of litigation. This will protect communications with third parties outside the narrowly defined concept of the 'client' under English law. Even though this was not the context of the *Rawlinson and Hunter Trustees* case, some UK white-collar crime experts consider it as authority for the proposition that employee accounts provided during an internal investigation with a view to making a self-report may not be privileged.[60] Whether such a challenge to privilege in employee accounts is successful will depend on the case.

Another key consideration is when litigation in a criminal context is reasonably in prospect. This point was explained in the recent High Court case of *Director of the SFO v. ENRC*.[61] The court held that a company must have uncovered actual evidence of wrongdoing before it could successfully assert that adversarial proceedings were in reasonable contemplation. Andrews J also distinguished between the reasonable contemplation of a criminal investigation and the reasonable contemplation of a prosecution. Documents produced in contemplation of the former only would not be privileged. This decision makes it harder to assert litigation privilege over documents generated in the course of an internal investigation, particularly where a company wishes to instruct lawyers to investigate matters that may suggest criminal wrongdoing, but has not yet uncovered evidence of wrongdoing. Authorities in both the United States and the United Kingdom have made clear that a company does not need to waive any applicable privileges to receive co-operation credit. However, it may be difficult for attorneys to find ways to present all facts discovered during an internal investigation in a manner that does not disclose privileged information.

See Chapter 35 on privilege

In presenting the underlying facts of an internal investigation, a company must be mindful of the inherent risk that such a presentation will be deemed a privilege waiver in any subsequent proceedings. If a disclosure of privileged information to a federal office or agency is deemed intentional, the privilege will be waived in any federal or state proceeding.[62] However, if a disclosure of privileged information is unintentional, it will not create a broad waiver so long as the holder of the privilege took steps to prevent the disclosure and then promptly took reasonable steps to seek return of any inadvertently disclosed information.[63] Accordingly, if

60 See e.g. S Balber, J O'Donnell and E Head, 'Cross-border overview: maximising privilege protection under US and English law' in *The Investigations Review of the Americas 2016* (Global Investigations Review, 2015).

61 *SFO v. ENRC* [2017] EWHC 1017 (Ch).

62 See Fed. R. Evid. 502(a).

63 See Fed. R. Evid. 502(b).

a company decides that it does not intend to waive privilege, it should devise reasonable steps that highlight the company's decision not to waive privilege, including providing written notice of the intention not to produce privileged materials in any letter or other correspondence that accompanies a document production. Courts in England and Wales have held that a company can share the contents of a privileged communication with a regulator or other third party, keeping the privilege intact, so long as this desire is made clear, the disclosure is confidential, and the communication is not proliferated widely.[64]

See Chapters 35 and 36 on privilege

Protecting confidential information 11.6

Companies producing information to the government should take steps to protect the confidentiality of that information. Although information produced in response to a grand jury subpoena must be kept confidential,[65] in the absence of a formal request, documents and testimony provided the DOJ, SEC or other government authority can be shared with others. In many instances, documents under the control of a government agency can be subject to requests made pursuant to the Freedom of Information Act (FOIA).[66] Further, documents typically shielded from disclosure by the FOIA and other regulations are not exempt from production to the United States Congress, which can, in turn, make the information public.

The procedures necessary to shield confidential information from disclosure can be quite complex. Each regulatory body has its own procedures for seeking confidential treatment of information. The SEC, for example, requires that each page of a document containing confidential information be stamped with a specific legend and that a request for confidential treatment go to the individual receiving the documents and the Office of Freedom of Information and Privacy Act Operations.[67] Many states have their own versions of the Freedom of Information Act governing the treatment of information provided to, among others, state attorneys general.[68] Further, while some congressional committees may implement their own procedures for seeking confidential treatment of information, an entity producing documents will have to consider what regulations apply to the information sought and whether the specific regulations prohibit disclosure in response to the request.

In the UK, the High Court confronted these issues in *Standard Life Assurance v. Topland Col*.[69] The SFO had disclosed information it had obtained through its section 2 powers to a Standard Life employee that it wished to interview. The SFO later discontinued the related investigation. Standard Life then used some of this information as part of civil proceedings against Topland. The court noted

64 See *Gotha City v. Sotheby's* [1998] 1 WLR 114 (CA).

65 Fed. R. Crim. Pro. 6(e).

66 5 U.S.C. § 552.

67 17 C.F.R. § 200.83

68 See, e.g., New York Freedom of Information Law, Public Officer's Law §§ 84-90.

69 *Standard Life Assurance Ltd v. Topland Col* (Rev 1) [2011] 1 WLR 2162.

that the SFO was not entitled to disclose any material obtained by it during an investigation except for the purpose of its investigation (which was the original purpose of the disclosure in this case). A person who wished to prevent disclosure of genuinely confidential information, either by the SFO or by a person SFO had disclosed documents to, would need to rely on judicial review proceedings or seek an injunction to prevent a breach of confidence. This suggests that, to avoid relying on these indirect remedies, a company should discuss with the SFO before disclosure how the SFO might control the further dissemination of confidential or sensitive documents. Safeguards may include the SFO returning the documents following a short time, or notifying a disclosing party before the SFO intended to disseminate documents further.

11.7 Concluding remarks

Companies have an incentive to co-operate with a government investigation, especially if co-operation credit does not necessarily require self-reporting of the misconduct. But, self-reporting will assist companies alongside the voluntary provision of relevant materials. The additional advantages of co-operation – control of the investigation process, orderly production of materials and managing press intrusion – are likely to be great when weighed against the disruption and publicity of formal actions including raids, arrests and prosecutions. In cross-border investigations, companies will need to devise due process safeguards to protect the rights of individuals and respect local law requirements. Ensuring local law specialists are instructed to work as part of a multidisciplinary team will be key.

12

Production of Information to the Authorities: The In-house Perspective

Femi Thomas and Tapan Debnath[1]

Introduction 12.1

Although less common for SMEs, it is not unusual for large, particularly multinational, companies to find themselves weighing whether to voluntarily disclose information, or being compelled to disclose information to law enforcement or regulatory authorities. The variables to consider are many and nuanced. They include, without limitation, the potential impact on customers and the business, the nature and pervasiveness of the wrongdoing, and whether mandatory reporting obligations arise. This chapter considers some of the key legal and practical considerations implicated when a company produces information to the authorities.

Initial considerations 12.2

The company should as early as possible seek to establish:

- Its status in the inquiry – is it a suspect or witness? This is not always communicated or readily discernible because the authority, itself, might not have decided either way, or might not wish its view to be known in the early stages of an investigation. There may, however, be some clue in how the authority has gone about obtaining the information. For instance, in the UK an SFO dawn raid on company premises implies that the SFO, and the courts, have reasonable grounds to believe, based on some assessment of facts, that it is impracticable to use less intrusive production order powers or doing so creates a risk of destruction of evidence. As such, unannounced raids tend to indicate, though not conclusively, that the company is a suspect.

1 Femi Thomas is global head of investigations and Tapan Debnath is legal counsel in Nokia Corporation's ethics and compliance investigations department. The views expressed are the authors' (or as otherwise attributed) and do not represent the views of Nokia Corporation.

- Are any of the company's employees suspects, and do they pose any ongoing risks to the business?[2] When employees are suspects, a company should ensure that data collection and any internal investigation is conducted without tipping off the implicated employees or 'trampling over the crime scene', while adhering to local data protection and labour law.
- Which authority is making the request, and is the request reasonable? Some authorities are more aggressive than others; this is worth factoring in when setting the response strategy. Equally important is determining whether there are multiple authorities involved. Requests from less familiar jurisdictions, where the independence of prosecutors and the judiciary might be less assured, pose additional questions: Is there a political or monetary motivation? Are employees at risk of arrest and imprisonment without adequate due process? And what are the rules of corporate liability, if any? A request for information should be carefully reviewed to ensure that it appears reasonable in terms of scope and the basis for the request, and should state the power under which the request was made.

12.3 Data collection and review

The company will at an early stage start to think about whether it has the responsive data and the appropriate process for collecting it. Data from digital devices to be produced to the authorities should be collected in a forensically sound way. At a high level, this means that the collection is carried out by skilled persons who can retrieve and preserve whole images of various types of devices in a manner that is repeatable with consistent results. It is vital to capture all relevant material, and having a systematic and methodical approach, which is clearly recorded, will help. The investigation support team should include someone with detailed knowledge of the company's IT systems and structure and will be, preferably, experienced in data extractions.

A company is also likely to want to understand for itself what the collected data reveals. The data review is invariably the most time-consuming and costly part of the production exercise. It is therefore imperative to try to agree realistic deadlines with the authorities at the outset and to communicate promptly if any slippage is anticipated. Most authorities will want a written record, usually in the form of witness statements, of the methodology used in the data collection and imaging, the process and rationale behind any filtering of the data, and how the review was conducted and the instructions given to the reviewers.

A corporate can manage the costs incurred in a data collection and production exercise by: having an established panel of specialist law firms, which should yield discounted rates, but maintaining flexibility to go off-panel as individual case needs dictate; outsourcing the data collection and document review to

2 While change of company personnel (and culture) is a desirable outcome in most cases involving serious wrongdoing, it will probably need to be considered after a thorough review of the issues.

professional service providers or even doing it in-house[3] if there is the requisite capability, instead of the law firm doing it; ensuring that the document review is as focused as possible through appropriate filtering and, possibly, use of AI technology; setting a budget at the outset and sticking to it unless extensions are approved; and monitoring costs monthly to ensure the exercise remains within budget.

Principal concerns for corporates contemplating production 12.4

There are numerous, often competing, concerns when a company produces documents to the authorities. One obvious but important concern is the impact that the disclosed material might have on (1) the authority's investigation, or even pre-investigation, and (2) the company's status with the authority. Another concern is to identify and then to protect any intellectual property, trade secrets or proprietary information, or commercially sensitive information that might be contained, or decipherable, from the material to be disclosed. This concern will accentuate when the company is co-operating with several international and domestic authorities, or where multiple authorities have taken, or could take, an interest. The disclosed material could end up being shared between the various authorities, which could result in the limitations on use that the disclosed material can be put to in one jurisdiction not applying in another.[4]

Special care must be taken at the start and throughout the investigation to have clear records of who is authorised on behalf of the company to instruct and receive advice from external lawyers, and is therefore the client. The purpose of any internal investigation is important also and should be recorded. Is it to obtain legal advice on the company's position in relation to a law enforcement or regulatory authority's interest? Is it to gather information for the purposes of a disclosure to the authorities? Or, is it to do with actual or contemplated litigation, or a combination of reasons?

In view of the UK requirement for adversarial litigation to be in reasonable contemplation for litigation privilege to be applicable,[5] which will not ordinarily be the case at the beginning of an internal investigation, it is necessary to try to protect sensitive communications through legal advice privilege. However, legal advice privilege only applies to communications between the lawyer and the client, or through their respective agents. The client includes those individuals who have on been authorised on behalf of the company to instruct lawyers and receive

3 Some companies have an in-sourced legal support function that handles, for example, initial review of contract terms, which can, with some training and guidance, be utilised to do the first document review in an internal investigation.

4 In *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017), the US Court of Appeal overturned the convictions and indictments of two LIBOR traders because, among other things, the testimony given by the defendants to the UK FCA under compulsion was used against them in their trial, which was held to be an infringement of the defendants' Fifth Amendments rights. This is an example of information given in one jurisdiction with statutory limitations on its use in that jurisdiction being used without limitation, initially at least, by another jurisdiction.

5 *Three Rivers District Council and others v. Governor and Company of the Bank of England (No. 6)* [2005] 1 AC 610, HL, para. 53 (*per* Lord Rogers).

advice from them. Eminent commentators suggest that employees to be interviewed by lawyers in an internal investigation should be expressly authorised by the company to communicate with the lawyers to receive legal advice so that the interview may be protected by legal advice privilege. However, doing so would void aspects of the US *Upjohn* warning. This would bring into question whether such an interview is protected under US privilege principles. Suffice to say that legal privilege in internal investigations is a real minefield, and there are no easy answers to how to deal with the currently expanding jurisdictional differences.

A company will also be keen to restrict the ability of third parties to use the information disclosed to the authorities in civil proceedings against the company. Such restrictions could be imposed by making clear at the time of production that the information is confidential and, when dealing with UK authorities, stated to be provided on a limited waiver of legal privilege or without prejudice privilege basis.[6]

Federal courts in the United States, however, are reluctant to recognise selected waivers of privilege in relation to documents produced as part of an investigation or prosecution.[7] The information may lose the protection of privilege and be subject to discovery by other parties.

See Chapter 36 on privilege, Section 5

Adherence to data protection principles is another important concern, especially when the information is being provided voluntarily and there is not the protection given by a document production order or subpoena, which usually overrides any local data protection rules.

12.5 Obtaining material from employees

There will often be a wide pool of employees, a few of whom might be 'suspects' or 'targets', who hold relevant information. It is important to first identify which, if any, of those employees should be notified of the data collection, bearing in mind the SFO cautioning against putting employees on notice and its desire to have the data collection undertaken with minimal risk of interference.[8] Local law on data collection and the company's own policies on data collection and the giving of notice or even obtaining the express consent of the employee to the collection will also need to be considered. The key is to weigh any risk of relevant information being destroyed, and displeasing the requesting authority, if notice of the data collection is given to employees against any specific local law requirements and internal data collection policies.

---

6 *Property Alliance Group Ltd. v. Royal Bank of Scotland plc.* [2015] EWCH 1557 (Ch) without prejudice privilege applied to negotiations with the FCA with a view to arriving at a settlement. The without prejudice rule applies to exclude negotiations genuinely aimed at settlement from being given in evidence.

7 See *In Re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002)

8 Speech by Alun Milford, SFO General Counsel, Annual Employed Bar Conference, 26 March 2014, available at: https://www.sfo.gov.uk/2014/03/26/corporate-criminal-liability-deferred-prosecution-agreements/.

It is common for employees to have personal material on work devices. If there are no reasonable grounds to believe that giving notice of a data collection exercise to an employee creates a risk that data will be destroyed, the employee could be instructed to separate personal material from work material before the device is copied. The personal material would then be safe from inadvertent disclosure to the authorities. If this separation of personal data is not possible because, for instance, the collection needs to be covert, then the filtering and review before disclosure, if appropriate, should provide adequate safeguards against personal data being handed over.

Less common is work material being stored on personal devices. If that same material also exists in a work device or on the company's servers, it can be collected from there rather than from the employee's personal device. Clearly, it is not possible for a company to covertly extract data from an employee's personal device but it may be possible to do so with the employee's express consent. Such situations should be catered for in the contract of employment and company internal policies.

As a best practice, companies should guard against this thorny issue of commingling of personal and business information by instituting appropriately tailored policies. It may not, however, be reasonable to expect that a company device will never be used for some personal purposes but companies should provide written limitations on the kinds of use that are acceptable and permitted. In any event, the transfer of business data through personal devices or email accounts should always be prohibited.

Material held overseas 12.6

Because of the global nature of business, information that is required by a law enforcement or regulatory authority might be held by the company's overseas subsidiaries – and in multiple locations at that.

When a company seeks to provide information it is not obliged to, or to make voluntary disclosure, it should assess whether this would expose it to potential claims of breaching the confidentiality or data protection rights of employees or third parties.

Despite a company's desire to co-operate with a subpoena or production order, there may be significant legal hurdles, such as blocking statutes, preventing it from providing the material.[9] There have been several US and UK court decisions that, applying the 'law of the forum' principle, ruled that the risk of prosecution for breaching an overseas blocking statute is not a reasonable ground for not complying with a court's order for discovery. In those circumstances, the company's lawyers must speak with the authority concerned, explaining the issues and

9 Such as, among others, the French, Swiss or Italian blocking statutes. Breach of the Swiss blocking statute has been prosecuted on several occasions, whereas breach of the French blocking statute has only been prosecuted once since inception in 1968. However, Sapin II has a provision for breach of the French blocking statute which leads some commentators to believe that it will be more readily enforced.

diplomatically suggesting that the authority consider obtaining the information through the MLAT route or through police-to-police information exchange. A legitimate alternative is available if the information also exists independently in another jurisdiction, which does not have blocking statutes, provided it had been transferred there previously for valid business or legal purposes and not to get around the blocking statute.

12.7 Concluding remarks

As explained in Chapter 11 of the book, there are many good reasons why a company might wish to take a proactive approach and voluntarily provide information rather than waiting for a subpoena or production order. It could, for example, give the best opportunity for maximising co-operation credit. Indeed, the senior UK judge granting the Rolls-Royce DPA cited voluntary provision of material as one of the ways Rolls-Royce demonstrated 'extraordinary' co-operation. Depending on the facts of the case, in the authors' view there could be little to no loss of credit by asking for a production order rather than voluntarily disclosing provided (1) there is early dialogue with the authorities and (2) the issues are reported before the authority learns of them separately through another source.[10]

In some circumstances a company might wish to think carefully about whether they need to demonstrate extraordinary levels of co-operation. One way to do so would be to waive legal privilege over certain class of documents to influence the company's eligibility for the United States Department of Justice's FCPA Pilot Program or a DPA.[11] The joint CPS and SFO Guidance on Corporate Prosecutions explains that 'genuinely proactive' self-reporting is a public interest factor militating against the prosecution of a company. A voluntary waiver of privilege is relevant to determining whether a company has genuinely and proactively co-operated with the SFO or other authority, and consequently to the assessment of whether it is in the public interest to prosecute or to invite the company to DPA negotiations. The company might therefore wish to think carefully about which documents it believes are truly legally privileged and whether in fact to assert legal privilege over them.

10 Rolls-Royce did not self-report but still received a DPA because of its 'extraordinary' co-operation. See *Serious Fraud Office v. Rolls-Royce PLC and another*, Case No. U20170036 (2017), paras. 21-22.

11 Of course, the implications of full or selective waiver of privilege must be very carefully thought through.

13

Employee Rights: The UK Perspective

James Carlton, Sona Ganatra and David Murphy[1]

The vast majority of employees implicated in an investigation will be suspended. Generally speaking, employers will rely on the increasingly common express provisions to suspend employees in the course of disciplinary investigations contained in the employment contract, staff handbook or disciplinary policies.

In the absence of such an express provision, employers may still suspend employees on the basis that it constitutes a reasonable management instruction not to work or attend the workplace in circumstances where serious allegations, particularly those of a regulatory nature, have been made or where relationships have broken down.

In such circumstances, however, employees may have greater grounds to challenge the suspension. English case law in relation to garden leave (when an employer requires an employee not to attend work during the notice period) suggests that if the employer does not have an express right to suspend an employee, the employee may have a legal basis for challenging the suspension if he or she can show that he or she needs to be able to use particular professional skills frequently to ensure that they are maintained and do not diminish through lack of use.[2] Even if the employee cannot show this, the longer the period of suspension, the more difficult it may become for the employer to justify it.

1 James Carlton and Sona Ganatra are partners, and David Murphy is a legal director, at Fox Williams LLP.

2 *William Hill Organisation Limited v. Tucker* [1998] IRLR 313.

Regardless of whether it has relied on an express right or not, employers must have reasonable grounds for any suspension and these grounds should be kept under review to ensure that the period of suspension is no longer than necessary.

13.1.1.2 What constitutes a reasonable ground for suspension?

Suspension may be reasonable if the individual is suspected of serious misconduct and his or her continued attendance at work creates a potential threat to the employer's business or its other staff or could have an adverse effect on the investigator's ability to investigate the matter appropriately. In the event of a legal challenge to suspension, an employment tribunal or court is likely to consider all the relevant circumstances, including the terms of the employee's contract, what the employer has said about the suspension, the length of suspension and any financial loss it is causing.

Most employers' disciplinary procedures are not contractual, and therefore a failure to follow them does not, generally speaking, constitute a breach of contract (unless the employee can show that the failure was a breach of the implied duty of trust and confidence owed by the employer). However, in the public sector, where contractual procedures seem to be more common, there have been circumstances in which employees have successfully obtained injunctions preventing their employers from proceeding with disciplinary proceedings where to do so in the particular circumstances would constitute a breach of contract.[3]

Given the potential for disciplinary action to have significant adverse consequences on the careers and finances of employees working in regulated sectors, in the coming years we may see employees pursuing creative legal arguments to obtain injunctions against disciplinary action. Such arguments might be based on the implied duty of trust and confidence, with the employees arguing that proceeding with disciplinary action in the particular circumstances would breach the duty.

In the United Kingdom, the statutory Code of Practice on Disciplinary and Grievance Procedures (the Code) published by the Advisory, Conciliation and Advisory Service (ACAS)[4] sets out the principles for handling disciplinary and grievance issues in the workplace. Its content in relation to investigations is written with internal investigations in mind, rather than investigations by an external third party, but its principles will be relevant to any disciplinary proceedings instigated by the employer and therefore to all investigations that might lead to disciplinary action. Individuals will not have any freestanding claim for any failure to follow the Code but employment tribunals take into account any such failures when considering relevant cases and the compensation to be awarded.

In practice, in a regulated environment such as the financial services sector, many employers will be far less concerned about compliance with the Code than they are about satisfying the demands and wishes of the regulators or prosecuting

3 *Mezey v. South West London & St George's Mental Health NHS Trust* [2010] IRLR 512.

4 www.acas.org.uk/media/pdf/f/m/Acas-Code-of-Practice-1-on-disciplinary-and-grievance-procedures.pdf.

authorities. Nonetheless, an individual who does not consider an investigation is being handled appropriately may find within the Code's principles some helpful points to refer to when explaining his or her concerns to the employer. In particular, that any period of suspension should be kept as brief as possible and should be kept under review.

Remuneration 13.1.1.3

It is usual for employees to continue to receive basic salary and benefits while an investigation is ongoing, irrespective of whether they are suspended from work. Unpaid suspension is rare and will not be an option open to the employer unless it has a contractual right to do so.

In the financial services sector, variable pay (such as annual bonuses and long-term incentive awards) often forms a significant part of an employee's annual remuneration and normally a proportion of variable pay is deferred and paid out over a number of years.

It is now common in the financial services sector to see provisions in employment contracts to the effect that variable pay will not be awarded or delivered if at the time of award or delivery the individual is subject to any kind of investigation. Similar provisions are usually also found within the relevant award plan rules.

Investigations can take many years so their implementation can have a significant financial impact on the employee, particularly as it can affect deferred remuneration from prior years, as well as the current year's bonus or long-term incentive scheme award.

It is not always clear from such provisions what happens to any variable pay that is not awarded or delivered if the investigation finds there has been no wrongdoing. When negotiating employment contracts, employees should seek clarity in the wording of the provisions that if an investigation finds no wrongdoing, the variable pay in question be awarded or delivered.

In 2016 rules were implemented relating to deferral and clawback applicable to variable remuneration awarded by banks, building societies and all PRA-regulated investment firms for performance periods beginning on or after 1 January 2016.[5]

In essence, the rules were intended to discourage excessive risk-taking and encourage more effective risk management.

As a result of those rules, in the financial services sector, for performance periods beginning on or after 1 January 2016, deferral (the period during which variable remuneration is withheld following the end of the accrual period) is extended to: (1) a minimum seven-year period with no vesting until three years after award for senior managers who are subject to the senior managers regime (SMR) (i.e., individuals who have the greatest influence over the strategic direction of the business); (2) five years for PRA-designated risk managers with senior, managerial or

5 As set out in SYSC 19D of the FCA Handbook in respect of dual regulated firms: https://www.handbook.fca.org.uk/handbook/SYSC/19D/?view=chapter.

supervisory roles; and (3) three to five years for all other staff whose actions could have a material impact on a firm (material risk takers).

At the same time, regulated firms must include *malus* provisions (i.e., arrangements that permit the employer to prevent vesting of all or part of deferred remuneration based on risk outcomes or performance) and clawback provisions (i.e., arrangements through which remuneration that has already vested is recouped) for seven years from the award of variable remuneration for all material risk takers. Importantly, both the PRA and the FCA clawback rules have been strengthened by a requirement for a possible three additional years for senior managers at the end of the seven-year period where a firm or regulatory authorities have commenced inquiries into potential material failures. In effect, therefore, employees operating at a senior level in the financial services sector who are subject to an investigation potentially now face a decade of uncertainty over their pay.

Guidance from the FCA provides that, in relation to issues relating to risk-management failure or misconduct, regulated firms are expected to consider cancelling or clawing back bonus awards in relation to those employees who could have been reasonably expected to be aware of the failure, misconduct or weakness at the time but failed to take 'adequate steps' or who, by virtue of their role or seniority, were 'indirectly responsible or accountable'.[6]

A key related issue is the operation of these *malus* or clawback provisions in the context of the buy-out of awards when an employee moves from one firm to another. For all buy-out contracts concluded on or after 1 January 2017, new employers are able to apply clawback or *malus* based on the previous employer's determination of misconduct or risk-management failings. Again, as a result, senior employees in the financial services sector who are subject to an investigation face further uncertainty and the possibility that previous employers can determine their future pay.

13.1.2 English law

Suspended employees are bound by the express terms of their contracts and by certain terms implied by law, including a duty of fidelity (which includes a duty of confidentiality) and a duty to obey lawful and reasonable orders.

At the same time, employers are also bound by an implied duty of trust and confidence. This duty comes into play when determining whether to suspend employees implicated in misconduct.

Employees have successfully argued that a failure to consider whether suspension could be avoided was a breach of the duty of trust and confidence owed by the employer in numerous cases, paving the way for a claim for constructive dismissal.[7] Such claims are often difficult to pursue but, if successful, release the individual from any post-termination restrictions in his or her contract.

6 https://www.fca.org.uk/publication/finalised-guidance/guidance-on-ex-post-risk-adjustment-variable-remuneration.pdf.

7 For example *Crawford and another v. Suffolk Mental Health Partnership NHS Trust* [2012] IRLR 402.

Accordingly, prudent employers should keep under continuous review the need for an employee to be suspended.

Representation 13.2

Need to collect information on behalf of client 13.2.1

Interviewing client 13.2.1.1

At the outset of an instruction from an individual, independent legal advisers (ILAs) should seek detailed instructions to clarify the full history of employment and determine the potential scope of the misconduct under investigation and the parties implicated. A key component of this stage is to assess the employee's relationship with the employer. Understanding the dynamics of the relationship at the outset will assist in the smooth running of the investigation and allow a better understanding of the support that is likely to be offered by the employer.

Requesting documents and information from: 13.2.1.2

Employer

An employee involved in an investigation (internal or external) may need to request that the employer provides documentation, access to witnesses or other support. This arises as during any period of suspension, the individual is often operating in a vacuum, likely to be prohibited from having contact with clients and colleagues and prevented from having access to the employer's IT systems, documents and premises other than to the extent permitted by the employer. From an employer's perspective these restrictions are crucial to ensuring that documentation has not been compromised and that potential witnesses or accomplices have not been warned. Indeed, such concerns will probably be as important for the employee.

There is unlikely to be an express or implied right that the employee can rely on such support from the employer.

In the context of an internal investigation, the employer would not want to provide carte blanche access to documentation and information to the employee and is likely to prefer that the employee provide his or her own account of the circumstances.

In the context of an external investigation by law enforcement authorities, the situation is more complex. It may well be in the employer's interests to co-operate with requests for assistance to gain some understanding as to the scope of the investigation and the potential repercussions. At the same time, the employer may have its own regulatory obligations in mind and may be required to co-operate with and disclose documentation to the regulator.

Any rights of the employer to access personal electronic devices used by the employee for work are likely to be set out in the staff handbook. Generally speaking, where such devices are routinely used for work purposes, employers will be permitted to seek access to them.

Law enforcement

In circumstances where a law enforcement authority has announced its intention to interview an individual, a request for a list of questions or topics of discussion together with relevant documentation should be made to the relevant body at the earliest opportunity. In practice, law enforcement authorities seldom provide more than a broad list of areas they wish to explore and often provide limited supporting documentation. Individuals should be advised at the outset that they are unlikely to receive detailed information from the law enforcement authority in advance of the interview and that further documentation is likely to be produced on the day of the interviews. There will be specific, limited circumstances, however, where law enforcement authorities are more receptive to such requests. For example, if the individual is no longer in employment and has no ongoing relationship with the employer or if the employer is no longer operating as a going concern, law enforcement authorities may be more amenable to requests for information as otherwise the employee will have no other avenue to properly prepare a case.

Other witnesses (and their counsel)

As noted above, individuals are likely to be prohibited from having contact with clients and colleagues during suspension. If an individual is aware of colleagues who would be able to provide assistance to clarify aspects of the case, appropriate action should be taken to contact them. Depending upon the ongoing relationship with the employer, in the first instance, it may be sensible to approach the employer to request details of the colleague's legal counsel (if one has been appointed).

13.2.2 Joint defence agreements

13.2.2.1 Between individuals and the company

On balance, in the vast majority of circumstances co-operation between the employee and employer will be mutually beneficial. From an individual's perspective, while there is a risk of self-incrimination, co-operation with the employer allows the employee to know how the investigation is progressing and whether external regulators are involved, and grants access to materials that are relevant and crucially the opportunity to engage with the employer in agreeing the outcome. Such co-operation often results in work-product produced by and communications between the parties and their legal advisers being protected by common interest privilege.

While perhaps not as common as in the United States, settlement discussions with law enforcement authorities in the United Kingdom are a growing trend. Although deferred prosecution agreements are not available for individuals in the United Kingdom at this time, there is no doubt that being party to settlement discussions with the employer will generally be advantageous to employees.

13.2.2.2 Between individuals and their counsel

In complex cases of misconduct, there are likely to be a number of individuals involved. There are clear advantages to ensuring communication lines are opened

and maintained with ILAs engaged by potential 'co-defendants'; such communications having the benefit of being protected by common interest privilege. The many advantages include the sharing of important information and documentation that others may have obtained, as well as the benefit of adopting a common approach with the employer to documentation requests. Employers are more likely to be receptive to common, and therefore more focused, information requests made by several employees rather than numerous different requests received at different times by each employee.

Indemnification and insurance coverage 13.3

Determining whether an individual is indemnified 13.3.1

Communications with the employer and company counsel 13.3.1.1

Upon instruction by an individual, clarification should be sought as to whether the employer will fund the costs of an ILA. From the employee's perspective, access to an ILA from the start of an investigation is essential (regardless of whether the employee is central to the allegations or on the periphery) given the potential dangers ahead. What may start off as the provision of an innocuous witness account to a regulatory authority may turn quickly into the employee being regarded as a suspect as new allegations of misfeasance surface.

Potential sources of right to indemnification 13.3.1.2

Employment contract, company policies, by-laws or local laws

It is generally very unusual to see rights of indemnification set out formally in employment contracts in the United Kingdom. In certain industries, however – for example, the financial services and media sectors – it is becoming increasingly common for employers to maintain formal policies setting out the circumstances in which they will indemnify employees' legal expenses. Such indemnification will be limited to situations where an employee is being investigated solely because of acts performed in the course of and within the scope of his or her employment.

Close attention should be paid to such policies and the restrictions set out in them. In particular, given the difficulties for an employer to determine the potential liability of an employee at the outset of an investigation, it is common for employers to provide indemnification for legal fees incurred at an initial stage while the scope of allegations is clarified and for the employer to have a right to stop further indemnification and seek reimbursement of earlier costs, for example, where the employee is found to have acted outside the scope of his or her employment.

Employers also, generally speaking, provide lists of approved law firms to act as ILAs and generally require employees to seek approval before appointing representatives not on the list.

Unlike other jurisdictions, English law does not provide indemnification rights to employees.

Insurance policies of employer

D&O insurance

At the same time, employees at a senior level may also benefit from directors' and officers' insurance.

The coverage of D&O policies should be carefully considered from both the employee's and employer's perspective to ensure that the policy covers investigations, prosecutions and related civil claims.

Generally speaking, UK-based D&O policies provide cover for 'formal' investigations. ILAs should clarify whether the definition of investigations also includes internal investigations and consider why the investigation has commenced. If an internal investigation has been commenced by the employer, for example, as a result of concerns over its own conduct and liability, other insurance policies, such as professional indemnity insurance, might be engaged. At the same time, the D&O policy might include an exclusion in relation to claims in connection with the performance or failure to perform professional services by or on behalf of any director or officer. In such circumstances, the professional indemnity insurance policy should become engaged. The exclusion of the D&O insurance and application of professional indemnity (or other related) insurance is frequently debated at the outset of investigations, particularly where there is concern about the requirement to pay deductibles under the D&O policy or where there are local insurance requirements under a global policy.

13.3.2 Advocating for indemnification when not otherwise clear

The appointment and funding of an ILA from the employer's perspective has clear benefits where it appears that the interests of both parties are congruent. It encourages the co-operation of the employee and assists in ensuring that certain communications with the employee can be made with the protection of privilege.

See Section 13.4

While indemnification policies are becoming more common, many employers choose not to have a formal policy and instead seek to enter into separate arrangements at the time of the investigation. This approach is attractive from the employer's perspective as it enables the employer to select when and how it will indemnify certain individuals without setting a precedent. In such circumstances, the employee should negotiate carefully to ensure that all potential costs and eventualities are covered.

13.3.3 Awareness of situations where indemnification may cease

13.3.3.1 Violation of undertaking to the company

Employer policies will set out the circumstances in which indemnification will cease. A common provision is the employee acting contrary to restrictions and requests set out in the agreement. For example, the indemnification policy or agreement may contain clauses requiring the employee to act in good faith in its dealings with the employer and regulatory authorities or to provide updates to the employer at given stages. Such undertakings should be highlighted in advance to

individuals and ILAs should ensure that information is provided to the employer and its counsel.

It is important to advise individuals at the outset that violation of certain provisions may also lead to the employer seeking reimbursement or clawback of fees already incurred.

Failure to co-operate with investigation 13.3.3.2

How to decide whether to co-operate where failure to do so will affect indemnification

Most indemnification policies or agreements will contain provisions setting out the need for full co-operation between the employee and employer. At various stages of an investigation, the employee should consider carefully whether it continues to be in his or her best interests to fully co-operate with the employer. As the investigation develops, matters may come to light that indicate the employee's interests conflict, or are likely to conflict, with the employer's. In such circumstances, ILAs should discuss with the employee the possibility of whether co-operation remains in the employee's best interests and the consequences that will flow from adopting a stance that is at odds with the employer.

Ensuring sufficient funds for protracted investigation 13.3.4

Cap on insurance policy 13.3.4.1

D&O policies should be reviewed at the outset and during investigations to ensure the scope and limitations of coverage are understood.

Generally, D&O policies include annual or total aggregate limits, or both. In circumstances where the employer and a number of directors are under investigation or where investigations are becoming protracted, it is not uncommon for the aggregate limit to quickly become exhausted. ILAs should ensure that the scope of any insurance cover is kept under constant review.

Commitment of company to continue indemnification 13.3.4.2

As previously noted, employers will continually assess whether it is appropriate to continue to indemnify employees under investigation. If it becomes clear that the employee has acted outside the scope of employment, the employer is unlikely to continue to provide support unless it would be in its interests to do so because, for example, there is a potential for related civil claims to be made against the employer.

Privilege concerns for employees and other individuals 13.4

In communications with other employees 13.4.1

Colleagues or people involved in underlying events 13.4.1.1

As a matter of English law, communications between an ILA and third parties will only be protected by privilege if they relate to an existing, pending or reasonably contemplated litigation (in other words, litigation privilege applies). This

See Chapter 35 on privilege

is not always going to be the case in the context of an internal, or indeed external, investigation.

As such, unless the former colleague or associate of the individual is also implicated in the allegations such that common interest privilege may arise in discussions involving their ILA, ILAs should avoid communicating with third parties. Even in circumstances where common interest privilege can be said to arise, this is a developing area of English law and therefore subject to change. ILAs should act with caution and ensure that the common interest between the parties is clearly recorded at the outset.

13.4.1.2 Company counsel

Communications between the employee and legal counsel instructed by the employer will not be privileged unless common interest privilege exists. Whether it exists will depend on the circumstances; even if it does, it will not necessarily encompass all communications with counsel.

Interviews conducted during internal investigations by the employer will not be privileged from the employee's perspective; the privilege, if it exists, lies with the employer.

See Chapter 35 on privilege

13.4.2 Use of employer email to conduct privileged conversations

13.4.2.1 With internal counsel

Employees should be wary of any communications with in-house counsel as such communications are unlikely to be protected by privilege.

See Chapter 35 on privilege

Unless the individual forms part of the client group identified within the employer[8] or unless litigation privilege applies, communications with the in-house counsel will not be protected by privilege.

13.4.2.2 With external counsel

Communications between an individual and an ILA will of course be protected by legal advice privilege. However, there are circumstances in which that privilege may be lost, particularly if it can be shown that the confidentiality in the communication has been lost as it is accessible by third parties.

On balance, it is inadvisable for an employee to use work email accounts to communicate with an ILA as it is likely (depending on the terms of any relevant IT policy maintained by the employer) to lead to a dispute that confidentiality in those communications has been lost.[9]

8 As required following *Three Rivers District Council v. Bank of England* [2003] EWCA Civ 474.

9 In *Shepherd v. Fox Williams LLP* and others [2014] EWHC 1224 (QB) it was held that the claimant remained entitled to assert privilege over documents even though they had been accessible to the defendant employer when they were sent to the work email address of an employee of the defendant.

14

Employee Rights: The US Perspective

Joshua Newville, Seth B Schafler, Harris M Mufson and Susan C McAleavey[1]

Introduction 14.1

Employees facing a corporate investigation have various rights that the corporation and the employees and their counsel should take into account from the moment they are made aware of the possibility of an investigation. This is the case regardless of whether a particular employee is a witness, subject or target. Employee rights also vary based on jurisdiction, the type of company (public or privately held), internal policies, the employee's seniority within the organisation and whether the government is or may be involved.

This chapter provides guidance regarding employee rights in the investigatory context. It highlights the issues and considerations that are unique to individual, rather than corporate, representation. In particular, this chapter addresses: (1) employee rights as provided by an employer and by federal and state law; (2) differences in employee rights in the context of an external (i.e., government-driven) investigation as compared with an internal investigation; (3) representation of individuals; (4) indemnification and insurance coverage for individuals; and (5) privilege issues particular to the representation of an individual.

Practitioners should be aware that this chapter is meant only to be an overview of United States law and that even within the United States, laws and court interpretation of those laws may vary by jurisdiction.

Rights afforded by company policy, manual, contracts, by-laws 14.2

Many companies have policies or guidelines relating to internal investigations, confidentiality, document collection, workplace searches, and/or indemnification,

1 Joshua Newville and Seth B Schafler are partners, Harris M Mufson is senior counsel and Susan C McAleavey is an associate at Proskauer Rose LLP.

among other areas, in their by-laws, handbooks or other policy documents. Employee contracts or offer letters may likewise contain provisions that pertain to employee rights. These documents should be consulted to determine what rights employees have during an investigation. For example, a company's equal employment opportunity and whistleblower policies typically protect employees from retaliation for participating in an investigation. Other policies provide guidance regarding data collection processes, monitoring of electronic communications, and searches of an employee's property or company-provided devices. In many cases, companies have policies concerning electronic communications or property that permit searches of employee property and workspaces as appropriate. In the absence of written policies, companies may have established processes that, among other things, require an employee to receive notice and to authorise certain types of workplace searches.

Increasingly common sources of information – such as an employee's social media postings, emails, voicemails and internet use, video surveillance and searches of an employee's office, desk and locker – raise special issues regarding employee expectations of privacy. As privacy law continues to develop, counsel should check the status of applicable law.

14.3 Rights afforded by US law

Various federal, state and local laws contain employee protections that can affect the course of an internal investigation. Absent a contractual agreement with an employer, such as a severance agreement, former employees do not have any legal obligation to assist a former employer in an internal investigation. Of course, former employees may be compelled to provide documents or testimony through a subpoena.

14.3.1 The right to be free from retaliation

Certain federal, state and local laws protect employees from being retaliated against for testifying, assisting or participating in an investigation. For example, a number of federal employment laws prohibit retaliation, including, but not limited to, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act, the Family and Medical Leave Act, the National Labor Relations Act, and the Occupational Safety and Health Act.

Several federal statutes have also codified whistleblower protections. The Sarbanes-Oxley Act of 2002 (SOX) prohibits retaliation against whistleblowers who (1) provide information to or otherwise assist in an investigation by a federal regulatory or law enforcement agency, any member of Congress, or any person with supervisory authority over the employee regarding any conduct that the whistleblower reasonably believes constitutes mail, wire, bank or securities fraud, a violation of any rule or regulation of the SEC or any federal law relating to fraud against shareholders, or (2) file, testify, participate in, or otherwise assist in a proceeding filed relating to alleged mail, wire, bank or securities fraud, violation of any rule or regulation of the SEC or any federal law relating to fraud against

shareholders.[2] The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)[3] created new anti-retaliation provisions for whistleblowers. Specifically, Section 922 of the Dodd-Frank Act provides anti-retaliation protections for whistleblowers who report possible securities law violations to the SEC.[4] Similarly, Section 748 of the Dodd-Frank Act,[5] amended the Commodity Exchange Act by establishing anti-retaliation protections for whistleblowers who report violations of the Commodity Exchange Act to the Commodities Futures Trading Commission (CFTC). In addition, the Consumer Financial Protection Act of 2010 (CFPA)[6] prohibits retaliation against employees for raising concerns about any violation of the CFPA that is subject to the jurisdiction of the Consumer Financial Protection Bureau.

The Dodd-Frank Act does not expressly authorise the SEC and CFTC to pursue anti-retaliation claims on behalf of whistleblowers. However, both agencies have adopted rules vesting themselves with authority to pursue enforcement actions.[7] In 2014, the SEC pursued an enforcement action against a registered investment adviser that allegedly removed a head trader from its trading desk and stripped him of his day-to-day trading and supervisory responsibilities after the company learned that the trader had made disclosures to the SEC.[8] The company settled the action only after agreeing to pay disgorgement of US$1.7 million, prejudgment interest of US$181,771 and a civil penalty of US$300,000.[9]

State and local fair employment practices laws may also contain anti-retaliation provisions.[10] These provisions sometimes can provide more robust employee protections. For example, following 2009 amendments, the Illinois Whistleblower Act now prohibits an employer from not only retaliating against an employee, but

2 18 U.S.C. § 1514A.

3 12 U.S.C. § 5301.

4 These provisions are codified in § 21F of the Securities Exchange Act of 1934, 15 U.S.C. § 77a (SEA). Courts are currently split about whether an individual must complain to the SEC to be covered by the anti-retaliation provision in the SEA. Whereas the Fifth Circuit has held that only individuals who provide information to the SEC are 'whistleblowers', the Second and Ninth Circuits have extended the anti-retaliation protection to individuals who have raised concerns about securities laws violations internally to their employers. Compare *Asadi v. G.E. Energy, LLC*, 720 F.3d 620 (5th Cir. 2013) with *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015); *Somers v. Digital Realty Trust*, 850 F.3d 1045 (9th Cir. 2017) (on appeal to the US Supreme Court, October term 2017, Dkt. No. 16-1276).

5 7 U.S.C. § 26.

6 Codified as § 1057 of the Dodd-Frank Act.

7 See 17 C.F.R. § 240.21F; 17 C.F.R. § 165.20 and Appendix A.

8 See In re Paradigm Capital Mgmt., Inc., Exchange Act Release No. 72,393, Investment Advisers Act Release No. 3857 (16 June 2014).

9 Id.

10 See California Whistleblower Protection Act, Cal. Labor Code §§ 1102.5 to 1105; Florida Private Sector Whistleblower Act, Fla. Stat. Ann. § 448.102; Hawaii Whistleblowers Protection Act, Haw. Rev. Stat. § 378-62; Illinois Whistleblower Act, 740 ILCS 174/20.2; Maine Whistleblower's Protection Act, Maine Law Tit. 26 M.R.S.A. § 839; New Jersey Conscientious Employee Protection Act, N.J.S.A. §§ 34:19-1-34:19-8.

also threatening to retaliate against an employee if the act or omission threatened would constitute retaliation under the Act.[11]

14.3.2 The right to disclose – prohibiting blanket confidentiality restrictions during an investigation

14.3.2.1 A whistleblower's right to disclose violations of law

Following the passage of the Dodd-Frank Act, the SEC promulgated a series of rules intended to provide certain protections to whistleblowers. Included among these is SEC Rule 21F-17, which prohibits any person from taking 'any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.'[12] In other words, companies subject to the SEC's jurisdiction may not take actions that prevent individuals, whether current or former employees, from reporting potential violations of securities laws to the SEC.

This rule has been broadly interpreted by the SEC and has resulted in several SEC enforcement actions. For example, in April 2015, the SEC settled an action against a company that had required employees to sign a confidentiality statement at the beginning of witness interviews conducted in the course of the company's internal investigations. The confidentiality statement 'prohibited [employees] from discussing any particulars regarding [the] interview and the subject matter discussed during the interview, without the prior authorization of the Law Department' and subjected employees to disciplinary action if they made unauthorised disclosures. Although the statement did not specifically reference reports to the government, the SEC concluded that the statement could have a chilling effect on employees considering making such reports.[13] The SEC has more recently penalised other employers who, in the SEC's view, adopted policies that could have a chilling effect on potential whistleblowers.[14]

The CFTC recently amended its whistleblower rules to conform with the SEC's rules. Specifically, the CFTC's rules now empower the agency to pursue anti-retaliation claims on behalf of whistleblowers and prohibit the use of

11 740 ILCS 174/20.2.

12 17 C.F.R. § 240.21F-17 (2011).

13 See *In re: KBR, Inc.,* Exchange Act Release No. 74619 (1 April 2015).

14 See *In re: BlueLinx Holdings Inc.,* Exchange Act Release No. 78528 (company assessed US$265,000 penalty based on restrictive severance agreements) (10 August 2016); *In re: Health Net, Inc.*, Exchange Act Release No. 78590 (company assessed US$340,000 penalty based on restrictive severance agreements) (16 August 2016); *In re: NeuStar, Inc.*, Exchange Act Release No. 79593 (company assessed US$180,000 penalty based on restrictive severance agreements) (19 December 2016); *In re: Sandridge Energy, Inc.*, Exchange Act Release No. 79607 (company assessed US$1.4 million penalty based on restrictive separation agreement) (20 December 2016); *In re: BlackRock, Inc.*, Exchange Act Release No. 79804 (company assessed US$340,000 penalty based on restrictive separation agreements) (17 January 2017) and *In re: HomeStreet Inc.*, Exchange Act Release No. 79844 (company assessed US$500,000 penalty based, in part, on a restrictive severance agreement) (19 January 2017).

confidentiality agreements and pre-dispute arbitration agreements that impede a whistleblower's communications with the CFTC.[15]

An employee's right to discuss the terms of employment 14.3.2.2

An employee's counsel should also be mindful of employee rights under the National Labor Relations Act, which protects the right of all non-supervisory employees (regardless of whether they are a member of a union) to discuss with co-workers discipline or ongoing disciplinary investigations involving themselves or fellow employees. The National Labor Relations Board (NLRB) has held that an employer may not give a generalised confidentiality instruction to witnesses in an investigation to protect the integrity of the investigation. Rather, an employer must first determine case by case whether in any given investigation, (1) witnesses need protection; (2) evidence is in danger of being destroyed; (3) testimony is in danger of being fabricated; or (4) there is a need to prevent a cover-up.[16] The DC Circuit Court of Appeals recently declined to address the NLRB's 'requirement of a case-by-case approach to justifying investigative confidentiality.'[17]

The right to representation 14.3.3

Legal representation 14.3.3.1

Generally, employees do not have a *per se* right to legal representation during an internal investigatory interview. However, employees may choose to obtain their own legal representation in an internal investigation. This is particularly the case when, among other things, employees have concerns that they may face personal legal risk (civil or criminal) as the result of an investigation, that their employment may be at risk, that the government may be involved or interested in the investigation, or where there may be a conflict between themselves and the company or their supervisors. As described in Section 14.4, the need for individual representation has become all the more acute given the United States Department of Justice's recent emphasis on prosecuting individuals in white-collar criminal cases.

Attorneys conducting the investigation generally may not speak to any witness represented by counsel in connection with the subject of the investigation without permission from the witness's counsel.[18]

Separate representation and pool counsel 14.3.3.2

Whether the company will agree to arrange for separate representation involves analysis of contractual and other indemnification rights and potential conflicts

15 17 C.F.R. § 165.20 and Appendix A.

16 See *Banner Health Sys.*, 362 N.L.R.B. No. 137, *3 (2015), aff'd in part 851 F.3d 35 (D.C. Cir. 2017).

17 *Banner Health Sys. v. N.L.R.B.*, 851 F.3d 35, 44 (D.C. Cir. 2017).

18 See Model Rules of Prof'l Conduct r. 4.2 ('In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorised to do so by law or a court order.')

of interest. For current or former senior officers and directors, advancement or indemnification of defence costs may be required by corporate by-laws or employment agreements. Costs may or may not be covered by insurers, depending on the terms of the relevant policies and the status of the investigation. Legal costs incurred in an internal investigation are often outside the scope of coverage.

See Section 14.6

See Section 14.6.1.2

Arranging for separate counsel for employees may benefit the entity in terms of co-operation credit with the government. The employees are protected by separate representation that is bound to act in their best interests. The entity may have greater credibility when reporting results of any inquiry if representation has been bifurcated.

In some circumstances, corporate entities arrange for 'pool counsel' to represent groups of current or former employees, to the extent they do not have conflicting interests. This arrangement can lead to reduced costs and greater efficiencies, and may facilitate information flow for the benefit of clients within the pool. However, if a conflict exists or arises between employees, the adverse client may have to be removed from the pool representation, or counsel may have to withdraw.[19]

14.3.3.3 Upjohn warnings

When investigatory interviews are conducted by company counsel (internal or external), *Upjohn* warnings, also known as corporate *Miranda* warnings, should be provided to employees by company counsel at the beginning of each interview. Derived from the United States Supreme Court case *Upjohn Co v. United States*,[20] an effective *Upjohn* warning puts the employee on notice, at a minimum, that: (1) the company's counsel (whether in-house or outside counsel) represents the company and not the employee being interviewed and, as such, an attorney–client relationship has not formed with the investigating attorney; (2) facts are being gathered to provide legal advice to the company; and (3) the investigation is confidential and covered by the attorney–client privilege but, critically, that the privilege belongs solely to the organisation and not to the employee, and the company may decide to waive the privilege and disclose the discussion to a third party, such as the government, without notifying the employee. Employees should also be given an opportunity to ask questions about the *Upjohn* warning and about the investigating attorney's role.

Upjohn warnings commonly include a request by company counsel to keep the discussion during the interview confidential. When giving *Upjohn* warnings, however, companies should *not* suggest that employees are prohibited from discussing the underlying facts with the government, as noted in the discussion above regarding SEC Rule 21F-17, or with the employee's own lawyer.

See Section 14.3.2.1

Similarly, employees and counsel representing employees should be aware of the NLRB's restriction on blanket confidentiality directives and its requirement

19 See ABA Model Rules, Rule 1.7, Comment 4.

20 *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

that counsel be able to articulate how any of *Banner Health*'s four accepted bases for confidentiality apply to the particular investigation.

See Section 14.3.2.2

Counsel may consider providing *Zar* warnings to employees,[21] stating that information they provide may be turned over to the government, and that the employee could be prosecuted for possible obstruction charges if false information is provided. In a handful of cases, the government has successfully brought obstruction of justice charges based on misleading statements during the course of internal investigations, under the theory that the individual knew that the misleading information would be provided to the government. *Zar* warnings are not required by law. They are generally provided in the interest of fairness to the employee, taking into account the DOJ's focus on individuals. However, counsel must weigh the potential chilling effect on free flow of information as a result of the warning, as well as the risk that the government may later view the company as having 'overwarned' its employees.

Weingarten rights 14.3.3.4

Union-represented employees have a right to a union representative when questioned during an investigation if the investigation could lead to disciplinary action.[22] However, an employer is not obligated to inform an employee of his or her Weingarten rights or to ask whether an employee would like to have a union representative present at a meeting or interview. An employee who wishes to have union representation must affirmatively make such a request.[23]

The right to privacy 14.3.4

An employee's activities while using an employer's computer system are largely unprotected by personal privacy laws. Documents stored on an employee's work computer are generally considered to be company property, and many employers adopt written policies expressly stating that internet activity and emails sent or received on the employer's computer systems are not private and may be reviewed. Nevertheless, federal and state laws may be implicated in the collection of data and certain information that may be viewed as personal and private. For example, in *Stengart v. Loving Care Agency*,[24] the Supreme Court of New Jersey held that an employee could have reasonably expected that email communications with her lawyer through her personal, password-protected, web-based email account would remain private, and that sending and receiving them using a company laptop did not eliminate the attorney–client privilege.

21 *United States v. Zar*, No. 04-331 (ILG) (E.D.N.Y. 8 April 2004).

22 See, e.g., *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

23 Id. at 257.

24 *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010).

14.3.4.1 Recorded calls

States have enacted varying laws regarding listening to and recording phone calls. Forty-nine states have enacted legislation making certain kinds of electronic surveillance illegal. Ten states have laws that require the consent of all parties to a phone call or conversation in order for the conversation to be legally recorded. These are often referred to as 'two-party' consent states and include California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Montana, New Hampshire, Pennsylvania and Washington.[25] The other states with surveillance laws generally require the consent of only one party for surveillance to be legal. In other words, in these states a person can lawfully record a conversation that they are a party to without informing the other party.[26]

Employers should also be mindful that the NLRB has held that a company policy prohibiting workplace recordings may unlawfully interfere with the rights of employees to engage in concerted activity regarding their terms of employment.[27]

14.3.4.2 Social media

With the advance of technology, many companies conduct searches of social media as part of an internal investigation. Similarly, certain social media activity of an employee may prompt a corporate investigation. The search and review of social media communications and postings can implicate various privacy laws. Numerous states have enacted laws restricting employers from requesting social media passwords, requiring employees to access social media in the employer's presence or requiring employees to divulge personal social media.[28] While some states have some exceptions for investigations of employee misconduct, requiring employees to provide their employers with the login information for their social media accounts is generally always prohibited.[29] There are also laws that restrict

25 Cal. Penal Code § 632 (a)-(d); Conn. Gen. Stat. Ann. § 52-570d Fla. Stat. Ann. §§ 934.01 to .03; 720 Ill. Comp. Stat. ANN. § 5/14-1, -2; Md. Code Ann. Cts. & Jud. Proc. § 10-402; Mass. Gen. Laws Ch. 272, § 99; Mont. Code Ann. § 45-8-213; N.H. Rev Stat. Ann. §§ 570-A:2; 18 Pa. Cons. Stat. §§ 5702, 5704; Wash. Rev. Code §§ 9.73.030 to 9.73.230.

26 See, e.g., Ariz. Rev. Stat. Ann. § 13-3005; D.C. Code Ann. § 23-542(b)(3); N.Y. Penal Law § 250.00(1); N.J. Rev. Stat. § 2A:156A-4(d); Ohio Rev. Code Ann. § 2933.52(B)(4); Tex. Penal Code Ann. § 16.D2(c)(4).

27 *Whole Foods Mkt., Inc. and United Food and Commercial Workers, L. 919 et al.*, 363 NLRB No. 87 (2015), aff'd *Whole Foods Mkt. Group, Inc., v. NLRB*, No. 16-0002-ag, 16-0346, 2017 WL 2374843 (2d Cir. 1 June 2017).

28 See, e.g., Cal. Lab. Code § 980; 19 Del. Code § 709A(b); Md. Code Lab. & Empl. § 3-712(b)(1); Nev. Rev. Stat. § 613.135; N.H. Rev. Stat. § 275:74; 820 Ill. Comp. Stat. § 55/10(b)(1).

29 See, e.g., Cal. Lab. Code § 980 (2012) (employer may require an employee to 'divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations,' but information must be used solely for the investigation); 820 Ill. Comp. Stat § 55/10 (2012) (employers may require employees to share specific content of personal online accounts (but not username and passwords) that has been reported to the employer for purposes of investigating employee misconduct); Wash. Rev. Code § 49.44.200 (2013) (employer may require an employee to share content (but not the

employers from encouraging an employee to add anyone to the list of contacts for his or her social media account.[30]

Employers who review information on social media sites can also implicate employee protections under the Stored Communications Act (SCA),[31] which prohibits unauthorised access to electronic communication services (ECS). At least one federal court has held that an employee's non-public Facebook posts are covered by the SCA.[32] Accordingly, employees who configure their Facebook and other social media privacy settings to restrict their posts from public access throughout the course of an investigation may benefit from the protections of the SCA. However, because only unauthorised access is prohibited under the statute, simply enhancing privacy settings may not be enough. An employer may be shielded from liability under the SCA if, for example, someone who is Facebook friends with an employee voluntarily provides the employer access to the employee's private posts.[33]

Of course, obtaining information that is available in the public sphere, such as through a Google search, would not typically implicate any laws or violate privacy rights of individuals.[34] Thus, concerns are raised only when an employer is seeking information that is outside of the public sphere or that can be learned only through 'friending' or obtaining access in contravention of privacy settings. Nevertheless, as these laws are evolving, it is critical for counsel to consider the state of local law.

Bring your own device (BYOD) 14.3.4.3

Some companies have BYOD policies to address employee-owned electronic devices that employees use on the job. BYOD policies can take many forms but commonly include an employer's right to access, monitor and delete information from employee-owned devices. These policies can raise employee privacy concerns because while the employee owns the device, the employer will want to maintain a certain degree of control over the use of the device to protect confidential information. When faced with an employer who requests to search an employee's mobile phone, tablet or other device, practitioners should always ensure that these searches conform with company policies and applicable law and are appropriately limited in scope. Consideration should be given to screening and search procedures to maximise location of relevant information and protection of non-relevant personal information.

---

login information) from his or her social media account as necessary to comply with applicable laws or investigate employee misconduct).

30 See, e.g., Col. Rev. Stat. § 8-2-127(2)(a). For example, under these rules, during an investigation, an employer cannot ask or require an employee to 'friend request' another employee on Facebook so that the employer can search through that employee's personal social media account.

31 18 U.S.C. § 2701 (2002), et seq., contained in Title II of the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510 (2002), et seq.

32 *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F. Supp. 2d 659, 669-71 (D.N.J. 2013).

33 Id.

34 See, e.g., *Doe v. City of N.Y.*, 15 F.3d 264, 268 (2d Cir. 1994).

14.4 Employee protection in internal versus external investigations

A number of different considerations come into play when an investigation involves – or has the potential to involve – external entities such as the government. In the United States, the Department of Justice (DOJ) has placed an emphasis on prosecuting individuals in white-collar cases. The DOJ has sent a strong message to companies that to obtain co-operation credit from the government in cases involving potential corporate culpability, companies should voluntarily disclose misconduct to the government and co-operate in the government's investigation. The government expects that companies will provide substantial facts regarding individuals potentially responsible for unlawful conduct.

14.4.1 Focus on individuals' conduct in investigations

The DOJ's renewed focus on individuals was recently set out in a memorandum by former Deputy Attorney General Sally Yates in September 2015, the 'Yates Memorandum'. At times, the DOJ may request that a company wait to individual employees until after the government interviews them (a 'de-confliction' request), further highlighting their focus on individual culpability. Counsel for individual employees, therefore, must keep this in mind as they consider the degree and nature of any co-operation with the company's investigation.

See Chapter 10 on co-operating with authorities

Employees and their counsel also should be mindful that while individuals have a right under the Fifth Amendment of the United States Constitution not to incriminate themselves, employers can require employees to co-operate fully during an investigation and can discipline or discharge them for failing to do so, even if the employee's basis for refusing to answer a question is self-incrimination.

Similarly employees and counsel should be aware that though company practices or policies may grant employees certain rights or protections in internal investigations, most policies contain a carve-out or other provision for requests from the government or for disclosures otherwise required by law (e.g., when the company is responding to a grand jury subpoena). For example, companies may be required by the government, via a subpoena, to produce personal employee information (e.g., emails, personnel files, telephone records).

14.4.2 The Fifth Amendment and compelled testimony

The Fifth Amendment provides that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.' In *Kastigar v. United States*, the US Supreme Court held that the government can compel testimony from a witness over his or her assertion of the Fifth Amendment only if it grants that witness immunity against direct and derivative use of the compelled testimony.[35] Under *Kastigar*, if an individual's testimony is so compelled, and that individual is later prosecuted for an offence related to that testimony, the government has the 'heavy' burden of showing that it 'had an independent, legitimate source for the disputed evidence.'

35 406 U.S. 441, 442 (1972).

The *Kastigar* principles also prohibit, in a US criminal prosecution, the direct or indirect use of a compelled statement made by a defendant to a foreign authority. Practitioners should keep in mind, however, that civil regulatory agencies are generally not prohibited from use of foreign compelled testimony. Certain non-US regulators, such as the UK's Financial Conduct Authority (FCA), do not generally allow a witness to assert the right against self-incrimination. Instead, failure to testify can potentially lead to imprisonment, while the compelled testimony is subject to 'direct use' – but not 'derivative use' – immunity.

Whether compelled non-US testimony can be used in a US criminal prosecution was recently addressed by the US Court of Appeals for the Second Circuit in *United States v. Allen*, a case brought in connection with the LIBOR scandal. In *Allen*, the defendants had previously been compelled to testify before the FCA before they were prosecuted in the US. The US Court of Appeals dismissed the defendants' indictment because prosecutors had relied on a witness who had been exposed to (and had read) the defendants' prior compelled statements. The Second Circuit held that the Fifth Amendment's prohibition on the use of compelled testimony applies even when a foreign sovereign has compelled the testimony. The court explained that, when the government makes use of a witness who has been exposed to a defendant's compelled testimony, *Kastigar* requires the government to prove 'that the witness's review of the compelled testimony did not shape, alter, or affect the evidence used by the government.' A generalised denial of taint did not satisfy the government's burden.

Representation 14.5

Need to collect information on behalf of client 14.5.1

Interviewing client 14.5.1.1

Prior to conducting an in-depth interview with an individual client, there are a number of steps counsel may want to undertake to ensure that the meeting is as efficient and effective as possible.

First, where appropriate, practitioners may request a briefing by company counsel about the subject matter, including not only a briefing about the individual client but also about the industry and relevant facts. This can be especially useful when the subject matter relates to a complicated industry or set of facts.

Second, practitioners should ask company counsel for all relevant documents, including documents on which their client appears, such as email correspondence and internal memoranda, as well as other background documents. Many companies will provide such documents.

Third, practitioners should ask the company if their individual client was previously interviewed by the company or any other parties and should request to be briefed on what their client said and to review memoranda drafted in connection with the interview.

Fourth, practitioners should ask their client about any relevant documents that he or she has access to and can provide.

Fifth, practitioners should familiarise themselves not only with documents provided by their individual client and by the company, but also with press reports, pleadings in civil and criminal actions related to the client, and any other relevant sources of information. These documents can be very useful in constructing an outline of topics to review with clients.

Sixth, prior to conducting the initial interview, counsel should construct an outline and, if possible, a chronology to ensure that all relevant topics are covered. This is especially crucial when clients are overseas and available time to conduct the interview is limited.

Finally, as noted in Section 14.5.1.2, if the government is already involved in the investigation and they are aware that counsel has been retained for the client, it may also be wise to speak with the government to understand the client's status as witness, subject or target and the basis for the government's interest.

See Chapter 10 on co-operating with authorities

Interviews themselves should cover a wide array of topics, including the client's background, their knowledge of the matters under investigation, inculpatory and exculpatory information, relevant knowledge of other individuals and the company, among other topics. Clients can also serve as useful experts to help counsel understand the company, the industry, and other pieces of relevant information. The interviews should serve as an opportunity to carefully assess the client's status as a target, subject or witness of the investigation, so as to construct the best strategy for the representation.[36] Counsel should also ask questions that help assess the degree to which the client can provide useful information to the government as part of an overall approach. For example, if a client's conduct is under investigation, counsel should consider with the client whether an appropriate strategy is to position the client as a co-operator against others.

14.5.1.2 Requesting documents and information from:

Employer

As noted, counsel for individuals should ask the company for documents relevant to their client. Companies often amass a significant documentary record as part of their investigation. Counsel, for example, may request that the company provide access to all of the client's emails and any other relevant documents, regardless of whether the client is on the documents. In seeking to understand what that record says about an individual client, practitioners should consider how and whether they can leverage company work-product and thereby create efficiencies. For example, if the company has conducted a comprehensive document review, company counsel can identify a more limited set of key documents, or it can provide all of the individual employee's documents along with coding to help guide

36 'A "target" is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.' U.S. Attorneys' Manual § 9-11.151. 'A "subject" of an investigation is a person whose conduct is within the scope of the grand jury's investigation.' Id. A 'witness' is someone that the government believes has relevant information but who is not considered to have any exposure in the investigation.

individual counsel's review. The sharing of such work-product may warrant entering into a joint defence or common interest agreement with the company, which is discussed in Section 14.5.2.

Law enforcement

If counsel has been contacted by the government in connection with the client, counsel should use the first interaction with the government as an opportunity to ask a number of questions. Counsel, for example, should ask whether the government considers the client to be a witness, subject or target. The status provided by the government will govern the advice that counsel provides to the client going forward. Counsel can request that the government provide a preview of the government's interest in the client. Counsel can ask the government to describe the topics and questions the government would like to discuss with the client. Counsel can also ask the government to provide documents (or a list of documents) that the government would like to review with the client. Other interactions with the government are highly fact- and jurisdiction-dependent. The degree to which the government is willing to share information in advance of an interview often depends on the office investigating the matter and whether it is a domestic or global investigation, among other issues. There are a number of other factors that will go into decision-making regarding future interactions with the government, including whether to agree to an interview at all and how to respond to a grand jury subpoena, among many other things.

Other witnesses (and their counsel)

Other witnesses in the case can also be a useful source of information. If they are represented by their own counsel, the wisdom of entering into a common interest or joint defence agreement should be explored with the other witness's counsel, depending on the facts or circumstances. If they are not represented, then counsel can contact that witness to ask if they would be willing to meet and answer questions. It is almost always better for such contact to be through counsel and not through the client.

See Section 14.5.2

Joint defence agreements 14.5.2

The sharing with a third party of communications or other documents protected by the attorney–client or work-product privilege can, in some circumstances, result in the waiver of those protections. Joint defence agreements (JDAs), whereby parties who share a common legal interest agree to share such communications and documents, can preserve attorney–client privilege and work-product protections and can therefore facilitate the flow of information between parties, creating important efficiencies. For example, a company under investigation by a government agency and an executive of the company may share a common legal interest. A JDA allows company counsel and counsel for the individual executive to share information with a lessened risk that such sharing would result in a waiver of the attorney–client and work-product protections. However, given

the sensitive nature of the activities they govern, JDAs must be approached with care, as the company and executive would be precluded from sharing information that they learn from one another with the government without the consent of the other party.

Counsel should consider whether to enter into an oral or written JDA. There is no requirement that such agreements be in writing. However, written agreements enable all counsel to consider, at the outset, the scope of the agreement, the extent to which the parties truly share a common defence interest, and how shared information will be treated. In a dispute over the existence or scope of the agreement – for example, if a member of the joint defence group subsequently chooses to co-operate with the government – a written agreement can prove valuable. Some courts have expressed a preference for written JDAs if only to ensure that all clients fully understand the implications of the agreement.[37]

It is less common for counsel to enter into a written JDA during the early stages of an investigation, especially if the entity has not determined the scope of the issues and if or how it may seek co-operation credit. However, when the investigation reaches a more defensive posture with the government, written JDAs may be more common. Questions that can be addressed under the terms of a written JDA include the scope of the agreement and the information to be shared, how and whether information can be used between the parties to the agreement if they become adverse, approved uses of information if a party becomes a co-operating witness with the government, and any circumstances under which a party is required to leave the agreement. Often an entity will demand a provision in a JDA that allows it to disclose information to the government to further company interests or meet regulatory or legal obligations. Under those circumstances, a JDA may still be beneficial to an individual, as long as counsel is aware of the risks.

On the other hand, oral agreements have the benefits of convenience – less time negotiating the minutiae of a written agreement to cover scenarios that may never occur – and of not being capable of production in the event they become part of a discovery demand. It is not often that JDAs become the subject of a court challenge, and many practitioners do not utilise written agreements.

Whether a JDA is ultimately reduced to writing or not, practitioners should remember that JDAs only preserve privilege and work-product protections – they do not protect otherwise unprivileged materials.

See Chapter 36 on privilege

14.6 Indemnification and insurance coverage

14.6.1 Determining whether an individual is indemnified

Determining whether an employee has a right to be indemnified, both for legal fees and for a potential judgment or settlement, is critical and can involve a

37 See, e.g., *United States v. Almeida*, 341 F.3d 1318, 1327 n. 21 (11th Cir. 2003) ('In the future, defense lawyers should insist that their clients enter into written joint defense agreements that contain a clear statement of the waiver rule enunciated in this case, thereby allowing each defendant the opportunity to fully understand his rights prior to entering into the agreement.').

number of steps. These can include communications with company counsel as well as review of various sources of indemnification or advancement of fees.

Communications with employer/company counsel 14.6.1.1

Counsel for individuals should engage in a conversation with the employer or with company counsel to determine whether the company will agree to indemnify the individual and what the scope of the indemnification entails. If the company agrees to indemnify, counsel should seek written confirmation.

Potential sources of indemnification 14.6.1.2

By-laws

A company's obligation to indemnify or advance defence costs with respect to claims arising in the course of the individual's official duties is normally contained in the company's by-laws, which must be carefully scrutinised to identify any procedural or substantive limitations on corporate indemnification (such as entering into a written undertaking to repay all advanced costs if it is determined the costs are not indemnifiable) with particular focus on advancement of defence costs prior to a determination of the right to be indemnified. There may also be supplemental, specially negotiated indemnification agreements with particular individuals, and indemnification obligations may sometimes be contained in an employment agreement. All of these sources must be carefully reviewed.

Local law of the state of incorporation

The local law of the state of incorporation can have a significant impact on the scope of permissible indemnification. For example, for companies organised under Delaware law, indemnification is mandatory where the officer or director was 'successful on the merits or otherwise in the defense of any action, suit or proceeding.'[38] In a criminal proceeding, 'anything less than a conviction constitutes "success" for purposes of DGCL § 145(c).'[39] Significantly, Delaware does not require the officer or director to have been 'wholly' successful, but merely requires that indemnification be provided 'to the extent' of success.[40] With respect to derivative actions, indemnification is allowed solely for defence costs, not for judgments or settlements that may result.[41]

Between these two poles of mandatory and prohibited indemnification, there is a wide range of permissible indemnification that gives corporations the discretion to indemnify officers or directors for conduct taken in a corporate capacity.[42] Delaware law also permits, but does not require, a corporation to advance defence

38 8 Del. C. § 145(c).

39 *Hermelin v. K-V Pharm. Co.*, 54 A.3d 1093, 1108 (Del. Ch. 2012).

40 13 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 3:17 (Perm ed. 1995).

41 8 Del. C. § 145(b). Such judgments or settlements, as well as defence costs, may be covered by insurance under Title 8 Del. C. § 145(g).

42 8 Del. C. §145(a).

costs prior to a determination of eligibility for indemnification.[43] Consequently, corporations generally define their indemnification obligations by charter, by-law, or contract.

In addition to state law, federal law may sometimes place limits on the scope of corporate indemnification. For example, the Federal Deposit Insurance Corporation Rule on Golden Parachute and Indemnification Payments[44] may restrict the power of depository institutions to provide indemnification for claims of regulatory violations.

Company policies

In addition to provisions in corporate by-laws, indemnification provisions are sometimes contained in employment agreements and employee handbooks. These additional sources should also be checked.

Insurance policies of employer

D&O insurance

Most corporations will have purchased some form of directors and officers (D&O) insurance to cover their directors and officers from claims for wrongful acts in the course of their official duties. The coverage may also extend to employees. Such policies will normally cover the corporate organisation (usually in excess of a deductible or retained amount) for its loss, to the extent it is indemnifying the individual insureds, and provide coverage directly to the individual where the company is not providing indemnification. The first recourse of the individual should be to demand indemnification from the company pursuant to corporate by-laws or other agreements or provisions. It is imperative to ensure that a prompt notice of claim has been provided to the insurance company to ensure that coverage is available in the event the company fails to indemnify for any reason. The definition of 'claim' in the policy may include written demands for monetary or non-monetary relief, or formal or sometimes informal investigations. The definition of this term may determine the point from which defence costs may be covered under the policy.

In addition to traditional D&O insurance, many companies have 'Side A' coverage that provides additional protection solely for officers and directors (sometimes further limited to independent officers and directors). Inquiry should be made concerning the existence of such policies and prompt notice of claim must be given to the insurer.

If there is any chance that an existing D&O policy will not be renewed, the existing policy will normally allow for notice of circumstances that may result in a future claim (as distinguished from notice of an existing claim). D&O policies that contain this option generally require that the notice identify specific circumstances that could give rise to a claim.

43 8. Del C. § 145(e).

44 12 C.F.R. § 359 (1996).

Other types of coverage

In addition to D&O policies, a company may have other types of policies that provide coverage for officers, directors and employees. These may include professional liability (errors and omissions, E&O) policies. All potential sources of coverage should be checked and notice given, if appropriate.

Advocating for indemnification when not otherwise clear 14.6.2

At times, the individual's right to indemnification may not be clear from corporate by-laws or other sources of indemnification rights. In these situations, counsel should be prepared to advocate for the benefits of indemnification. For example, for the result of an investigation to be considered credible, it may be necessary for the individual to receive independent advice and counsel without the potential for conflict with the corporation's interests. In appropriate circumstances, experienced counsel can engage in a degree of co-operation and share certain information with the company on a privileged basis that inures to the benefit of both parties. Practitioners should be aware that pressure from the government on companies not to indemnify employees, which may have marked government investigations in the past, has been held constitutionally improper and has been disavowed by the Department of Justice.[45]

Awareness of situations where indemnification may cease 14.6.3

Violation of company undertakings 14.6.3.1

As mentioned above, a company's obligation to advance defence costs prior to determination of entitlement to corporate indemnification may be conditional on a written undertaking to repay such costs in the event the costs are ultimately determined not to be indemnifiable. If the individual refuses to execute such an undertaking, the company may refuse to indemnify. Alternately, the company may be entitled to recoup its defence costs if the individual fails to abide by the terms of the undertaking (such as by failing to provide invoices on a timely basis) or if there is a determination of fraud or bad faith.

Assessing whether to co-operate with investigation 14.6.3.2

Counsel should consider various factors in determining the level of co-operation with the company under the circumstance of each case. These factors may include: (1) the willingness of the company to provide indemnification and other

45 See *United States v. Stein*, 435 F. Supp. 2d 330, 363 (S.D.N.Y. 2006), aff'd, 541 F.3d 130 (2d Cir. 2008) (holding that government policy of treating the payment of legal fees as a factor in favour of indictment 'discourages and, as a practical matter, often prevents companies from providing employees and former employees with the financial means to exercise their constitutional rights to defend themselves. . . . It therefore burdens excessively the constitutional rights of the individuals whose ability to defend themselves it impairs and, accordingly, fails strict scrutiny.'); McNulty Memorandum, available at: https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf ('Prosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment.').

repercussions of a failure to co-operate; (2) the possibility that the client will have no counsel if the client cannot otherwise afford representation; (3) the sliding scale nature of co-operation, which can be negotiated with the company; and (4) employment considerations. Counsel should make clear to the client that no matter who pays the bills, the lawyer always owes a duty of loyalty to his or her individual client.

See Chapter 10 on co-operating with authorities

14.6.4 Ensuring sufficient funds for protracted investigation

14.6.4.1 Cap on insurance policy

To the extent the indemnification proceeds are coming from insurance, there may be a cap on the amount of such proceeds. Typically (although not always) defence costs in D&O policies are part of, and not in addition to, the limits of insurance. That means defence costs will erode the limits of the policy that may be available to pay for any judgment or settlement. In addition, costs of other individuals or the company (to the extent the company is also incurring covered costs) may contribute to exhaustion of the available limits of insurance.

14.6.4.2 Commitment of company to continued indemnification

In addition, the ability or willingness of the company to pay indemnification expenses may not be unlimited. To the extent the company is unable to pay for indemnification expenses due to financial impairment, this may allow the individual direct recourse to Side A insurance coverage under a D&O policy.

14.7 Privilege concerns for employees and individuals

14.7.1 In communications with other employees or company counsel

Employees do not enjoy protections over their communications with anyone other than their individual counsel. Practitioners may wish to advise their clients not to discuss the matters under investigation with colleagues, people involved in the underlying events, company counsel and others.

It is possible that company counsel will request an interview of the client with the client's individual counsel present. Before agreeing to such an interview, however, counsel should explain to his or her client that the privilege will not attach to such communications although it may be possible to conduct such interviews under a JDA.

If a client has already been interviewed by company counsel, individual counsel should seek to obtain the substance of that interview and investigate whether a proper warning under *Upjohn* was given and whether the warning was adequately documented. An inadequate *Upjohn* warning or inadequate documentation of the warning may be a basis to limit the disclosure of statements made by the client in the interview. More specifically, if an individual was not provided a sufficient *Upjohn* warning, the individual can try to assert that it was his or her belief that an attorney–client relationship had developed and that, as a result, the company should be prevented from sharing the information or the government should be prevented from using the information, or both. Counsel should nonetheless

understand that prevailing on such an argument can be difficult. Most of the federal appellate courts have adopted a version of the *Bevill* test, which provides that executives or employees seeking to assert a personal claim of attorney–client privilege over communications with corporate counsel must demonstrate five factors: (1) that they approached counsel for the purpose of seeking legal advice; (2) that when they approached counsel they made it clear that they were seeking legal advice in their individual rather than in their representative capacities; (3) that counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise; (4) that their conversations with counsel were confidential; and (5) that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company.[46]

In communications with individual counsel paid for by employer 14.7.2

Employees' communications with their individual counsel are privileged regardless of whether counsel is paid for by the employer. Individual counsel owe a duty of loyalty to their individual clients, regardless of how counsel is being paid.

Use of employer email to conduct privileged conversations 14.7.3

With internal counsel 14.7.3.1

Communications with internal company counsel, if it falls within the parameters of the attorney–client privilege, will be the company's privilege and not the individual's privilege. However, in certain circumstances, the individual may seek to prevent the disclosure or use of the communication by asserting that it was his or her belief that the communication was privileged as to the employee. See Section 14.7.1

With external counsel 14.7.3.2

Best practices include advising individual clients to communicate with their personal counsel using personal email, as opposed to workplace email, as there is at least the risk that the employer could review those emails or that someone may argue that the use of a workplace email account resulted in a waiver of any applicable privilege. However, the law is mixed in this area, and the success of any such argument would be highly fact-specific.

46 See *United States v. Graf*, 610 F.3d 1148, 1159-1160 (9th Cir. 2010) (citing *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123-125 (3d Cir. 1986)); see also *United States v. Int'l Brotherhood of Teamsters*, 119 F.3d 210, 215 (2d Cir. 1997) (personal privilege depended on whether employee made clear that he sought legal advice on personal matters).

15

Representing Individuals in Interviews: The UK Perspective

Jessica Parker and Andrew Smith[1]

15.1 Introduction

This chapter considers the representation of individuals in three types of interview: interviews in corporate internal investigations, interviews of witnesses in law enforcement investigations, and interviews of suspects in law enforcement investigations.[2]

15.2 Interviews in corporate internal investigations

15.2.1 When should employees have their own lawyer?

In many corporate internal investigations, it is common for employees not to receive or be offered legal advice, either before or during their interviews. This is because the employee is not normally treated as a suspect in what is commonly referred to as a 'fact-finding investigation'. Their position is analogous to but distinct from an employee interviewed in disciplinary proceedings, in which an employee suspected of misconduct has no right to legal representation at the interview, but is entitled to be accompanied by a fellow employee or trade union representative.

However, in some corporate internal investigations, the corporate may recommend a lawyer (often called an independent legal adviser or 'ILA') who can

1 Jessica Parker and Andrew Smith are partners at Corker Binning.

2 By 'law enforcement investigations' we mean investigations by UK public bodies such as the National Crime Agency and regional police forces exercising a statutory function of investigating criminal offences. Some of these bodies also act as prosecutors, for example the Serious Fraud Office and the Financial Conduct Authority. In other cases, the Crown Prosecution Service will be responsible for prosecuting. There are other types of interviews in law enforcement investigations which fall outside the scope of this chapter, for example interviews of co-operating witnesses under the Serious Organised Crime and Police Act 2005.

represent the employee. Alternatively, the employee may prefer to benefit from legal advice, regardless of whether a lawyer has been recommended by the corporate.

Legal representation for an employee may be desirable in two main situations. First, if the employee risks self-incrimination or admitting regulatory breaches, there may be a conflict of interest between the employee and the corporate. In particular, conducting the interview without first offering the employee legal representation may place the corporate's lawyers in breach of their professional ethical duty not to take 'unfair advantage' of a third party.[3]

Secondly, legal representation for an employee may be desirable where the employee's acts and omissions determine the criminal or regulatory liability of the corporate, for example where the employee is the 'controlling mind' of the corporate or an 'associated person' for the purposes of the Bribery Act 2010.[4] In these circumstances, the corporate may consider that legal advice will enable the employee to render a more reliable account in an interview – an outcome that furthers the corporate's interests in helping it more accurately to assess its own exposure to criminal or regulatory liability.

The role of the employee's lawyer prior to the interview 15.2.2

While the lawyer will always owe professional obligations to the client (i.e., the employee), the corporate may require the employee to agree to the lawyer acting on restricted terms. Such terms may define the scope of the lawyer's work and outline circumstances in which the lawyer's fees will not be paid or can be clawed back from the employee (e.g., if the employee becomes a whistleblower or is charged with a criminal offence). There may be other terms dictated by the corporate's insurers. However, nothing in such terms can derogate from the lawyer's professional ethical duty to act in the employee's best interests.[5]

It is not uncommon for a single lawyer (or law firm) to be asked to act for a number of employees all of whom will be interviewed in the internal investigation. Whether this is permissible is purely a question of professional ethics.[6]

While the employee's lawyer must be independent from those conducting the investigation, it is nearly always beneficial for the employee's lawyer to form a constructive relationship with the corporate's lawyers. This relationship should enable the employer's lawyer to understand the allegations being investigated, the employee's perceived role in relation to the allegations, and whether the corporate has reported the allegations to a law enforcement body. The lawyer should seek comprehensive disclosure prior to the interview of all documents the employee

3 Outcome 11.1 of the SRA Solicitors Code of Conduct. However, whether this outcome is likely to be breached in a corporate internal investigation has not been explored in any case law, and will depend on precisely how the interview is conducted.

4 *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153; sections 7 and 8 Bribery Act 2010.

5 Fundamental Principle 4, SRA Code of Conduct.

6 See Chapter 3, SRA Code of Conduct: the solicitor proposing to act for two or more witnesses must be satisfied there is no conflict between them, or no substantial risk of a conflict arising in future, unless specified appropriate safeguards are observed.

will be asked about, and ensure that the employee has sufficient preparation time for the interview.

Clearly the employee's lawyer needs competence in the areas of law relevant to the allegations being investigated (e.g., bribery or the FCA's Senior Managers Regime). This competence will enable the lawyer to pre-empt the questions that are likely to be asked in the interview, to take meaningful instructions from the client, to structure those instructions in a logical fashion, and to assess how well the employee would perform in the interview. This may require separate advice on employment law as well as advice from other jurisdictions if the allegations are international in nature or the corporate has self-reported to overseas law enforcement bodies.

The work performed by the employee's lawyer should lead to two fundamental tactical decisions. First, is it in the employee's best interests to attend the interview? Second, if the employee attends the interview, how should the questions be answered to advance his or her best interests?

15.2.3 Advising the employee whether to attend the interview

In most investigations, employees are told that they have a duty to co-operate with the investigation under their employment contract. Failing to attend the interview will ordinarily lead to the employee being suspended or dismissed. However, this outcome should never be the sole or even the primary factor to consider when advising an employee. Of equal or greater importance is the impact of the interview on any existing or future legal proceedings involving the employee.

The employee's duty to co-operate with the investigation is not akin to a statutory compulsion.[7] Equally, however, employees cannot sensibly attend the interview and then elect not to answer certain questions on the basis that they will incriminate themselves. Electing to answer some questions but not others is overwhelmingly likely to lead to the same result as refusing to attend the interview, namely suspension or summary dismissal.

If by co-operating and answering all questions the employee self-incriminates or admits to regulatory breaches, the interview is unlikely to serve his or her best interests. Not only is the employee likely to be dismissed or suspended given the nature of the admissions (the same outcome that would have occurred had he refused to attend the interview), but the corporate will obtain a damaging interview record which could be handed over, and used, in a law enforcement investigation. The disclosure of the interview record could be compelled by criminal law enforcement bodies (assuming it is not privileged) or because the corporate may choose to waive privilege over the interview record as a hallmark of its co-operation. There is now a heightened risk of the interview record being compelled by a law enforcement body following the recent decisions on privilege in *The RBS Rights Issue Litigation*[8] and *Director of the SFO v. ENRC*.[9] In light of those

7 It is merely a breach of a private employment contract and carries no statutory penalty.

8 [2016] EWHC 3161 (Ch).

9 [2017] EWHC 1017 (QB).

decisions, the interviewee must be advised that he or she should only proceed with the interview if prepared to accept the real risk that a law enforcement body will ultimately review an audio recording or transcript of it, and potentially make important decisions about the status of the interviewee in any future criminal or regulatory investigation based on the answers given in the interview.

Whether the record of an interview in an internal investigation constitutes admissible evidence against the employee in legal proceedings has not been explored in any case law. However, there are analogous cases which suggest that, as long as warnings akin to *Upjohn* warnings are delivered at the commencement of the interview, the interview record would probably be admissible in criminal proceedings.[10]

Given that the interview record could be admissible against the employee, the employee's lawyer needs to balance the risk of dismissal or suspension against the risk of increasing the client's exposure to personal liability in criminal and regulatory proceedings. If the employee is able to deliver a credible account without self-incrimination or admitting regulatory breaches, it will ordinarily serve his or her interests to attend the interview. Equally, there are circumstances in which employees will be advised to attend the interview even though they will admit criminal or regulatory offences, for example, the employee was junior, the offending is relatively trivial, and the employee wishes to be able to say, in any subsequent legal proceedings, that he or she gave the employer an explanation consistent with what he or she now asserts to the law enforcement body. However, if the employee is likely to admit serious offences in the interview, then attending the interview simply to advance mitigation is unlikely to be advisable.

The role of the lawyer in the interview 15.2.4

An employee attending the interview will typically be advised that, to advance his or her best interests, answers should be concise, contain no speculation and provide no extraneous detail beyond that required by the particular question. Ideally, this process occurs organically and the lawyer does not need to intervene during the interview. Nonetheless, the lawyer's presence is important, and interventions may become necessary, so as to ensure that:

- the employee is asked questions that are clear and fair;
- the employee is given an adequate opportunity to answer the questions without interruption, intimidation or improper pressure;
- the interviewers do not misconstrue any answers given by the employee;
- the employee does not inadvertently waive privilege over advice;
- the employee can take advice on an ongoing basis about issues that arise during the interview or previously undisclosed documents which he or she is asked to comment on;
- an accurate record is kept of the questions and answers; and

10 *R v. Twaites and Brown* (1991) 92 Cr App R 106 CA; *R v. Smith* [1994] 1 WLR 1396; *R v. Welcher* [2007] Crim LR 804 CA.

- the employee raises all material facts, defences and mitigation identified during the preparatory work conducted with the lawyer.

15.3 Interviews of witnesses in law enforcement investigations

Law enforcement investigations are conducted under distinct statutory regimes, depending on the nature of the conduct under investigation and the agency conducting it.[11] However, in general terms, there are two types of witness interview: interviews conducted voluntarily and interviews conducted compulsorily.

15.3.1 Voluntary interviews

The majority of interviews are conducted without the witness being subject to legal compulsion. In other words, the witness is interviewed as a volunteer. While being interviewed voluntarily may seem attractive in that it suggests a co-operative attitude toward law enforcement, the record of the voluntary interview (including any admissions made by the witness) could be used in evidence against the witness in subsequent legal proceedings. In criminal proceedings, this risk increases if the witness has received legal advice prior to the interview, because it becomes less likely that a court would use its discretionary power to exclude the interview.[12]

If there is a risk, however remote, that the witness will self-incriminate in the interview, it is unlikely to be in the witness's interests to attend voluntarily. In these circumstances, being compelled to attend the interview is likely to be advantageous.

15.3.2 Compulsory interviews

Where a witness owes a duty of confidentiality to another party concerning the subject of the investigation, or is concerned about the potential use of the interview record against him or her in subsequent proceedings, the witness will ordinarily refuse to attend the interview voluntarily. In some circumstances, the witness can be compelled to attend and answer questions under statutory powers available to all major investigators, including HMRC, the FCA, the SFO and the police.[13] Where this compulsory power is used, the witness is protected from civil suit for breach of confidence. Moreover, the answers given cannot be used in evidence in criminal proceedings against the witness – an important protection that is not available in a voluntary interview.

There are two exceptions to this latter protection. First, where criminal proceedings are brought in respect of false or misleading statements made during the course of the interview. Second, where the witness, who later becomes a defendant, advances a different version of events in subsequent proceedings.

---

11 For example, under section 1 of the Criminal Justice Act 1987 the SFO has a mandate to investigate serious or complex fraud; the FCA's statutory objectives are set out in the Financial Services and Markets Act 2000.

12 Section 78 of the Police and Criminal Evidence Act 1984

13 See, for example, section 2 Criminal Justice Act 1987; section 62 Serious Organised Crime Act 2005; section 165 Financial Services and Markets Act 2000.

The role of the lawyer in compulsory interviews is similar to the role in the interview of an employee in a corporate internal investigation. See Section 15.2

Right to legal representation in a compulsory interview 15.3.3

There is no absolute right to a lawyer in a compelled interview, although usually a lawyer will be allowed to attend. In the context of compelled interviews with the SFO under section 2 of the Criminal Justice Act 1987, this principle was confirmed in *R v. Lord* and others.[14] In this case the SFO challenged a witness's choice of lawyer on the basis that it was the same lawyer that represented a corporate suspect in the same investigation. The SFO refused to permit the lawyer's attendance at an interview and the witness sought relief by way of judicial review of the SFO's decision. Permission for the judicial review was not granted and the Administrative Court upheld the SFO's decision to exclude the lawyer.

The SFO's response to this case was to withdraw its existing guidance on section 2 interviews and issue new guidance in June 2016.[15] This new guidance creates inroads into the right to legal representation that go far beyond the factual scenario examined in *Lord*. Under the new guidance, witnesses are reminded that they may consult a lawyer before and after an interview, but a request for representation by a lawyer during an interview will only be granted if, *inter alia*, the following conditions are met:

- a written request is provided in a prescribed period prior to the interview;
- the reasons that a lawyer is requested are set out;
- the lawyer agrees to undertake to a list of restrictions generally aimed at ensuring that information imparted or documents provided by the SFO remain confidential;
- the lawyer undertakes not to act for a suspect in the investigation; and
- the lawyer agrees to provide 'legal advice and essential assistance and otherwise not interrupt the free flow of truthful information which the interviewee, by law, is required to give.'

Despite these attempts to restrict a lawyer's role during the interview, it is important for a lawyer always to act in the best interests of the witness and in accordance with his or her professional obligations.

The Law Society has issued a practice note that is essential reading for those advising the recipient of a section 2 notice.[16]

Any undertaking requested should be carefully considered. The Law Society practice note advises as follows, 'You should consider whether it is appropriate and necessary to agree the undertakings sought by the SFO on a case-by-case basis. You should carefully consider the implication of agreeing to any undertaking and,

14 *R v. Lord and others* [2015] EWHC 865 (Admin).

15 https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/codes-and-protocols/.

16 https://www.lawsociety.org.uk/support-services/advice/practice-notes/representing-clients-at-section-2-cja-interviews/#cp21.

if necessary, seek to amend the terms of the undertaking before agreeing it.'[17] By way of example:

- Has sufficient information been provided to enable the lawyer to undertake whether he or she acts for another suspect?
- Do the undertakings on confidentiality relate to documents that are actually confidential (i.e., if the witness has obtained them from another source, this undertaking should be drafted to exclude such items)?
- Are the undertakings relating to the provision and retention of pre-interview disclosure practicable?

In respect of the conduct of the interview, the lawyer must give advice that the SFO may consider conflicts with the 'free flow of truthful information', for example:

- The lawyer must also ensure that the interview is conducted within the parameters of the section 2 power.
- The lawyer must ensure that the SFO respects the statutory exception to its compulsory power, such as a refusal to answer questions that are properly the subject of legal professional privilege.[18]
- The lawyer must ensure that the witness is able to deal with the interview properly: the lawyer must ensure that answers given by the client are not misconstrued, that the witness has sufficient time to consider the documents put to them, etc.

15.3.4 Confidentiality of the interview

At the conclusion of an interview with a witness (and some interviews with suspects), the investigator will often inform the witness that they consider the interview to be confidential and that the witness should not discuss it with anyone other than their legal adviser. There is no legal force in these statements. In *Lord*, for example, the court confirmed that there is no obvious bar to an interviewee discussing their interview as they wished.[19] Indeed, there may be good reason for a witness (or their lawyer) to discuss what was learned in an investigator's interview with others; careful thought should therefore be given to whether this would be in the witness's best interests.

15.4 Interviews of suspects in law enforcement investigations

15.4.1 The caution

Law enforcement interviews of suspects are conducted in accordance with the protections set out in the Codes of Practice (PACE Codes) issued pursuant to section 66 of the Police and Criminal Evidence Act 1984 (PACE). Among the most

17 Paragraph 2.2 of the Law Society's practice note.

18 Section 2(9) Criminal Justice Act 1987. Legal professional privilege may be claimed over any communication between a client and their lawyer seeking or giving legal advice and over communications between a lawyer and a third party if litigation was in contemplation and the document or communication was created for the dominant purpose of litigation.

19 *R v. Lord and others*, at para. 21.

important of these protections is the caution administered to a suspect at the start of an interview.

An investigator must caution a person if there are 'reasonable, objective grounds for suspicion, based on known facts or information which are relevant to the likelihood the offence has been committed and the person to be questioned committed it.'[20] The failure to administer a caution may render the interview record inadmissible in subsequent criminal proceedings.

The caution is as follows:

> *You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence.*[21]

The caution confers on the suspect a right to silence. It also reminds the suspect that if he or she chooses to answer questions, the answers will be admissible in evidence against the suspect at any criminal trial. Finally, the caution alerts the suspect to a rule called the adverse inference. This rule means that, if the suspect fails to mention a fact that in the circumstances existing at the time could reasonably have been mentioned at the interview and later relies on that fact in his or her defence, there is a risk that the trial judge directs the jury that they may draw an adverse inference against the suspect.[22] The jury could draw an adverse inference, for example, if they found that the reason that no answer was given was because there was no good or true answer that would stand up to scrutiny, or if they found that any subsequent fact raised in the defence could be fabricated.

Jurors may not be asked about their deliberations and so the impact of a judicial invitation to draw an adverse inference is not known. Nonetheless, it is believed that jurors do not always draw an inference even when invited to do so.

Deciding on the suspect's approach 15.4.2

The single most important decision taken by a lawyer representing a suspect in an interview under caution is whether to answer questions, exercise the right to silence or read from a prepared statement. This decision is rarely straightforward; care must be taken to protect the client from a variety of risks, including the risk of making damaging admissions, the risk of being ambushed by previously undisclosed documents and the risk of an adverse inference being drawn in any future trial.

To advise on this decision, the lawyer should seek pre-interview disclosure from the investigator, namely an explanation of the evidential basis of the allegations against the suspect. There is no legal requirement to provide pre-interview disclosure, although case law suggests that where none is given, disclosure is very limited or what is given is misleading, the court may decline to draw an adverse

20 See Note 10A to paragraph 10.1 of Code C of the PACE Codes.

21 *per* PACE Code C para. 10.5.

22 Section 34(1) and (2) Criminal Justice and Public Order Act 1994.

inference or may even exclude the interview from evidence.[23] In practice, most investigators will provide some pre-interview disclosure in an attempt to prevent these outcomes. If the disclosure is limited, for example if it contains a summary of facts with no contemporaneous documents, the lawyer should ask a series of questions to establish what evidence has been collected in the course of the investigation and seek sight of any document that will be put to the client in the interview. A note should be taken of these discussions so that it can be used in any subsequent application for exclusion of evidence or objection to an adverse inference.

If thorough disclosure is provided, a full comment interview may add credibility to a defence advanced at trial or give the investigator reasons to re-evaluate the factual basis of his or her suspicions. However, if disclosure is inadequate, answering questions may simply provide an account that is inconsistent with material already gathered by the investigator (and that may be deployed by the investigator during the interview to discredit the suspect's account). Moreover, answering questions without fully understanding the basis of the allegations may simply extend the scope of the investigation into new, problematic areas.

In complex financial crime cases, reading from a prepared statement may often be preferable to a suspect answering questions or exercising the right to silence. An effective prepared statement will set out the salient points in the suspect's defence in a structured format and guard against the risk of the adverse inference being drawn. However, there is always a risk in relying on these statements if disclosure is inadequate, such that the statement could be undermined at a later stage of the investigation or omit facts that could have reasonably been mentioned in interview. Practices vary as to whether such statements should be read out at the beginning or end of the interview.

Lawyers advising a suspect should ask themselves two questions. First, are there factors that may suggest the client is not able to provide a full and clear account of the conduct? Secondly, are there tactical reasons to adopt a certain approach? Some of the factors that feed into these questions are as follows:

- there are no facts on which the client will rely in his or her defence;
- pre-interview disclosure is so limited that it is not possible properly to evaluate and advise on the case against the suspect;
- limited disclosure may indicate that the investigator's case is weak and there is a risk that the suspect would make admissions that may strengthen the case or lead to new lines of enquiry;
- the disclosure, however briefly put, reveals the type of case that calls for a defence to be put in evidence at an early stage;
- the case disclosed is not based on admissible evidence;
- the conduct under investigation is historic or complex, such that inadequate time or disclosure has been provided to prepare effectively (this may not necessarily be the investigator's strategic decision but because evidence is still being obtained);

23 *R v. Mason* [1987] 3 All ER 481.

- the lawyer knows or suspects that the investigator plans to provide documents in the course of the interview that have not been shown to the lawyer in advance; and
- the suspect is by reason of illness, cognitive impairment, drink or drugs, fatigue or other mental state not able to provide an accurate account or take advice on board.

The lawyer's role in the interview 15.4.3

The lawyer's role in an interview of a suspect is similar to the roles described above when acting for employees in corporate internal investigations or for witnesses in law enforcement investigations. However, there are additional considerations when acting for a suspect. For example, in some circumstances, the client should be warned not to accuse others of lying or other reprehensible behaviour, as to do so will automatically risk their own 'bad character' (which includes non-conviction material such as disciplinary matters) being admitted in evidence.[24]

24 Under section 101(1) g of the Criminal Justice Act 2003.

16

Representing Individuals in Interviews: The US Perspective

William Burck, Ben O'Neil and Daniel Koffmann[1]

16.1 Introduction

Companies typically undertake internal investigations to ascertain their exposure to criminal or civil liability. Because a business can act only through its employees, that necessarily entails examining the conduct of its employees. In practice, this largely means reviewing documentary evidence and interviewing company employees.

16.2 Issues to bear in mind when representing an individual

16.2.1 Prospect of discontinued employment and disqualification

Often an individual's chief concern when participating in an internal investigation is not the potential legal consequences, but the consequences to his or her reputation and career. For example, an individual might feel compelled to sit for an interview simply because refusing to do so could alienate superiors or draw suspicion from investigators and other employees. However, there is significant risk in making statements to corporate counsel whose mandate is to determine whether any misconduct occurred and, if so, who is responsible, as these statements are likely to be turned over to others within management or the board of directors, and may even be shared with government investigators, prosecutors and the shareholding public. Counsel to an individual must understand not only their client's personal culpability and criminal exposure, but also the dynamics of the client's employment situation, including both the non-legal personal factors and any legal obligations the client might have to co-operate. Equally important is understanding the circumstances in which a client who is a professional can

1 William Burck and Ben O'Neil are partners, and Daniel Koffmann is an associate, at Quinn Emanuel Urquhart & Sullivan, LLP.

be disqualified. In highly regulated industries where internal investigations are common, violations of codes of professional conduct may lead to professional consequences including permanent debarment.

The scope of representation 16.2.2

Counsel must understand the scope of the representation from the very start and have a mutual understanding with the client. For example, an individual who has received a personal subpoena to produce documents to an investigative agency will have a different set of needs and expectations from an individual who has been provided counsel by an employer because he or she is to be interviewed by law enforcement. The former may not know what a criminal investigation entails, what the significance of receiving a subpoena is, or what to expect in terms of time and disruption to daily life. In the latter scenario, management should provide some context about why the employee is to be interviewed and what the goal of the representation is. Moreover, where the company has retained counsel for the individual, counsel must determine how and under what terms to share information and coordinate decision-making with the company.

Witness, subject or target: whether individuals require counsel 16.3

The US Department of Justice (DOJ) classifies the people and entities involved in their investigations into three categories: (1) witnesses, who have information relevant to the investigation but no known involvement in any wrongdoing; (2) subjects, whose conduct is within the scope of the investigation; and (3) targets, about whom the government has evidence of criminality and whom it intends to charge. The vast majority of individuals and entities relevant to a federal criminal investigation are subjects, but a person's status is always contingent on the information known to the government and subject to change depending on what the investigation reveals.

As a result, it is always prudent for individuals to have counsel. Although it is less imperative for witnesses than it is for subjects and targets, even innocent bystanders may find themselves in precarious legal circumstances if wrongdoers attempt to save themselves by deflecting blame onto others. For subjects and targets, the need for counsel is even more acute. In the wake of recent announcements from the DOJ emphasising the importance of companies providing detailed and specific evidence of individual wrongdoing – including in some circumstances by providing up to 45 per cent reductions in fines and other criminal penalties – individuals must tread extremely carefully.[2] For any individual whose con-

2 Memorandum from Sally Q. Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to Assistant Att'ys Gen. and U.S. Att'ys (9 September 2015), available at https://www.justice.gov/dag/file/769036/download (the Yates Memorandum); Andrew Weissmann, U.S. Dep't of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (5 April 2016) (announcing a 'pilot program' primarily intended 'to promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to voluntarily self disclose

duct is within the scope of a government or internal investigation, it is unwise to participate in the investigation without counsel.

16.3.1 Independence of counsel retained by employer to represent employee

It goes without saying that counsel's first obligation is to the individual they represent. It is a dereliction of duty and a serious ethical violation for an attorney to place any other interest above those of the client.[3] Nevertheless, individual counsel retained by an employer to represent an employee will often feel pressure to consider the interests of the company when representing the individual – especially when the company is paying counsel's fees. In these circumstances, it is especially important to advocate zealously on the individual's behalf and rebuff any undue pressure to deviate from the individual's interest.

Many companies seek to reduce the cost of an internal investigation by instructing the company counsel to act for employees as well. This carries with it the potential for thorny conflicts of interest that may arise if the company's and the employee's interests diverge. For example, suppose in the course of a voluntary interview with government investigators it becomes clear that the employee made false statements in the past about the conduct under investigation, and the employee seeks advice from the attorney who has accompanied him or her to the interview. Traditionally, providing legal advice under these circumstances could be sufficient to create an attorney–client relationship between counsel and the employee. But the company may wish to distance itself from the employee, who previously misrepresented facts relevant to a government investigation, and may even decide to provide information to aid in a prosecution of the employee.

As a result, counsel should always obtain an informed waiver of any conflicts of interest from both the company and the individual.[4] One common practice is for counsel and clients to agree in advance how conflicts will be resolved if they arise by, for example, one party agreeing to find separate counsel if a conflict develops.

It is also important where counsel acts for more than one client to preserve the attorney–client privilege. In such a situation, counsel should encourage the clients to agree to conduct a joint defence that will enable the clients to share privileged information between one another without waiving the privilege as to others.

16.3.2 Representing more than one individual: conflicts and maintaining privilege

Similarly, it is not uncommon for lawyers to represent more than one individual in connection with a single investigation. As with employer-employee dual representation, counsel must determine that the individuals' interests are not directly adverse, and the lawyer can effectively discharge the distinct obligations owed to each client, as well as any third party.[5]

FCPA-related misconduct'), available at https://www.justice.gov/opa/file/838386/download (the Pilot Program).

3 See Model Rules of Pro'l Conduct R. 1.3 cmt. 1, 1.7, 1.13; 5.4(c).

4 See Model Rules of Pro'l Conduct R. 1.13(g).

5 Model Rules of Pro'l Conduct R. 1.7(a).

Joint representation 16.3.3

In certain circumstances, an individual may desire to retain multiple lawyers or law firms. For example, a target of an investigation that involves a large quantity of documents and evidence may retain two firms to shoulder the load of reviewing and digesting the evidence. Whatever the reason, it is imperative that both the client and counsel have a clear understanding of roles and responsibilities. Above all, open and active communication among the lawyers and between the lawyers and the client is vital to joint representation.

Privilege against self-incrimination 16.4

The Fifth Amendment to the US Constitution protects an individual from compelled, testimonial self-incrimination. In its most common form, that means a person can refuse to make statements to law enforcement, to a grand jury, or in court, if answering the question would tend to incriminate him or her.

The Fifth Amendment protects individuals (not corporations) against government-compelled testimonial self-incrimination in criminal cases. Nevertheless, individuals may invoke the privilege in civil cases where there is a risk that the testimony could be used by the government in a criminal case. Thus, individuals whose interviews are sought by government entities conducting investigations may exercise their privilege against self-incrimination to refuse to answer government questions.[6] Internal investigations by private employers, however, generally do not implicate the Fifth Amendment, although courts, on occasion, have attributed a private employer's conduct to the government and thereby turned private conduct into a constitutional violation.[7] We are unaware of any decision holding that a person's Fifth Amendment rights were violated in the course of a corporate interview,[8] but the Yates Memorandum may provide more opportunities for courts to consider these arguments. Although there is no protection under federal law, some states, such as New York, have protections for individuals compelled by private employers to give statements.[9]

6 *Garrity v. New Jersey*, 385 U.S. 493 (1967).

7 In *United States v. Stein*, 440 F. Supp. 2d 315 (S.D.N.Y. 2006), the court found that the accounting firm KPMG had changed its practice with respect to paying employees' legal fees so that employees would not receive indemnification for the fees unless they co-operated with the government. Id. at 322. The court attributed this conduct to the government and found that it violated the employees' constitutional rights.

8 The Second Circuit Court of Appeals recently rejected such a claim in a civil employment dispute in *Gilman v. Marsh & McLennan Cos.*, 826 F.3d. 69, (2d Cir. 2016). In *Gilman*, the company fired two employees who refused to sit for interviews with corporate counsel as part of an internal investigation. The court held this could not be attributed to the government – and thereby become state action amounting to a constitutional violation – because, although the government's investigation motivated the company to fire the non-compliant employees, the government was not the 'but for' cause: 'The interests of prudent directors alone would justify or compel such a measure.' Id. at 77.

9 See N.Y. C.P.L. § 60.45 (involuntary statements are inadmissible, and a statement may be involuntary if it is obtained '[b]y any person by the use of . . . improper conduct or undue pressure

Nevertheless, on a practical level, an individual who asserts the Fifth Amendment in an internal investigation may face non-legal consequences of the sort discussed above. What is more, individuals who choose to remain silent may risk violating an employment agreement and thereby jeopardising their ability to have their legal costs indemnified by their employer. However, individuals who choose to provide incriminating information must understand that any information will likely be provided to law enforcement, especially in the wake of the Yates Memorandum and the Pilot Program.

See Chapter 10 on co-operating with authorities

16.5 Interview by counsel representing the company

16.5.1 Purpose and scope of interview

Prior to sitting for an interview with company counsel, the employee and counsel should seek to understand the purpose and scope of the interview. For example, they should determine whether the company views the employee as a subject or a target, to use the DOJ terminology, or simply a witness. It is also important to understand how the company intends to use the information learned from the interview. For example, the employee should be aware if the company is actively co-operating with law enforcement and intends to disclose information (including privileged information) learned in the interview to governmental authorities. Indeed, under certain circumstances, false statements made to company counsel during an internal investigation can be the basis for obstruction-of-justice charges.[10] This is particularly important in the wake of the Yates Memorandum, and individual counsel should be sure to ask company counsel what the individual's status is.

16.5.2 Access to documents, location and conduct of interview

Often corporate counsel will have broader access to documents than the employee and his or her counsel, putting the employee at a disadvantage. Moreover, counsel for the company may be hesitant to provide employees with the documents that will be discussed in the interview beforehand. Nevertheless, the employee should ask the company for a copy of documents about which the company's counsel intends to enquire so that the employee can identify any potential risk areas and prepare for them.

If an employee has separately retained counsel, that counsel should attend the interview to ensure the employee's interests are protected. The interview should be conducted in a neutral location, such as the company's offices. In addition, to the extent possible, counsel for the employee should try to limit the number of

---

which . . . undermin[ed] his ability to make a choice whether or not to make a statement'); *People v. Barham*, 781 N.Y.S.2d 870 (Dist. Ct. 2004) (holding that threat of job loss may qualify under Section 60.45).

10 See, e.g., *United States v. Singleton*, No. 4:04-cr-514, 2006 WL 1984467 (S.D. Tex. 14 July 2006); *United States v. Ray*, No. 2:08-cr-1443 (C.D. Cal. 15 Dec. 2008).

company representatives present at the interview to ensure the employee is not overwhelmed or unreasonably outnumbered at the interview.

Interview by law enforcement 16.6

Whether to make the individual available to law enforcement 16.6.1

Legal or contractual requirement 16.6.1.1

Certain government agencies, including the Securities and Exchange Commission, may compel individuals' participation in interviews.[11] However, not every government request for a witness interview carries the full weight of the requesting entity's power to compel co-operation. Counsel may consider probing the government's willingness to take legal action to compel an individual to sit for an interview. If the government is merely 'fishing', investigators are unlikely to move to compel a witness to appear for an interview.

Some employees have provisions of their employment contracts that require co-operation with law enforcement. As a result, in addition to non-legal consequences with a person's employer, he or she may risk violating the contract and losing indemnification for attorneys' fees.[12] A person with reason to fear co-operating with law enforcement may do well to negotiate a resignation on favourable terms prior to refusing to co-operate. However, corporate efforts to stifle or otherwise minimise whistleblowing can be problematic.[13]

See Chapter 20 on whistleblowers

Whether the authority considers the individual to be a target 16.6.1.2

Meeting with government investigators or prosecutors is an especially delicate question when one's client is a target. Although an individual who believes he or she is innocent may enthusiastically seek to meet with the government to demonstrate innocence, the risk of a person's statements being taken out of context and viewed in a negative light often will be too great.

Counsel seeking to understand whether a client is a target should look to interactions with the government, counsel for the company, and the client. Where counsel has been in contact with a prosecutor or other law enforcement about the investigation, he or she should consider asking whether the client is a target. Although a prosecutor is not required to respond, the United States Attorneys' Manual encourages prosecutors to notify targets 'a reasonable time before seeking

11 See, e.g., 15 U.S.C. § 78u (providing the SEC power to compel disclosure and testimony in the course of an agency investigations); see also *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186 (1946) (enforcing subpoena from the Federal Trade Commission); *United States v. Powell*, 379 U.S. 48, 57-58 (1964) (enforcing IRS subpoena).

12 But see *Stein*, discussed above at footnote 6, which held that, under the circumstances of that case, revoking attorney fees for those employees who refused to co-operate with the government violated the employees' constitutional rights.

13 For example, in 2015 the SEC charged military and industrial contractor KBR, Inc. with violating the whistleblower protection rule enacted under the Dodd-Frank Wall Street Reform and Consumer Protection Act. See *In the Matter of KBR, Inc.*, Admin. Proc. 3-16466, available at https://www.sec.gov/litigation/admin/2015/34-74619.pdf.

an indictment', except when notification could jeopardise the investigation.[14] However, not every agency will be quite as forthcoming, and some agencies, such as the SEC, typically do not respond to the enquiry at all.

16.6.1.3 Relevant evidence prior to interview

It is unlikely that government investigators will share the full array of evidence and information at their disposal. However, counsel may be able to get a rough sense from (1) any documents the employee has produced to a grand jury or other investigators; (2) documents or questions that arose in a prior internal investigation; (3) other individuals who have been interviewed; (4) to the extent counsel is aware, recipients of grand jury subpoenas and what they were asked to produce; and (5) in high-profile cases, media reports on leaks from within the government, to name a few.

16.6.1.4 Offer of proffer agreement or other grant of immunity

Individuals who have knowledge of wrongdoing and exposure of their own may be able to trade their information for immunity or reduced charges.[15] The decision to co-operate with investigators by providing information can be very difficult, and it is imperative that a client who agrees to do so is able to follow through. A person who violates the co-operation agreement by deciding not to testify against former colleagues, making false statements to investigators, or continuing to engage in criminal conduct, will not only lose the benefit of immunity or any other agreement with the government, but typically investigators will use all of the information provided against him or her or refuse to advocate for leniency at sentencing. That is because under most co-operation agreements with prosecuting authorities, individuals' protection against having their statements used against them is voided if they violate the agreement. As a result, although a government offer of immunity in exchange for information may be attractive, counsel must be certain that the client will be able to meet the obligations under the agreement.

16.6.1.5 Anticipated use of information and admissibility in other proceedings

Related to the considerations of proffer agreements and immunity, this factor may weigh in favour of declining to make one's client available for interview if the government intends widespread use of the interview content, and if the government is unable to assure that the interview substance and transcript, if any, will be treated confidentially. However, counsel should be aware that notes and

14 U.S. Att'ys' Manual § 9-11.153.

15 There are three varieties of immunity under US law: (1) 'use' immunity, in which the government may still prosecute the individual, and although it cannot not use the person's statements against him at trial, it may use evidence discovered through investigation based on the statements; (2) 'use and derivative use' immunity, in which the government may still prosecute but cannot use the person's statements or any evidence identified as a result of the statements; and (3) 'transactional' immunity, in which the government may not prosecute the person for any crime related to the conduct that is the subject of the agreement.

recordings of the interview may be procurable under Freedom of Information Act requests. An individual's statements, even if not made under oath, can be used in many ways in subsequent proceedings and may even be introduced as evidence.

Parties attending the interview, including company counsel 16.6.1.6

Counsel should never permit the client to meet with law enforcement alone. Moreover, counsel should inquire about who else will be present during an interview. The presence of company counsel may be welcome, if the employee is on good terms with his company and is not expected to make damaging statements about his employer. However, if the witness is expected to implicate high-level management, the presence of company counsel taking instructions from the same high-level management would be counterproductive.

Access to documents or information prior to interview 16.6.2

As discussed above, government investigators will rarely share evidence prior to an interview. Nevertheless, counsel should learn as much as possible by reviewing documents in the client's possession or available from the client's employer; counsel may also consider seeking the permission of the prosecutor to allow the company to provide the employee with access to, at a minimum, relevant emails produced to the government by the company.

Special considerations in international parallel investigations 16.6.3

The trend toward parallel multi-jurisdictional investigations can affect whether and under what circumstances counsel may advise clients to agree to be interviewed. As discussed elsewhere, in some countries, individuals may not refuse to testify before investigatory bodies, including, for example, the UK Financial Conduct Authority (FCA), and such testimony may be used as a basis for criminal conviction. Such testimony, however, is not admissible in the United States. Indeed, one recent decision, *United States v. Allen*,[16] reversed convictions of two bankers convicted of manipulating the benchmark London Interbank Offered Rate where a witness reviewed the bankers' testimony before the FCA before testifying against the bankers in their criminal trial in the United States. The appellate court held that the privilege against self-incrimination prohibited US prosecutors from using both the defendants' testimony before the FCA, as well as evidence derived from such testimony, including testimony by a witness who reviewed the defendants' FCA testimony. *Allen* thus creates tactical considerations for counsel representing targets in a multi-jurisdictional investigation. For example, counsel should consider whether a client's prior compelled testimony in a foreign country imposes barriers for US prosecutors and thus reduces the benefits to be gained from voluntary co-operation with US investigators.

See Chapter 15 on representing individuals in interviews (UK perspective)

16 *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017).

16.7 Preparing for interview

Preparation for an interview should include substantive discussion of the relevant facts and a critique of how the client presents to investigators – what a person says is just as important as how he or she says it. Similarly, counsel must consider the audience and the setting – an interview in a conference room with prosecutors and investigators is very different from testimony before a grand jury under examination by a prosecutor (and without counsel present). Counsel should also consider the extent to which the client should review documents, diaries and other evidence to refresh his or her recollection. On the one hand, it can help counsel assess the client's veracity and depth of recollection and provide an opportunity to practise avoiding pitfalls and dealing with problematic evidence. On the other hand, it may be in the client's interest to be able to state honestly that he or she does not recall, rather than attempt to minimise or rationalise past misconduct. These decisions are always driven by the facts of particular cases.

16.8 Notes and recordings of the interview

Counsel should inquire whether the interview will be transcribed or memorialised in any way, and if so, whether counsel, client or both will be able to review and correct errors in the transcript. Counsel must be aware, of course, that the opportunity to correct the record will imply assent to non-corrected portions of the record. Although criminal investigators will rarely share interview notes and memoranda with an individual until shortly before trial, individuals who have testified before a grand jury have a right to review their testimony, and some civil investigators may provide individuals an opportunity to review their statements. For example, at the conclusion of testimony before the SEC, the witness has the right to inspect the transcript of the testimony, and although the SEC typically will permit the witness to obtain a copy of the transcript, it is not required to do so.

17

Individuals in Cross-Border Investigations or Proceedings: The UK Perspective

Brian Spiro and Gavin Costelloe[1]

Introduction 17.1

In any global investigation there will invariably be individual suspects either located in different jurisdictions, or subject to investigation by authorities from different jurisdictions, or both.

This chapter looks at the key issues that arise when acting for individuals involved in parallel, cross-border investigations or proceedings from the UK perspective.[2]

Extradition 17.2

In cross-border criminal investigations suspects are often resident outside of the jurisdiction of those conducting the investigation. As such, a critical question will be whether, and how, they may be subjected to extradition.

The answer lies in the respective legislation of, and arrangements between, the requesting and requested states.

The UK position is currently[3] governed by the EU Framework Decision[4] and its obligations are implemented through the Extradition Act 2003 (the 2003 Act).

The 2003 Act is divided into two parts. Part 1 applies to requests made by 'category 1 territories' (European Union countries and Gibraltar) by use of the

1 At the time of writing Brian Spiro was a partner and Gavin Costelloe was a solicitor at BCL Solicitors LLP.

2 Whereas England and Wales share a common legal system, there are certain substantive and procedural differences in the Scottish and Northern Irish systems. This chapter focuses on the English and Welsh legal system but identifies any significant differences with the other UK systems.

3 It remains to be seen how the position will change as a result of the UK's Brexit referendum vote to leave the EU.

4 2002/584/JHA.

European arrest warrant (EAW) procedure.[5] Part 2 applies to requests made by, 'category 2 territories', namely those other countries with which the United Kingdom has extradition relations.[6]

It is not yet clear what impact the UK's decision to leave the EU will have, but it is likely that the legislators will be revisiting this sometimes controversial area of law.

17.2.1 Extradition from the UK – category 1 territories: the EAW

The EAW is a fast-track procedure that allows the requesting state to secure the return of a requested person quickly and effectively.

The National Crime Agency (NCA) certifies the EAW on receipt from the requesting state before liaising with the Crown Prosecution Service (CPS) for advice on the validity and content of the request.

The requesting statement must identify the offence the requested person is accused of and confirm that the EAW is issued with a view to his or her arrest and extradition for the purpose of prosecution or, where the requested person has been convicted, for the purpose of being sentenced or to serve a sentence already passed. The information must include details such as the requested person's identity and particulars of the alleged offence or conviction. Failure to comply with these requirements invalidates the EAW.[7]

Following the certification of the EAW, a warrant for the requested person's arrest is issued. On arrest, the individual will initially be taken to a police station and held there under the provisions of the Police and Criminal Evidence Act 1984 (PACE) and the accompanying Code C. The individual has various rights including the right to have someone informed of the arrest; the right to free independent legal advice; and the right to consult privately with a solicitor. A formal custody record will be opened, detailing key aspects of the detention, but the individual will not be interviewed as it is not the role of the police to investigate the evidence. However, given the significance of identification to the extradition process, fingerprints, non-intimate samples and photographs may be obtained from the individual in accordance with PACE Code D.[8]

Following the requested person's arrest and initial detention, he or she must be brought before a court[9] 'as soon as practicable' for an initial hearing and fixing of the extradition hearing within the next 21 days.[10] Depending on the day of the week and time of the arrest, this requirement can mean that the individual spends only a matter of hours in police detention before being brought before the court

5 Extradition Act 2003 (Designation of Part 1 Territories) Order (SI 2003/3333).

6 Extradition Act 2003 (Designation of Part 2 Territories) Order (SI 2003/3334).

7 Section 2, the 2003 Act.

8 Sections 166 to 168, the 2003 Act.

9 In England and Wales, cases are heard at the Westminster Magistrates' Court, in Scotland cases are heard at the Sheriff Court in Edinburgh and in Northern Ireland, cases are heard by designated county courts or resident magistrates.

10 Sections 3 and 4, the 2003 Act.

although, if arrested at the weekend, it can mean spending up to two nights in police custody.

At the extradition hearing the judge must be satisfied that the alleged conduct constitutes an extraditable offence[11] and that no bar to extradition applies.

See Section 17.2.4

Either party may appeal the judge's decision to the High Court.[12] Thereafter, an appeal may be made to the Supreme Court if the matter concerns a point of law of general public importance.[13]

If the judge orders extradition, in the absence of any appeal, the requested person must be extradited within 10 days of the order, or later if agreed with the requesting state.

Extradition from the UK – category 2 territories 17.2.2

Part 2 of the 2003 Act provides for the extradition to those non-EAW territories the United Kingdom has bilateral or multilateral extradition treaties with.[14]

Such territories are usually required to provide *prima facie* evidence of the case against the requested person; unless they are signatories to the European Convention on Extradition or the United States, New Zealand, Australia or Canada.[15]

Requests must be certified by the Home Secretary as being valid before being sent to the appropriate judge.[16] The judge then considers whether there are reasonable grounds to issue an arrest warrant,[17] which include that the evidence produced would justify the issue of a warrant for the individual's arrest if it was a domestic case.[18]

Once an arrest warrant has been issued and executed, the requested person must be brought before the magistrates' court as soon as practicable. Unless the requested person consents to extradition, the court will fix a date for the extradition hearing, usually within the next two months, and decide whether to grant bail.

The judge must be satisfied that the material provided by the Home Secretary is compliant, including that the offences specified are extraditable, and will discharge the requested person if it is not.[19] The judge will then consider whether any bars to extradition exist.

See Section 17.2.4

In cases where *prima facie* evidence must be considered, the judge must decide if the evidence supporting the request is 'sufficient to make a case'. This is the same

11 Sections 64 and 65, the 2003 Act.

12 Sections 26 to 29, the 2003 Act.

13 Section 32, the 2003 Act.

14 A list, as of 5 January 2016, of category 2 territories is provided here: https://www.gov.uk/guidance/extradition-processes-and-review.

15 http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024/signatures?p_auth=4WJ8nibX.

16 Sections 69 and 70, the 2003 Act.

17 Sections 137 and 138, the 2003 Act.

18 Section 71, the 2003 Act.

19 Section 78, the 2003 Act.

test that applies in domestic UK criminal proceedings in determining whether a criminal prosecution should be allowed to continue.

Once the judge is satisfied that all the conditions have been met, and that no bars to extradition exist, the matter is referred to the Home Secretary for his or her decision whether to extradite; having considered issues such as the possible imposition of the death penalty.[20] Representations may be made by the requested person to the Home Secretary to be included in the decision.

The judge's decision to refer may be appealed within 14 days of the date of the decision and thereafter appeals may be lodged with the High Court, or if appropriate, the Supreme Court.

17.2.3 Extradition from the UK – other territories

For countries that are neither category 1 nor category 2 territories, section 194 of the 2003 Act allows the Home Secretary to certify that 'special extradition' arrangements have been made between the United Kingdom and that country for the extradition of a person.

These special arrangements must comply with the Act's Part 2 procedures and apply as for a category 2 territory.

In addition, a territory that is party to an international convention to which the United Kingdom is also a party may, by virtue of section 193 of the 2003 Act, be designated a territory to which Part 2 of the 2003 Act applies.[21]

17.2.4 Bars to extradition

Under the 2003 Act a properly issued extradition request will be honoured, unless it can be challenged and prevented by one of the bars to extradition.

Sections 11 and 79 of the 2003 Act set out the bars to extradition for Part 1 and Part 2 requests respectively; these include the rule against double jeopardy, the absence of a prosecution decision, excessive passage of time and the inappropriate age of the requested person.

In addition to these specific bars, there are a number of general bars, as detailed below.

17.2.4.1 The human rights bar

The judge must determine 'whether extradition would be compatible with the Convention rights', contained within the European Convention on Human Rights.[22] A request may be refused where there are substantial grounds shown that the requested person, if extradited: faces a 'real risk of exposure to inhuman

20 Section 93, the 2003 Act.

21 SI 2005 No. 46, the Extradition Act 2003 (Parties to International Conventions) Order 2005: provides that a state will only be designated a category 2 territory in this way in relation to conduct to which the convention applies, e.g., drug trafficking offences in contravention of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

22 Sections 21(1), 21A(1)(a) and 87(1), the 2003 Act.

or degrading treatment or punishment',[23] contrary to Article 3; or whether the court considers the interference with the private and family lives of the requested person, and members of his or her family, is outweighed by the public interest in extradition,[24] contrary to Article 8. Arguments under Article 5 (the right to liberty and security)[25] and Article 6 (right to a fair trial)[26] have also been made in a number of cases.

The proportionality bar 17.2.4.2

This bar applies to EAW accusation cases only.[27] When considering a request, the judge may consider the seriousness of the alleged conduct, the likely penalty to be imposed and whether there are alternatives to extradition.

The forum bar[28] 17.2.4.3

This will be considered where the nature of the criminal conduct means that the alleged offence could potentially be prosecuted in more than one country. This bar is particularly relevant to parallel or cross-border investigations.

The forum bar provides that extradition may be barred if it is considered not to be in the interests of justice as a substantial measure of the criminal activity took place in the United Kingdom and, having regard to 'specified matters', the judge decides extradition should not take place.

By virtue of sections 19D and 19E of the 2003 Act, the UK prosecuting authorities can effectively veto a judge barring extradition on forum grounds by the production of a prosecutor's certificate stating why the corresponding offences will not be prosecuted in the United Kingdom. It may be issued where the prosecution considers that there is insufficient admissible evidence; that a prosecution would not be in the public interest; or that there are concerns about the disclosure of sensitive material. This certificate may only be challenged on appeal to the High Court where the procedures and principles of judicial review will be applied.

Asset seizures, forfeiture and recovery 17.3

Restraint orders 17.3.1

Individuals subject to criminal investigations or proceedings relating to money laundering may be subject to a restraint order.[29] Such orders are made on the application of the investigating authority and prohibit the individual from

23 *Soering v. United Kingdom* (1989) 11 EHRR 439.

24 *HH v. Deputy Prosecutor of the Italian Republic, Genoa* (2012) 3 WLR 90 – summarised conclusions of Baroness Hale *re*: case law interpreting Article 8.

25 *Shankaran v. India* (2014) EWHC 957 (Admin).

26 *Vincent Brown aka Vincent Bajinja, et al. v. The Government of Rwanda, The Secretary of State for the Home Department* (2009) EWHC 770 (Admin).

27 Section 21A, the 2003 Act.

28 Sections 19B and 83A, the 2003 Act; not in force in Scotland.

29 Section 41 POCA.

dealing[30] with, or otherwise dissipating, his or her realisable property and assets[31] so that they remain available for confiscation by the court in the event that individual is convicted of a criminal offence.

The authority must show reasonable cause to believe[32] that:

- the alleged offender
- has benefited[33]
- from his or her criminal conduct.[34]

The case of *Barnes v. The Eastenders Group*[35] emphasised that the prosecution and court are expected to apply a high level of scrutiny to the application for restraint when considering whether these conditions have been met.

Where a restraint order is obtained, it is likely that relevant banks and other financial institutions will be served with a copy of the order. This is done to 'freeze' the suspect's assets and may also expose him or her to reputational damage.

In practice, the authority seeking the restraint order often alleges that the activity being investigated falls within the 'criminal lifestyle'[36] definition. This has the effect of restraining all property obtained by the suspect during the previous six years.

Once an order has been made, a variation[37] limiting the value of the assets subject to the order may be obtained that, if granted, can free up some of the accused's assets.

Where a person anticipates being the subject of a restraint order, it may be possible for the suspect's or accused's legal advisers to enter into an undertaking with the investigating authority detailing the extent, and whereabouts, of assets and offering to ring-fence some of these, leaving the balance unrestrained.

17.3.2 Criminal confiscation

The Proceeds of Crime Act 2002 (POCA) provides for the confiscation of the proceeds of criminal conduct from offenders. CPS guidance states that: 'Prosecutors should consider asset recovery in every case in which a defendant has benefitted from criminal conduct and should instigate confiscation proceedings in appropriate cases. When confiscation is not appropriate, and/or cost effective, consideration should be given to alternative asset recovery outcomes.'[38]

30 *Irwin Mitchell v. Revenue & Customs Prosecutions Office* [2008] EWCA Crim 1741.

31 Section 83 POCA; property is free unless there is a relevant court order in respect of it, or it has been forfeited – section 82 POCA.

32 Section 40 POCA: sets out five conditions that must be satisfied to allow the Crown Court to restrain realisable assets.

33 Section 76(4)-(6) POCA.

34 Section 76(1) POCA.

35 [2008] EWCA Crim 1741.

36 Section 75 POCA.

37 Section 42(5) POCA.

38 http://www.cps.gov.uk/legal/p_to_r/proceeds_of_crime_act_guidance/.

Under POCA, the courts can restrain property once satisfied that the property is recoverable:[39] that it was obtained through conduct that was criminal under UK law,[40] or was criminal under the law in the territory where the acts occurred and would also be criminal if it had occurred in the United Kingdom.[41]

Even where there has been no criminal prosecution, or a failed prosecution, proceedings for civil recovery, or cash forfeiture, can still be brought.[42]

Civil recovery 17.3.3

The authorities can apply for a civil recovery order even when they are unable, or unwilling, to prove the commission of a criminal offence.

They must prove on the balance of probabilities (i.e., the civil standard of proof) that there has been unlawful conduct and that the property to which the application relates is, or includes, recoverable property.[43] Proceedings are brought in the High Court against any person the authority thinks holds the recoverable property.[44]

Property may be followed where it remains identifiable so, even where it has been disposed of, it can be followed into the hands of the current holder.[45] Overseas property can be included where it is possible to identify a 'connection' with the United Kingdom.[46]

If the property was obtained in good faith, for value and without knowledge that it was recoverable property,[47] the property ceases to be recoverable. However, the payment, or other consideration, provided by the purchaser can be followed as representing recoverable property in the hands of the respondent.

Where tainted property has been invested, any profit accruing will also be recoverable,[48] and, in situations where there is 'mixed property', the proportion that is attributable to the recoverable property will represent that obtained through unlawful conduct.[49]

As part of any civil recovery proceedings, a freezing order[50] may be sought to prohibit any person the order applies to from dealing with any property specified or described within the order.

See Chapter 25 on fines, disgorgement, etc.

39 Section 304 POCA.
40 Section 241(1) POCA.
41 Section 241(2) POCA.
42 *Olupitan v. DARA* [2008] EWCA Civ 104.
43 Smith, Owen and Bodnar on 'Asset Recovery – Criminal Confiscation and Civil Recovery', 2nd Edition, Oxford University Press.
44 Section 243 POCA.
45 Section 304 POCA.
46 Section 47 Crime and Courts Act 2013, inserting new section 282A POCA and Schedule 7A POCA.
47 Section 308 POCA.
48 Section 307 POCA.
49 Section 306 POCA.
50 Section 245A POCA.

The Criminal Finances Bill 2016 (the Bill)[51] proposes inserting, among other significant proposed amendments,[52] sections 362A to 362H to the POCA 2002, thereby allowing the High Court to make an 'unexplained wealth order': defined[53] as an order requiring an individual to explain, within a specified period, the nature and extent of their interest in specified property,[54] and how they obtained it, where it appears disproportionate to their income.

The High Court must be satisfied that the individual is a politically exposed person,[55] or that there are reasonable grounds to suspect the individual, or a person he or she is connected with, has been involved in serious crime in the United Kingdom or elsewhere.[56]

An interim freezing order can be imposed against the specified property pending a response. Should the individual fail to comply with the order, the property will be presumed recoverable, unless the contrary can be shown.[57] Where a response is provided, the investigating authority must determine, within 60 days, what, if any, action should be taken in relation to the property, or release it.[58]

17.3.4 Cash seizure and forfeiture

People travelling to or from the United Kingdom from a non-EU country carrying currency worth €10,000 or more must declare the cash to UK customs. Failure to do so can lead to a fine of £5,000 under the Control of Cash (Penalties) Regulations 2007.

Under section 294 POCA, currency worth £1,000 or more[59] may be seized if an officer has reasonable grounds for suspecting that it is, or represents, recoverable property obtained through unlawful conduct, or it is intended to be used in unlawful conduct. Currency includes bankers' drafts and cheques.[60]

Cash seized can be detained for an initial period of 48 hours, during which an application for continued detention must be made. This period can be extended

51 http://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0097/17097.pdf (as amended on 23 November 2016). At the time of writing, the Bill is going through the parliamentary process and may yet be amended.

52 Proposed amendments fall within Part 1 of the Bill dealing with investigations, money laundering, civil recovery, and enforcement powers and related offences.

53 Proposed amendment at section 362A(3) POCA.

54 The High Court must be satisfied that the individual holds the specified property and its value exceeds £100,000; it does not matter whether the property was obtained before or after the relevant section comes into force.

55 The Bill refers to the Fourth EU Money Laundering Directive indicating a PEP includes ministers, members of Parliament and senior judges, plus family members and close associates.

56 Proposed amendment at section 362B POCA.

57 Thereby reversing the burden of proof in such proceedings – proposed amendment at section 362C(2) POCA.

58 Proposed amendment at section 362D POCA.

59 Proceeds of Crime Act 2002 (Recovery of Cash in Summary Proceedings: Minimum Amount) Order 2006 (SI 2006/1699).

60 Section 289(6) POCA.

by up to six months on application to a magistrates' court. Repeated applications can be made up to a maximum of two years.[61]

Seized cash is released once the officer is satisfied that detention is no longer justified or the court orders its release.[62]

During any forfeiture proceedings there is no requirement for the officer to prove there has been any criminal investigation, charge or conviction; the court need only be satisfied that the cash seized is derived from, or was intended to be used for, some kind of criminal activity.[63]

These are civil proceedings[64] and the burden of proof is on the applicant 'on the balance of probabilities'.[65] In practice, however, it is often seen as necessary for the person from whom the cash was seized to prove its legitimacy. In today's cashless society, an individual carrying relatively significant sums of cash of itself raises suspicions and the courts have held that requiring an explanation does not amount to a shift in the burden of proof.[66]

Appeals against an order of forfeiture can be made to the Crown Court within 30 days from the order.[67]

It is of concern that law enforcement agencies are increasingly using cash seizures and forfeiture proceedings to circumvent the higher standards of proof required to obtain court-sanctioned restraint and confiscation orders.

Interviewing individuals in cross-border investigations 17.4

Chapter 15 covers in detail the issue of acting for an individual who is being questioned, and the reader is directed to this for a more detailed consideration of the topic.

An individual suspected of criminal activity by the UK authorities who is resident, or temporarily present in the United Kingdom, whom the authorities wish to question will be interviewed 'under caution'. This is usually done on a voluntary basis unless it is considered necessary to arrest the individual and there are legitimate reasons to justify an arrest; such as a reasonable belief that unless placed under arrest the suspect will abscond from the jurisdiction or will somehow attempt to improperly interfere with the investigation.[68]

Either way, the interview will be conducted in accordance with the procedures laid down in PACE and the accompanying Code C. The suspect has a number

61 Section 295 POCA.

62 Section 297 POCA.

63 *R v. Muneka* [2005] EWHC 495 (Admin): the prosecution need not identify the particular criminal activity or the source of the cash; all that is required is that, on balance, the source of the money was a criminal offence, or was intended to be used for a criminal offence.

64 *R (Mudie) v. Dover Magistrates' Court* [2003] EWCA Civ 237: the blameworthiness of the person from whom the property was seized is not of itself an element in what has to be proved and therefore the proceedings do not amount to the bringing of criminal proceedings.

65 *Butt v. HMCE* [2001] EWHC 1066.

66 *Muneka* [2005] EWHC 495 (Admin).

67 Section 299 POCA.

68 Section 24 and Code G PACE.

of rights, including the right to have a lawyer present.[69] A lawyer is defined as a UK solicitor holding a current practising certificate or an accredited or probationary representative.[70] This means that the suspect cannot be represented during the interview by an overseas lawyer. However, the suspect may have an approved interpreter present if he or she does not speak, or has only limited, English.[71]

At the commencement of the interview the suspect will be 'cautioned'. The caution to the suspect is given in the following terms:

> *You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence.*[72]

Not only are a suspect's answers to questions admissible in any future proceedings, but failure to mention a fact subsequently relied on may give rise to an adverse inference if the court finds that it would have been reasonable in the circumstances for him or her to have answered.[73]

These rules apply to UK proceedings and the question of whether the interview is admissible in proceedings in any other jurisdiction will depend on the laws of that country. This means that, in cross-border investigations, serious consideration must be given by all of the suspect's legal advisers prior to any interview in the United Kingdom as to whether his or her answers (or silence) may be admissible in any other investigating jurisdiction and, if so, the resulting potential benefits or disadvantages.

When a suspect is resident in the United Kingdom, but is wanted for questioning by an overseas authority, the individual (or his or her legal advisers) may be approached with a request that the suspect travel to the country of the requesting authority for interview on a voluntary basis.

In the absence of any such request, or if it is refused, the requesting authority may be able to gain evidence from the suspect in the United Kingdom through mutual legal assistance (MLA).

MLA in the United Kingdom is primarily governed by the Crime (International Co-operation) Act 2003 (CICA), Part 1 of which deals with criminal cases. Under CICA, an MLA request can only be made if it appears to the investigating authority that an offence has been committed, or there are reasonable grounds to suspect, and proceedings have been initiated, or an investigation has begun.[74]

MLA requests are made to the UK Central Authority[75] through a formal international letter of request, known as a *commission rogatoire* in civil law jurisdic-

69 Paragraph 6, Code C PACE.

70 Paragraph 6.12, Code C PACE.

71 Paragraph 13, Code C PACE.

72 Paragraph 10.5, Code C PACE.

73 Section 34, Criminal Justice and Public Order Act 1994.

74 Section 7, Crime (International Co-operation) Act 2003.

75 The UKCA is the Home Office department responsible for receiving, acceding to and ensuring the execution of MLA requests in England, Wales and Northern Ireland. Her Majesty's Revenue

tions. The UK Home Office has published detailed guidance on how authorities outside of the United Kingdom can make such requests.[76]

In brief, an overseas authority can request that a statement be taken from the suspect on a voluntary basis. Alternatively, either where the evidence needs to be taken on oath or where the suspect refuses to co-operate voluntarily, the request can be for the suspect to be compelled to attend court for questioning.

Once before the court, the suspect can then be questioned under oath (although an oath may not be administered if this is allowed under the laws of the requesting state). The suspect retains the right against self-incrimination and may refuse to answer any question.

If a suspect consents to giving the overseas authority a statement on a voluntary basis, or answers questions in court, this is admissible evidence in any future proceedings in the requesting jurisdiction. Again, the question of whether statements are also admissible in proceedings in any other jurisdiction will depend on the laws of that country, and serious consideration must be given by all of the suspect's lawyers as to the potential implications of this.

There are many occasions when the requesting state seeks to obtain evidence from an individual who is not a suspect in the investigation. In such situations, the same MLA procedures can be utilised in obtaining evidence from a witness or other non-suspect, as explained above.

However, if it is believed that the non-suspect individual will be unco-operative or unwilling to assist in any circumstances other than by compulsion, and assuming that the investigation is into a serious or complex fraud of the type that would fall under the remit of the Serious Fraud Office (SFO), an MLA request can be made to direct the SFO to obtain such evidence from the individual using its compulsory section 2 powers.[77] Answers obtained via this process are not generally admissible as evidence against the interviewee in criminal proceedings,[78] albeit they will inform the rest of the investigation.

Before granting the request, the requesting authority will be expected to provide an undertaking that any statement, or the contents of any interview, made by an individual pursuant to a compulsory section 2 notice will not be used in evidence against that person in any subsequent prosecution.[79]

However, in the context of, for example, a request by the US Securities and Exchange Commission (SEC) to the FCA, no such undertaking can be sought as it only protects those subject to criminal proceedings, a type of proceeding the

---

and Customs (HMRC) is responsible for MLA requests in England, Wales and Northern Ireland relating to tax and fiscal customs matters. The Crown Office is responsible for MLA requests in Scotland, including devolved Scottish matters.

76 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415038/MLA_Guidelines_2015.pdf.

77 Section 2 of the Criminal Justice Act 1987. The Financial Conduct Authority has a similar power under s.171 of the Financial Services and Markets Act 2000.

78 Answers given in compelled interviews will, however, be admissible against the interviewee in most types of non-criminal proceedings.

79 *Saunders v. The United Kingdom* [1996] ECHR 65, para. 68 in particular.

SEC cannot initiate, and thereby raises concerns regarding the privilege against self-incrimination. In practice, the FCA will assist the SEC and will try to circumvent admissibility issues by inviting the individual to attend an interview and threatening the use of powers to compel answers should he or she refuse.

Individuals in such a predicament are advised to seek appropriate UK and US advice before entering into any dialogue with the authority.

17.5 Privilege considerations for the individual

Chapter 35 covers the question of privilege and the reader is directed to this for a more detailed consideration of privilege issues.

In the United Kingdom, legal professional privilege (LPP), comprising legal advice privilege (LAP)[80] and litigation privilege (LP),[81] is both a substantive and procedural right that, if established, can be asserted in response to any request for communications or documents. It is 'a fundamental condition on which the administration of justice as a whole rests'.[82]

It is an essential prerequisite[83] to a claim for LPP that the material is confidential. This does not, of itself, give rise to LPP, but if the material is not confidential then it cannot be asserted.

LAP attaches only to communications passing between the client and lawyer, acting in a professional capacity, in connection with the provision of legal advice, which 'relates to the rights, liabilities, obligations or remedies of the client under private law or under public law.'[84]

LP attaches to communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation where litigation is in progress or reasonably in contemplation; the communications are made with the sole or dominant purpose of conducting that anticipated litigation; and the litigation is adversarial, not investigative or inquisitorial.

Privilege generally cannot be overridden, except in limited circumstances where either the client waives his or her privilege or it is overridden by statute.[85]

LPP prohibits privileged communications or documents from compulsory disclosure and, therefore, questions as regards jurisdiction tend not to arise. Whether a UK court has jurisdiction will be subject to the UK rules of law. The Court of Appeal confirmed this principle when it held that privilege was not lost on the basis that it could not be claimed in another country: 'The crucial consideration is whether the document and its information remain confidential in the sense that it

80 Communications between lawyer and client for the purpose of giving or receiving legal advice.

81 Communications between a client or his or her lawyer and third parties for the purposes of litigation.

82 *R v. Derby Magistrates, ex p B* [1996] 1 AC 487.

83 *Three Rivers District Council v. Governor and Company of the Bank of England (No. 6)* [2005] 1 AC 610 (HL).

84 Ibid.

85 *Bowman v. Fels* [2005] 1 WLR 308.

is not properly available for use. If it is, then privilege in the United Kingdom can be claimed and that claim, if properly made, will be enforced.'[86]

LAP and LP extend to advice received from foreign lawyers[87] and to documents prepared in connection with proposed or actual litigation in a foreign court.[88] However, LPP can be lost where, for example, documents are produced in open court thereby losing their confidentiality.

When representing individuals, the client is easily identifiable. When representing corporate entities the 'client' is the corporate entity itself and privilege will attach only to those communications with individuals who are, expressly or impliedly, authorised by the company to give instructions to, and receive advice, from the instructed lawyer.

In May 2017, the High Court handed down a significant judgment relating to LP and LAP.[89] The SFO sought a declaration from the High Court compelling the disclosure of documents requested from mining company Eurasian Natural Resources Corporation Ltd (ENRC). This was opposed by ENRC arguing that LPP attached to the documents sought as they had been produced during an internal investigation. ENRC's internal investigation commenced in 2011, whereas the SFO's investigation commenced in 2013.

See Chapter 35 on privilege

In relation to LP, the court found that ENRC had to show that at the time the internal investigation commenced, it was 'aware of circumstances which rendered litigation between itself and the SFO a real likelihood, rather than a mere possibility.'

Mrs Justice Andrews concluded that ENRC fell at this hurdle: privilege would not attach where an investigation was only contemplated. Furthermore, documents generated at a time when there is no more than a general apprehension of future litigation cannot be protected by LP just because an investigation is, or is believed to be, imminent.

This is an important development, particularly in relation to corporates undertaking internal investigations. While this judgment may well be appealed, those conducting internal investigations into suspected criminal activity must give careful thought as to how they can best preserve their clients' rights to privilege, such as the corporate providing its employees with authorisation to receive legal advice from its lawyers, or undertaking a qualitative assessment of an interviewee, rather than a verbatim record.

Evidentiary issues 17.6

In complex parallel and cross-border proceedings, a frequent issue when acting for an individual is whether evidence obtained in prior, or contemporaneous, civil proceedings will be admissible in any potential future criminal proceedings.

86 *Bourns Inc v. Raychem Corp* [1999] 3 All ER 154 (CA).

87 *R (on the application of Prudential plc) v. Special Commissioner of Income Tax* [2011] 2 WLR 50.

88 *Re Duncan* [1968] P 306, 313; *Minnesota Mining & Manufacturing co v. Rennicks* [1991] FSR 97.

89 [2017] EWHC 1017 (QB).

17.6.1 Evidence obtained in civil proceedings

The disclosure obligation in UK civil litigation requires each party to disclose documents to the other side. Such documents may be of a highly confidential nature and due to the risk of misuse once in the hands of the receiving party, there exists an implied obligation[90] not to use the documents, or copies of them, or information derived from them, for any collateral purpose.

Under the Civil Procedure Rules, rule 31.22, a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed. There are three exceptions to this rule:

- the document has been read to or by the court, or referred to, at a hearing held in public (although the court may make an order restricting or prohibiting the use of a disclosed document in these circumstances on application by a concerned party);
- the court gives permission; or
- the party who disclosed the document and the person to whom the document belongs agrees.

In the matter of *Tchenguiz v. Director of the Serious Fraud Office*,[91] Edgar J held that, in such cases, the burden of proof lies with the applicant arguing that one of the three exceptions apply. The applicant must show cogent and persuasive reasons as to why the document, or documents, in issue should be released so as to amount to a special circumstance that will permit their release. The judge then provided a number of useful indicators to the circumstances in which permission is likely to be granted by the court for disclosure of documents, including the situation where the documents may reveal criminal conduct.

In the *Tchenguiz* case itself, the conduct in issue was 'possible perjury, perjury-type offences or bribery offences'. The court concluded that the exception did apply because 'if the documents revealed any criminality, then that would be a serious matter . . . and . . . any party who may be a victim of such a possible criminal offence should, in principle, be entitled to obtain legal advice in relation thereto.'[92]

17.6.2 Resulting disclosures and breaches

The principal issue is whether the documents have been disclosed within the definition of rule 31.2.[93] Practically speaking, this means that, for example, in regard to pre-action disclosure – where material may be disclosed to avoid unnecessary litigation – documents should only be disclosed upon receipt of a collateral undertaking thereby requiring leave from the court to use the material.

---

90 First formally recognised in *Alterskye v. Scott* [1948] 1 All ER 469.

91 [2014] EWHC 1315 (Comm) at paragraphs 19-25.

92 [2014] EWHC 1315 (Comm) at paragraph 22.

93 A party discloses a document by stating that the document exists or has existed; *Smithkline plc v. Generics (UK) Ltd* [2003] EWCA Civ 1109.

A breach of any such collateral undertaking is a contempt of court (carrying sanctions from imprisonment to a fine) and any attempt at reliance may be restrained by an injunction.

Release of the undertaking for production in criminal proceedings 17.6.3

In *Marlwood Commercial Inc v. Kozeny*,[94] which concerned the use of documents in connection with a foreign criminal investigation, brought within the jurisdiction by a foreign defendant under compulsion, the Court of Appeal held that in the absence of arguments to the contrary, 'the public interest in the investigation or prosecution of a specific offence of serious or complex fraud, should take precedence' over the use of compulsorily disclosed documents.

Also, the Criminal Justice Act 1987 does not prevent the SFO from disclosing documents received from third parties in response to section 2 notices.[95] In the *Tchenguiz*[96] case the court confirmed that the SFO's normal duty of confidence in respect of information obtained pursuant to its statutory powers is overridden in a number of circumstances including when the disclosure is required for the purposes of a criminal prosecution in the United Kingdom, or elsewhere, pursuant to section 3(5) of the Criminal Justice Act 1987.

Use of material disclosed in criminal proceedings in other proceedings 17.6.4

Section 17 of the Criminal Procedure and Investigations Act 1996 (CPIA) provides that there is an implied undertaking that the material and documents disclosed in the course of a criminal investigation and trial will not be used for any purpose other than that for which they were specifically disclosed, namely the trial of the defendant.

The principle of open justice, however, provides that the legal process should be conducted in public and access will be given, therefore, to material and evidence referred to in open court as such material is effectively in the public domain.

It is a contempt of court to knowingly use or disclose an object of information recorded in a document in contravention of section 17.[97]

Settlement considerations 17.7

There will be many occasions during parallel and cross-border investigations and proceedings when a corporate entity will commence settlement discussions with the authorities (be they regulators or criminal enforcement agencies).

Within the United Kingdom, such discussions are most likely to be with the Financial Conduct Authority (FCA), or the SFO, or both, and, as regards

94 [2004] EWCA Civ 798.

95 *Tchenguiz v. Director of the Serious Fraud Office* [2013] EWHC 2128 (QB).

96 Ibid.

97 Section 18, CPIA.

criminal investigations, they are most likely to be centred on the possibility of the authorities agreeing to a deferred prosecution agreement (DPA). [98]

A DPA settlement is only binding upon the authority (usually the SFO) and suspect corporate entity. There is no limitation as to the use that the authority can put on much of the information it obtains during the DPA negotiations in criminal proceedings against others, including individuals employed by the corporate entity.[99]

This means that an employee suspect is at great risk of having his or her position seriously compromised, including a heightened risk of criminal prosecution, as a result of an employer's settlement negotiations.

If a corporate with which the client is connected enters into a DPA, the client may be named in the statement of facts. The current state of the law is unsatisfactory in that a third party does not have to be notified that he or she may be named in this way. This is in sharp contrast to the protection of third-party rights afforded by section 393 of the Financial Services and Markets Act 2000.

Dependent on the status of the individual within the corporate structure, the corporate entity may well enter settlement negotiations with the authorities without even their knowledge, let alone their input. In such circumstances, there is little that the individual's lawyers can do.

If the individual is a party to the negotiations, perhaps because of his or her seniority within the organisation, or is at least aware as to their existence, it is open to the legal advisers to approach the company's lawyers and seek to have some input as to how the negotiations are conducted. Most importantly, this would include what is said about the client and what documentation concerning the client is disclosed to the authority. However, there is no obligation on the company's lawyers to entertain any such approach. Indeed, they may well argue that to do so would potentially jeopardise their negotiations as being contrary to their obligation to 'fully cooperate' with the authority under the joint SFO and CPS Code of Practice.[100]

17.8 Reputational considerations

See Chapter 39 on protecting corporate reputation

Throughout any parallel or cross-border investigation or proceeding, there is the constant need for those representing an individual to consider the potential impact that the matter could have on their client's reputation.

Reputation may include the client's professional reputation among his or her peers or wider public reputation; particularly if the client is already a well-known figure. Matters are further complicated because the individual may have a low profile in one jurisdiction, but a high profile in another, or, despite having a low media profile, may have become embroiled in a high-profile investigation.

Recently in the United Kingdom, reputation management has been seen as a distinct professional discipline, with a number of lawyers specialising in the

98 Schedule 17, Crime and Courts Act 2013.

99 Paragraph 13(6), Schedule 17, Crime and Courts Act 2013.

100 Paragraph 2.8.2(i), DPA Code of Practice, Crime and Courts Act 2013.

field. They often work together with, rather than in competition to, those from the more traditional public relations firms and consultancies. In any event, those acting for individuals who have reputational considerations, but who lack their own specialised in-house resource, are best advised to turn to one or more of these specialists at as early a stage as possible and integrate them in to the client's team of professional advisers.

Only through mutual work as part of an integrated team can properly informed consideration be given on the key issues of whether the client's reputation is at risk and, if so, how it can be best protected without adversely affecting his or her position in the ongoing investigation or proceedings.

The Supreme Court recently handed down a significant judgment in relation to the FCA's use of monikers, such as 'Trader A', to hide the names of individuals in corporate final or decision notices. The central issue was whether, despite the use of a moniker, the individual had been 'identified' for the purposes of section 393 of the Financial Services and Markets Act 2000. [101]

The matter arose from the decision of the Upper Tribunal, in April 2014, that Mr Achilles Macris, a former senior manager responsible for JP Morgan Chase's chief investment office in Europe, had been 'identified', and therefore prejudiced, in not being accorded his third-party rights despite being referred to throughout the FCA's notice as 'CIO London management'. This decision was appealed to the Court of Appeal, which upheld the Upper Tribunal's decision.[102]

The FCA appealed to the Supreme Court, which handed down judgment on 22 March 2017.[103] The Supreme Court panel was split, 4 to 1, with the majority adopting a more restricted interpretation of 'identifies' than the Upper Tribunal and Court of Appeal. Lord Sumption, delivering the majority decision, concluded that 'it must be apparent from the notice itself that it [the name or synonym] could apply to only one person.'[104] Furthermore, the relevant audience is 'the public at large'[105] and the fact a specific sector of the public, with additional special information, may identify the individual is irrelevant. The dissenting view considered the majority verdict too 'narrow' and suggested the assessment should be made from the perspective of an 'operator in the same sector of the market'.[106]

The widely accepted view of this decision is that it was policy-driven and that, when asked to consider third-party interests and due process against the practicalities for the FCA, the majority preferred the latter.

Since this decision, a number of high-profile individuals subject to regulatory probes have abandoned legal action against the FCA for improper identification.

---

101 Section 393 provides: 'If any of the reasons contained in a notice to which this section applies relates to a matter which: (a) identifies a person ("the third party") other than the person to whom the notice is given, and (b) in the opinion of the Authority, is prejudicial to the third party, a copy of the notice must be given to the third party.'

102 *Macris v. The Financial Conduct Authority* [2015] EWCA Civ 490.

103 *Financial Conduct Authority v. Macris* [2017] UKSC 19.

104 Ibid., para. 11.

105 Ibid., para. 15.

106 Ibid., para. 63.

Nevertheless, Mark Steward, Head of Enforcement at the FCA, has recently announced that, where there are concurrent corporate and individual liability issues, the agency will aim to run investigations in parallel and release notices implicating corporates and individuals at the same time. This statement suggests that the FCA is looking for ways to balance the interests of all parties concerned.

18

Individuals in Cross-Border Investigations or Proceedings: The US Perspective

Jeffrey A Lehtman and Margot Laporte[1]

Introduction 18.1

Representing individuals in parallel or cross-border investigations and proceedings requires the ability to interact with counsel in multiple jurisdictions and disciplines, and a dogged focus on the desired result, often in the face of complex and competing jurisdictional, procedural and legal obstacles. In some instances, issues of foreign law or regulatory climate, as well as the nature and order of interactions with regulators and third parties, can affect the outcome to a greater extent than the underlying facts or evidence. In this chapter, we discuss certain of the variables counsel should anticipate, including extradition, asset seizures and forfeiture, interaction with local counsel, pool counsel and privilege considerations, evidentiary issues involving cross-border document production and parallel proceedings, and issues involving settlement and client reputational risk.

Extradition 18.2

The United States has aggressively pursued the extradition of individuals located abroad who are charged with US criminal offences. While successful extradition requests have historically been in the context of violent crimes and narcotics trafficking, the United States has increasingly obtained extradition in connection with white-collar crimes, including corruption and money laundering.[2] Attorneys representing individuals located outside the United States in white-collar criminal

1 Jeffrey Lehtman is a partner and Margot Laporte is an associate at Richards Kibbe & Orbe LLP.

2 For instance, in connection with the US Department of Justice's charges against multiple international soccer officials for FIFA-related corruption allegations, Switzerland has approved the extradition of several officials detained in Zurich. Other FIFA officials have chosen to waive extradition from Switzerland and voluntarily appear to face charges in the United States. See, e.g., Rebecca R. Ruiz, FIFA Official's Extradition Approved on Eve of Meeting in Zurich, N.Y.

matters, therefore, should understand the extradition process and anticipate that their clients may be subject to a US extradition request.

18.2.1 Law and practice

Extradition law and practice is driven by obligations that arise from bilateral or multilateral treaties. Under a typical extradition treaty, the parties agree, under specified conditions, to extradite individuals who are within their jurisdictions and who have been charged with extraditable offences in the requesting country. The United States has entered into bilateral treaties with over 100 countries[3] and is a party to two multilateral extradition agreements, including the 2010 Extradition Agreement between the United States and the European Union.[4] In addition, the United States has entered into several multilateral international conventions that supplement bilateral extradition treaties by obligating the parties to prosecute or extradite individuals charged with certain crimes.[5]

Modern extradition treaties have expanded the definition of extraditable offences. Historically, the United States has entered into 'list' treaties that enumerate extraditable offences, often to the exclusion of modern white-collar offences.[6] Under more recent 'dual criminality' extradition treaties, an offence is extraditable if it is a crime in both jurisdictions punishable by more than one year's imprisonment.[7]

Times, 23 September 2015, available at www.nytimes.com/2015/09/24/sports/soccer/fifa-officials-extradition-approved-on-eve-of-meeting-in-zurich.html?_r=0.
Separately, in connection with the extradition of an Algerian national from Thailand to face cybercrime charges in the United States, then Deputy Attorney General Yates noted that '[n]o violence or coercion was used to accomplish this scheme,' but that '[t]his arrest and extradition demonstrates our determination to bring [cybercriminals] to justice.' Press Release, US Dep't of Justice, International Cybercriminal Extradited from Thailand to the United States (3 May 2013), available at https://www.justice.gov/usao-ndga/pr/algerian-national-extradited-thailand-face-federal-cybercrime-charges-atlanta-spyeye.

3 See US Dep't of State, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on 1 January 2016, available at https://www.state.gov/documents/organization/267489. pdf.

4 See Inter-American Convention on Extradition, 26 December 1933, 49 Stat. 3111; Agreement on Extradition Between the United States of America and the European Union, entered into force 1 February 2010, S. Treaty Doc. No. 109-14.

5 See, e.g., United Nations Convention for the Suppression of Unlawful Seizure of Aircraft art. 8, 16 December 1970, 860 U.N.T.S. 105 ('The offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between the Contracting States.'); United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 6, 20 December 1988, 1582 U.N.T.S. 95 ('Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties.').

6 See, e.g., Extradition Treaty, U.S.-N.Z., art. 2, 12 January 1970, 22 U.S.T. 1.

7 See, e.g., Extradition Treaty, U.S.-Lux., art. 2, 1 October 1996, T.I.A.S. No. 12,804.

Many modern treaties have expanded the list of extraditable offences to include crimes committed outside the territory of the requesting state.[8] This expansion is particularly significant in light of the United States' assertion of broad 'territorial' jurisdiction in charging foreign individuals for conduct that occurred overseas on the basis of only minimal US contacts.[9] In 2010 and 2011, for instance, the US Department of Justice (DOJ) successfully extradited two UK citizens, Jeffrey Tesler and Wojciech Chodan, for violations of the US Foreign Corrupt Practices Act (FCPA),[10] asserting jurisdiction based, in part, on the use of correspondent bank accounts in the United States to make corrupt payments to Nigerian government officials.[11]

Enforcement of the extradition request 18.2.2

In practice, extradition decisions are part judicial and part foreign policy. Federal and state prosecutors in the United States must submit extradition requests for review and approval by the DOJ's Office of International Affairs.[12] Once approved, the US Department of State will formally request extradition to the appropriate agency within the requested state.[13] While practices vary, in general, the judicial branch in the requested state will then make a determination as to whether the individual is extraditable under the relevant treaty and domestic law.[14] During this process, the individual typically may challenge the extradition request within the requested state, based on the factual and procedural defences discussed immediately below.[15] Once extradition is determined to be lawful, the executive branch of the requested state generally makes the final decision as to whether to approve the extradition request.[16] If the request is approved, the requested state will transfer custody of the individual to US law enforcement authorities.[17]

---

8 See, e.g., Extradition Treaty, U.S.-U.K. (United Kingdom Extradition Treaty), art. 2, 31 March 2003, S. Treaty Doc. No. 108-23 ('If the offense has been committed outside the territory of the Requesting State, extradition shall be granted . . . if the laws in the Requested State provide for the punishment of such conduct committed outside its territory in similar circumstances.' If the laws of the Requested State do not provide for such punishment, the Requested State may grant extradition in its discretion.)

9 See Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-3(a) (providing that foreign entities (other than US issuers) and individuals are subject to US jurisdiction if they 'corruptly . . . make use of the mails or any means or instrumentality of interstate commerce,' or if they 'commit any other act in furtherance of' a proscribed bribery offence, 'while in the territory of the United States').

10 See *Chodan v. Government of the United States and Another*, [2010] EWHC 2207 (Admin.); *Tesler v. Government of the United States*, [2011] EWHC 52 (Admin.).

11 See Indictment ¶ 21, *United States v. Tesler & Chodan*, No. 09-CR-098 (S.D. Tex. 17 February 2009).

12 US Dep't of Justice, Office of the US Attorneys, US Attorneys' Manual § 9-15.210, available at https://www.justice.gov/usam/united-states-attorneys-manual.

13 Id. § 9-15.300.

14 Id.

15 Id.

16 Id.

17 Id. § 9-15.400.

18.2.3 Defences

When representing an individual who may become, or has become, subject to an extradition request from the United States, relevant considerations include (1) which treaty or treaties may be applicable, given the client's nationality and current location; (2) whether it would be advisable for the client not to travel to certain jurisdictions; and (3) whether to waive or challenge extradition. In considering these factors, it may be necessary to consult counsel specialising in the extradition law of the relevant jurisdiction.

Factors to consider when advising a client as to whether to waive extradition and surrender to the requesting state include: (1) the likelihood of success in challenging extradition in the relevant jurisdiction; (2) the effect of waiving extradition on any future charges that may be brought, by both US and foreign regulators; and (3) the potential benefits of waiving extradition and co-operating with US regulators, including the possibility of obtaining more favourable conditions of release once in the United States.

In considering whether to challenge an extradition request, practitioners should bear in mind that authorities in the requested state must, in theory, grant extradition if the relevant treaty requirements are met. Nonetheless, extradition treaties enumerate specific grounds for denying extradition requests to accommodate the legal and policy interests of both state parties.

While each extradition treaty is negotiated separately and contains party-specific provisions, available defences against extradition generally fall into four categories: (1) the character of the offence charged, including defences against extradition for political offences[18] (which, in most recent treaties, excludes violent acts of terrorism)[19] and military offences;[20] (2) the characteristics of the individual, including whether the individual is a national of the requested state;[21] (3) legal due process, including the legality of the offence charged, statute of limitations and prohibitions against double jeopardy;[22] and (4) humanitarian considerations, including whether the individual may be subject to cruel and unusual punishment or the death penalty in the requesting state.[23]

Although the United States successfully extradited defendants in a number of recent white-collar matters, the United States continues to face certain challenges in securing the extradition of foreign nationals.[24] First, while most modern

18 See, e.g., United Kingdom Extradition Treaty, supra note 8, art. 4(1).

19 See, e.g., id. art. 4(2).

20 See, e.g., id. art. 4.

21 See, e.g., id. art. 3.

22 See, e.g., id. arts. 2, 5, 6.

23 See, e.g., id. art. 7.

24 Since 2011, for instance, the DOJ has unsuccessfully sought the extradition of certain former executives and agents of Siemens AG, including German nationals residing in Germany, for their alleged participation in a scheme to bribe Argentine government officials in violation of the FCPA. See Letter from Preet Bharara, then US Att'y, Dep't of Justice, to Denise Cote, US District J., Southern District of New York, *United States v. Sharef et al.*, No. 11-CR-1056 (S.D.N.Y.

bilateral treaties prohibit the refusal of extradition on the basis of nationality,[25] a number of the United States' key treaty partners, including France, Germany and Brazil, cannot extradite their nationals under their constitutions or domestic laws and are not obliged to do so under their extradition treaties with the United States.[26] Second, under modern dual criminality treaties, an extradition request may not be granted where the alleged offence is not a crime in the jurisdiction of the requested party.[27] This requirement raises particular defences in the context of FCPA matters, for example, where the country in which the individual currently is located may not prohibit certain types of payments that are prohibited under the FCPA.[28]

---

15 December 2011) ('The defendants in this case all reside overseas and none of the defendants is currently in custody. As such, none of the defendants will be arraigned in the immediate future.').

25 See, e.g., United Kingdom Extradition Treaty, supra note 8, art. 3 ('Extradition shall not be refused based on the nationality of the person sought.').

26 See, e.g., Extradition Treaty, U.S.-Braz., art. VII, 18 June 1962, 15 U.S.T. 2093 ('There is no obligation upon the requested State to grant the extradition of a person who is a national of the requested State, but the executive authority of the requested State shall, subject to the appropriate laws of that State, have the power to surrender a national of that State if, in its discretion, it be deemed proper to do so.'); Extradition Treaty, U.S.-Ger., art. 7(1), 20 June 1978, 32 U.S.T. 1485 ('Neither of the Contracting Parties shall be bound to extradite its own nationals. The competent executive authority of the Requested State, however, shall have the power to grant the extradition of its own nationals if, in its discretion, this is deemed proper to do and provided the law of the Requested State does not so preclude.'); Extradition Treaty, U.S.-Fr., art. 3(1), 23 April 1996, S. Treaty Doc. No. 105-13 ('There is no obligation upon the Requested State to grant the extradition of a person who is a national of the Requested State, but the executive authority of the United States shall have the power to surrender a national of the United States if, in its discretion, it deems it proper to do so.').

The representation of individuals from nations that do not extradite their citizens raises special considerations, including whether it would be advisable for such individuals not to travel to the US or other jurisdictions during the pendency of criminal investigations. For instance, in connection with the US government's investigation into Volkswagen AG's diesel emissions tests, on 24 May 2017, the US Court of Appeals for the Sixth Circuit upheld a district court ruling that a Volkswagen engineer (a German national who was arrested upon travelling to the United States) should be detained pending trial because he was a flight risk. Order, *United States v. Schmidt*, No. 17-336, at 2 (6th Cir. 24 May 2017). In concluding that the Volkswagen engineer was a flight risk, the district court noted, among other factors, that Germany does not extradite its citizens to the United States. Order Denying Def. Schmidt's Mot. for Revocation of Detention Order, *United States v. Schmidt*, No. 2:16-cr-20394, at 4 (E.D. Mich. 16 March 2017).

27 See, e.g., United Kingdom Extradition Treaty, supra note 8, art. 2(1).

28 For example, in 2005, the DOJ indicted Viktor Kozeny, a Czech national residing in The Bahamas, who was accused of participating in a scheme to bribe Azeri government officials. Although the United States and The Bahamas have entered into an extradition treaty, see Extradition Treaty, U.S.-Bah., 9 March 1990, S. Treaty Doc. 102-17, in 2012, the highest appellate court for The Bahamas ruled that Kozeny could not be extradited, among other things, for acts that would not constitute offences against the law of The Bahamas if they had taken place within The Bahamas, see *Superintendent of Her Majesty's Foxhill Prison & United States v. Kozeny*, Privy Council Appeal No. 0073, ¶ 53 (Judicial Comm. of the Privy Council 28 March 2012) (Bah.).

18.3 Asset seizures and forfeiture

In recent years, US authorities, including the DOJ and the US Securities and Exchange Commission (SEC), have pursued the seizure and forfeiture of assets, located in the United States and abroad, relating to white-collar criminal offences including insider trading, corruption and money laundering.[29] To that end, the DOJ has established a dedicated Asset Forfeiture Program that coordinates with a number of other US regulatory and law enforcement authorities, including with respect to requests for international assistance in the seizure and forfeiture of assets.[30] Attorneys representing individuals in cross-border investigations and proceedings, therefore, should anticipate that US authorities may seek to seize or forfeit their clients' assets, even when those assets are located outside the United States.

18.3.1 Circumstances required for freezing or seizure of assets

US law provides mechanisms through which the DOJ and SEC may obtain court orders to freeze, seize and forfeit assets in connection with criminal and civil proceedings. In criminal enforcement matters, the DOJ may seize the property of a defendant through either criminal or civil forfeiture proceedings.[31]

To initiate a criminal forfeiture proceeding, the DOJ must include criminal forfeiture-related charges in the indictment.[32] Owing to concerns that defendants may hide assets, prosecutors often will seek both pre-indictment and pretrial restraining orders to freeze the assets at issue until a criminal forfeiture order can be obtained.[33] While the DOJ also may take possession of the property pursuant to a criminal seizure warrant,[34] generally, the property will remain in the possession of the defendant, subject to a restraining order, until the court enters an order of forfeiture.[35]

---

29 In *Sec. Exch. Comm'n. v. One or More Unknown Traders in the Securities of Onyx Pharmaceuticals, Inc.*, for instance, the court agreed to maintain a previously imposed asset freeze on accounts that held allegedly illicit trading profits, even while dismissing the SEC's complaint for failure to present sufficient evidence to support an inference of insider trading. 296 F.R.D. 241, 257 (S.D.N.Y. 2013).

30 See US Dep't of Justice, Asset Forfeiture Program, Participants and Roles, https://www.justice.gov/afp/participants-and-roles.

31 See, e.g., 18 U.S.C. §§ 981, 982.

32 Fed. R. Crim. P. 32.2(a).

33 See 18 U.S.C. § 1963(d); 21 U.S.C. § 853(e) (incorporated by reference in 18 U.S.C. § 982(b)(1) and numerous other federal criminal forfeiture statutes).

34 21 U.S.C. § 853(f) (incorporated by reference in 18 U.S.C. § 982(b)(1) and numerous other federal criminal forfeiture statutes).

35 US Dep't of Justice, Asset Forfeiture & Money Laundering Section, Asset Forfeiture Policy Manual at 35, available at https://www.justice.gov/criminal-afmls/file/839521/download ('It is not necessary for the Government to have the property subject to criminal forfeiture in its possession during the pendency of a criminal forfeiture proceeding. . . . Cases where the Government takes physical possession of property subject to criminal forfeiture with a criminal seizure warrant prior to the entry of a preliminary order of forfeiture are relatively rare.').

The DOJ cannot obtain a criminal forfeiture order unless the defendant has been criminally convicted or has pleaded guilty to a forfeitable offence.[36] In cases where the property subject to forfeiture is no longer available as the result of an act or omission of the defendant, the court may, under certain circumstances, order the forfeiture of 'substitute assets' belonging to the defendant.[37]

To initiate a judicial civil forfeiture proceeding,[38] the DOJ must file an *in rem* action against property that was derived from or used to commit the crime.[39] Unlike criminal forfeiture, in the case of civil forfeiture, the DOJ typically will seize the property at issue, with the exception of real property,[40] before the court enters a civil forfeiture order.[41] Depending on the circumstances, the DOJ may seize the property: (1) pursuant to a seizure warrant obtained in the same manner as a search warrant under the Federal Rules of Criminal Procedure,[42] which requires the DOJ to establish that there is 'probable cause', or a reasonable basis, to believe that the defendant committed a forfeitable offence and that the property has the requisite connection to the crime;[43] (2) pursuant to an arrest warrant *in rem*, which also requires a showing of probable cause;[44] or (3) without a warrant.[45] The DOJ may also obtain pre-indictment and pretrial restraining orders to freeze any assets that it has not seized.[46]

Unlike in criminal forfeiture actions, the defendant need not have been convicted or pleaded guilty for the DOJ to obtain a civil forfeiture order. In a civil forfeiture action, the DOJ must establish, by a 'preponderance of the evidence', that the property is subject to forfeiture.[47]

In civil enforcement matters, the SEC may seek temporary pretrial restraining orders to freeze a defendant's assets, primarily to secure funds for any future disgorgement if the defendant is found liable.[48] For instance, the SEC may seek a temporary restraining order to freeze a defendant's assets when it appears to the

36 See 18 U.S.C. §§ 982(a), 1963(e); Fed. R. Crim. P. 32.2(b)(1)(A).

37 21 U.S.C. § 853(p) (incorporated by reference in 18 U.S.C. § 982(b)(1) and numerous other federal criminal forfeiture statutes).

38 Certain civil forfeiture statutes also contemplate non-judicial or administrative civil forfeiture, in which federal agencies may forfeit property without a court order. See 18 U.S.C. § 983(a)(1); 19 U.S.C. § 1607.

39 See 18 U.S.C. §§ 983(a)(4), 984(a)(1), 985(c).

40 Id. § 985(b)(1).

41 Id. § 981(f) ('All right, title, and interest in property [subject to forfeiture] shall vest in the United States upon commission of the act giving rise to forfeiture under this section.'); 21 U.S.C. § 853(c) (incorporated by reference in 18 U.S.C. § 982(b)(1) and numerous other federal criminal forfeiture statutes) (same).

42 Id. § 981(b)(2).

43 Fed. R. Crim. P. 41(d)(1).

44 Fed. R. Civ. P., Supp. R. G(3).

45 18 U.S.C. § 981(b)(2).

46 Id. § 983(j).

47 Id. § 983(c).

48 *Onyx*, 296 F.R.D. at 254 (citing *Sec. Exch. Comm'n v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990)).

Commission that the defendant 'is engaged or is about to engage' in securities law violations.[49] To obtain an asset freeze, the SEC must make a 'proper showing',[50] by showing either a likelihood of success on the merits or that 'an inference can be drawn' that the defendant violated federal securities laws.[51]

The decision to freeze assets, or to modify an asset freeze, is within the court's discretion to order equitable relief.[52] In practice, courts have not imposed a high burden of proof on the SEC, ordering asset freezes in cases where there was only circumstantial evidence that a violation had occurred[53] or where the funds could not be traced directly to the alleged illegal activity.[54]

18.3.2 Freezing or seizure of assets located abroad

US authorities' efforts to seize assets that are believed to be related to illicit conduct are not limited to assets located within the United States. The United States and other members of the international community have concluded a number of treaties and other formal and informal understandings that provide for the seizure or return of assets located in foreign jurisdictions.[55] In addition, both US authorities and private civil litigants may seek to register with the courts of a foreign jurisdiction final decisions by US courts ordering the seizure or forfeiture of assets, or both, and to request the assistance of the authorities in that jurisdiction to enforce the judgment.[56] US-based practitioners should also bear in mind that international co-operation mechanisms are mutual, and that foreign regulators may seek the co-operation of US authorities to seize or forfeit assets located in the United States.

49 15 U.S.C. § 78u(d)(1).

50 Id.

51 *Onyx*, 296 F.R.D. at 254–55 (citing *Smith v. Sec. Exch. Comm'n*, 653 F.3d 121, 128 (2d Cir. 2011)).

52 Id. (citing 15 U.S.C. § 78aa).

53 See id. at 255–57.

54 See *Sec. Exch. Comm'n v. Grossman*, 887 F. Supp. 649, 661 (S.D.N.Y. 1995).

55 See, e.g., Mutual Legal Assistance Treaty, U.S.-U.K., arts. 1 and 16, 6 January 1994, T.I.A.S. No. 96-1202 (providing for 'mutual assistance' in connection with 'executing requests for searches and seizures' and 'identifying, tracing, freezing, seizing, and forfeiting the proceeds and instrumentalities of crime and assistance in related proceedings').

56 See, e.g., id. art. 19(2) (providing that the parties may, at their discretion, and as agreed in writing, provide mutual assistance with respect to 'hearings or any investigations before any court, administrative agency or administrative tribunal with respect to the imposition of civil or administrative sanctions'). While the United States has not entered into any treaties for the recognition of foreign court judgments in civil actions, private civil litigants may seek to register final US court decisions with foreign courts through exequatur proceedings under the law of the foreign jurisdiction. See, e.g., French Code Civ. Part. 509 ('Judgments rendered by foreign courts and deeds received by foreign officers shall be enforceable on the territory of the French Republic in the manner and under the circumstances specified by law.').

Strategic considerations – legal fees and other expenses 18.3.3

When representing an individual faced with a court-ordered asset freeze, counsel should consider the tactical ramifications of litigating to challenge the freeze order, negotiating or litigating to obtain a carve-out for legal fees and other expenses, or of letting the order stand. While practitioners may, in the first instance, attempt to negotiate the terms of an asset freeze with the relevant authority, it may ultimately become necessary to seek judicial relief. In considering whether to litigate an asset freeze, counsel should balance factors such as the opportunity to gain insight into the government's enforcement investigation against the risk that litigation may accelerate the enforcement process, the jurisdictional implications of challenging the order, the fact that the defendant may need to provide evidence during the course of litigation, and the likelihood of success given prior precedent.

Nonetheless, even if a court determines that a freeze order is appropriate with respect to certain assets, it may be possible to argue that the order is overly broad. Potential arguments include that the freeze order restricts untainted assets or assets belonging to individuals who have not been charged in the proceeding,[57] or that the asset freeze leaves the defendant without the means to pay for reasonable living expenses.[58]

Practitioners should also consider whether the asset freeze will preclude their clients from paying legal fees. In general, whether a court will agree to a carve-out for the payment of legal fees will be influenced largely by whether the client is facing a civil or criminal proceeding. In particular, civil proceedings do not implicate the US constitutional right to counsel,[59] and courts have held that civil defendants do not have a right to pay legal fees with the proceeds of illegal activity.[60] Therefore, courts in civil proceedings may (or may not), in their discretion, agree to release frozen funds for the payment of legal fees if it is shown that the particular assets at issue were not tainted by the alleged conduct and that the client has sufficient funds to satisfy any future penalties and disgorgement.[61]

With respect to criminal proceedings and parallel civil and criminal proceedings, the US Supreme Court has held that neither pretrial restraint nor forfeiture of tainted assets needed to retain counsel of choice violates a criminal defendant's

57 See, e.g., 18 U.S.C. § 983(d) (providing for an 'innocent owner defence' with respect to property subject to civil forfeiture).

58 See *Sec. Exch. Comm'n v. Petters*, No. 09-1750, 2009 WL 3379954, at *3 (D. Minn. 20 October 2009) ('A district court may exercise its discretion to release frozen funds to pay living expenses or attorney fees, even in instances where the profit from the alleged wrongdoing exceeds the amount of the frozen funds.').

59 See U.S. Const. amend. VI ('In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.').

60 See *Sec. Exch. Comm'n v. Coates*, No. 94 Civ. 5361, 1994 WL 455558, at *3 (S.D.N.Y. 23 August 1994) ('A party is not entitled to foot his legal bill [in a civil matter] with funds that are tainted by his fraud.').

61 See id.; *Onyx*, 296 F.R.D. at 254 (stating that the primary purpose of an asset freeze is to secure funds for any future court-ordered payments).

Sixth Amendment right to counsel.[62] In particular, in *United States v. Monsanto*, the Supreme Court held that the pretrial restraint of assets that prevented a defendant from hiring counsel was constitutional because, among other reasons, there was probable cause to believe that the defendant had committed a forfeitable offence and that the assets had the requisite connection to the crime.[63] Since *Monsanto*, many US District Courts will, under certain circumstances, provide criminal defendants seeking to use restrained funds to hire counsel a right to a pretrial adversarial hearing, commonly called a '*Monsanto* hearing', at which the court evaluates whether there is probable cause to believe that the property at issue has the requisite connection to the crime.[64]

By contrast, on 30 March 2016, the Supreme Court held that, unlike tainted assets, the pretrial restraint of a criminal defendant's untainted assets violated the individual's constitutional right to counsel.[65] Therefore, in criminal proceedings, and in parallel civil and criminal proceedings, counsel should consider asserting their clients' constitutional rights to obtain a carve-out from untainted assets for reasonable legal fees. At the same time, counsel may argue that the court, in its discretion, should grant a carve-out from untainted assets for living and other expenses as well.

18.4 Interviewing individuals in cross-border investigations[66]

18.4.1 Dual representation

During the course of a cross-border investigation, individuals may receive requests for interviews from authorities across multiple jurisdictions, as well as from their current or former employers as part of internal investigations. Because

62 *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626–27, 631 (1989) (holding that post-conviction forfeiture of tainted assets that a convicted defendant would have used to pay counsel was constitutional because '[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney,' and because title in assets subject to criminal forfeiture under 21 U.S.C. § 853(c) vests in the United States at the time of the criminal act giving rise to forfeiture); *United States v. Monsanto*, 491 U.S. 600, 614, 615 (1989) (holding that pretrial restraint of tainted assets was constitutional).

63 *Monsanto*, 491 U.S. at 615 (citing 21 U.S.C. § 853(a)).

64 See *United States v. Monsanto*, 924 F.2d 1186, 1191 (2d Cir. 1991) (en banc) (on remand from the Supreme Court, holding that the Fifth and Sixth Amendments entitle a criminal defendant seeking to use restrained funds to hire counsel of choice to an adversarial, pretrial hearing at which the court evaluates whether there is probable cause to believe that the defendant committed forfeitable crimes and that the property at issue has the requisite connection to the crime), abrogated, in part, by *Kaley v. United States*, 134 S. Ct. 1090, 1105 (2014) (holding that a defendant does not have a constitutional right to contest in a *Monsanto* hearing a grand jury's determination that there was probable cause to believe that the defendant committed a forfeitable offence); *United States v. Bonventre*, 720 F.3d 126, 131 (2d Cir. 2013) (clarifying the US Court of Appeals for the Second Circuit's en banc holding in *United States v. Monsanto* and holding that, to trigger a *Monsanto* hearing, defendants must make a threshold showing that they have insufficient alternative assets to fund counsel of choice).

65 *Luis v. United States*, No. 14-419, 578 U.S. ___, slip op. at 16 (2016) (plurality op.).

66 See Chapter 16 on representing individuals in interviews.

such interviews often raise highly fact-specific, complex questions, lead counsel should consider at the outset of the representation whether the client would benefit from the addition of relevant subject matter and foreign law experts to assist in identifying and navigating issues in each jurisdiction. Relevant considerations include (1) the jurisdiction in which the individual is located; (2) the jurisdiction in which the relevant events occurred or documents are located; and (3) any actual or likely interest from foreign authorities. For example, lead counsel may wish to initiate communications with foreign authorities through local counsel in the relevant jurisdiction and may wish local counsel to be present at any interviews with the client, both to assist with legal and cultural considerations and to preserve attorney–client privilege in that jurisdiction. Labour counsel may be necessary in the jurisdiction in which an individual is located to advise whether the individual must submit to an interview as part of an internal investigation and to provide context as to the tactical and legal implications of doing so under local labour laws.

Lead counsel should consider any potential civil, regulatory or criminal implications before submitting to an interview. Considerations include (1) any limitations on how information shared during an interview may be used; (2) any bases on which an individual may choose to decline to answer certain questions, such as the Fifth Amendment of the US Constitution[67] or attorney–client privilege; and (3) if the individual declines to participate in the interview or to respond to certain questions, any potential legal implications in the relevant jurisdictions.

Before submitting to an interview, counsel also must be mindful of issues inherent in parallel criminal proceedings. For example, while US authorities may compel testimony from an involuntary witness over the witness's assertion of the privilege against self-incrimination under the Fifth Amendment of the US Constitution, the authorities may not use the tainted testimony, or any evidence derived therefrom, against the witness in subsequent US criminal proceedings.[68] Noting the prevalence of cross-border prosecutions, and the 'intimate coordination' between the US and foreign authorities involved, on 19 July 2017, the US Court of Appeals for the Second Circuit held that the Fifth Amendment's prohibition against the use of compelled testimony in US criminal proceedings applies even when the testimony was legally compelled by a foreign authority.[69] When a witness has been compelled to testify with respect to matters for which the witness is later prosecuted, US criminal authorities have an 'affirmative duty' to prove that the evidence they propose to use was 'derived from a legitimate source

67 U.S. Const. amend. V ('No person shall be . . . compelled in any criminal case to be a witness against himself.').

68 See *Kastigar v. United States*, 406 U.S. 441, 460–62 (1972) (holding that US criminal authorities may compel testimony from a witness who invokes the Fifth Amendment privilege against self-incrimination, by conferring immunity against the use of the compelled testimony and any evidence derived therefrom in subsequent criminal proceedings).

69 *United States v. Allen*, No. 16-898-cr, 2017 WL 3040201, at *2, *13, *18–19 (2d Cir. 19 July 2017).

wholly independent of the compelled testimony.'[70] US counsel, in consultation with counsel in the relevant jurisdictions, should consider the implications of this issue in coordinating (or fending off) testimony in multiple jurisdictions.

Finally, if the individual is registered with any regulators (such as the US Financial Industry Regulatory Authority (FINRA) or the UK Financial Conduct Authority) that may conduct their own investigations or implement their own disciplinary measures as a result of the facts uncovered in the investigation, it may be necessary to consult with counsel experienced with the relevant authorities. Counsel should consider, among other factors, the interplay between co-operating with an investigation and the potential loss of registration with a regulator. If the individual has potential criminal exposure or more significant regulatory risk, it may be in an individual's best interest to decline to co-operate with an internal investigation, even if the individual faces termination or potential de-registration with a regulator as a result.[71]

When consulting with multiple counsel across jurisdictions, lead counsel should take steps to preserve any applicable privileges, including by formally retaining any additional counsel to preserve the attorney–client privilege.

18.4.2 Pool counsel considerations

'Pool' counsel, or independent counsel that represents more than one individual in connection with an internal investigation, can provide an effective and efficient way of providing legal representation when multiple current or former employees are identified as witnesses. From the initiation of representation through the resolution of the matter, pool counsel must remain vigilant to issues such as conflict of interest among the pool of clients, and protection of applicable legal privileges. Experienced pool counsel should understand how to evaluate these risks as new clients are added to the pool or new facts are developed. In addition, counsel must be able to communicate effectively with all clients to ensure that each understands the nature of his or her own attorney–client relationship and that counsel owes a duty to other clients in the matter.

18.4.2.1 Considering conflicts

Pool counsel should evaluate potential conflicts at the outset of each client relationship to determine that there is no conflict of interest that would prohibit

70 *Kastigar*, 406 U.S. at 460; see also *Allen*, 2017 WL 3040201, at *20 ('When a witness has been compelled to testify relating to matters for which he is later prosecuted, the government bears "the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources."' (quoting *Kastigar* 406 U.S. at 461–62)).

71 See, e.g., *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002) ('Testimony in [a National Association of Securities Dealers, Inc.] proceeding may entail exposure to criminal liability, but that in itself is not enough to establish' the applicability of Fifth Amendment protections (citation omitted)); *United States v. Solomon*, 509 F.2d 863, 867–72 (2d Cir. 1975) (holding that the Fifth Amendment did not preclude the use in US criminal proceedings of a defendant's compelled testimony before the New York Stock Exchange).

concurrent representation of the proposed clients. This evaluation process has become more difficult since the promulgation of the 'Yates Memorandum'[72] in the United States because the heightened focus on prosecution of individuals has caused many companies to involve pool counsel earlier in an investigation. As a result, counsel may already have begun representations only to learn facts later in the investigation that reveal a potential conflict of interest. Counsel should monitor for potential conflicts of interest among pool clients on an ongoing basis. Use of pool counsel, while efficient, should be limited to circumstances where the individuals in the pool are generally considered witnesses and have little personal criminal or regulatory exposure.

There are practical steps that pool counsel and the company can take to set expectations among counsel and clients, and to allow counsel to zealously represent each client without prejudicing another. For example, pool counsel can work with company counsel to evaluate whether representing a particular category of potential clients (e.g., only former employees, or only employees from the legal department) will reduce the risk of conflicts of interest.

A straightforward discussion of the benefits and potential challenges inherent in concurrent representations can help each client provide informed consent to such an arrangement, and can protect pool counsel from concerns regarding professional responsibility and conflicts of interest. Benefits include pool counsel often being in a position to develop a broader and deeper understanding of the underlying facts and having more opportunities to interact with authorities and understand the issues of interest to them. The core challenge inherent in concurrent representation is pool counsel's use, and ability to use, information obtained in the course of representing one client for the benefit of another client while minimising the risk of conflicts of interest and preserving legal privilege. Client engagement letters should address this challenge explicitly.

Typically, such engagement letters will identify clients represented by counsel (and be updated from time to time through an addendum to the engagement letter), and set forth the expectation that pool counsel may use information provided by one client to more efficiently and effectively represent the interests of all clients. They should note that information provided in confidence will not be provided to other clients without specific authorisation, but that counsel has a duty to represent all clients and may be forced to withdraw from one or more representations if restricted from using information necessary to fulfil that duty with respect to information provided in confidence. The engagement letter should also address the possibility that, during the course of the representation, pool counsel may learn of conflicts among one or more represented clients and as a

72 Memorandum from Sally Quillian Yates, then Deputy Attorney Gen., US Dep't of Justice, Individual Accountability for Corporate Wrongdoing (9 September 2015), available at https://www.justice.gov/dag/file/769036/download. The 'Yates Memorandum' articulated the DOJ's policies with respect to the prosecution of individuals in corporate fraud cases, including that, to be eligible for any co-operation credit, corporations under investigation must provide the DOJ with 'all relevant facts about the individuals involved in corporate misconduct.'

result obtain each client's consent to counsel's continued representation of the remaining non-conflicted clients.

18.4.2.2 Maintaining privilege among clients

Educating one's clients is the most effective step pool counsel can take to protect legal privilege. Pool counsel should discourage clients from discussing with one another either the matter at issue or their communications with counsel. Clients represented by pool counsel may mistake the nature of their relationship with one another in the context of the matter and assume that disclosures they make to others represented by the same lawyer are protected. While it is possible that a common interest or joint defence privilege may exist among individuals represented by pool counsel, it is not always the case.

Pool counsel should carefully consider communications with clients in the pool, and disclosures made to third parties, to ensure that privilege is not inadvertently breached with respect to one client in the course of representing another. It may be helpful for counsel to consider before each interaction with the government or other third parties (on behalf of any client in the pool) whether there is particular information that is sourced directly from a client interaction. This helps to streamline and clarify the analysis and resulting communication, particularly in the context of a co-operating witness.

18.5 Effect of varying privilege laws across jurisdictions

Individuals and their counsel may engage in a variety of communications during the course of the attorney–client relationship (including with employers' internal and external counsel and compliance personnel, as well as with third parties such as auditors) that may be subject to discovery during the course of a cross-border regulatory investigation. When representing individuals in cross-border investigations, it is important to understand the differing rules of privilege across jurisdictions that may protect such communications from disclosure. It is equally important to establish procedures at the outset of the representation to ensure the client preserves the broadest applicable privileges. In navigating these privilege considerations, it may be necessary to consult counsel with expertise in the privilege laws of the relevant jurisdictions.

While the United States and other common law jurisdictions such as the United Kingdom typically afford broad protections based on privileges that include the attorney–client privilege, attorney work-product privilege, and joint defence and common interest privileges, many civil law and other jurisdictions provide far fewer protections. For example, while US attorney–client privilege attaches to communications of legal advice from a company's internal and external counsel to its employees,[73] the European Union does not recognise privilege protections for any communications from in-house counsel and from external

73 See *Upjohn v. United States*, 449 U.S. 383, 397 (1981).

counsel not licensed in the local jurisdiction.[74] Other jurisdictions, most notably those in Asia, impose a duty to maintain client confidentiality but do not provide for an attorney–client privilege.[75]

See Chapter 36 on privilege

In general, US courts will apply foreign privilege laws if they conclude that the foreign jurisdiction has the predominant interest in whether the communications remain confidential (the 'touch base' test).[76] Thus, foreign documents and communications may be subject to discovery in US proceedings that would otherwise be withheld as privileged under US law.

In communicating on behalf of clients, attorneys in cross-border investigations play an important role as gatekeepers in preserving their clients' privilege protections. Regardless of the applicable privilege laws, counsel should take steps to preserve the privilege over all materials used or created as part of the representation, including by: (1) restricting access to attorney–client and work-product materials, particularly in jurisdictions with more limited privilege protections; (2) labelling all documents and communications as legally privileged and confidential; and (3) limiting written communications that may be subject to discovery. In addition, attorneys should consider whether communications with foreign in-house or external counsel, which may be protected under the US common interest privilege, will be considered privileged in the relevant jurisdiction and take steps to tailor their communications accordingly.

Individual counsel should also consider whether communications with in-house counsel are protected as privileged in the relevant jurisdictions. If the privilege is inapplicable or unclear, counsel should, initially, be aware that communications pertaining to their clients that were generated during the course of an internal investigation under the direction and supervision of in-house counsel, as opposed to locally licensed external counsel, may not be privileged and may be subject to discovery by authorities and third parties.[77] Privilege protections may also not apply to documents and communications generated during internal investigations under the direction or supervision of an internal or external compliance or audit team. Moreover, consideration should be given to the potential involvement of in-house counsel in any interviews of the client, including the risk that the client's statements and any notes, memoranda or other records prepared as a result of the interview may be subject to discovery.

---

74 Case 155/79, *Austl. Mining & Smelting Europe Ltd. v. Comm'n of the European Communities*, 1982 E.C.R. 1575 (1982); Case C-550/07, *Azko Nobel Chems. & Akcros Chems. Ltd. v. European Comm'n*, 2010 E.C.R. I-08301 (2010).

75 See, e.g., Indian Evidence Act of 1872 § 126; Malaysia Evidence Act § 129.

76 See, e.g., *Gucci Am., Inc. v. Guess? Inc.*, 271 F.R.D. 58, 65 (S.D.N.Y. 2010) (finding that US privilege protections applied to communications made in Italy involving Italian in-house counsel because the communications related to US legal proceedings and reflected advice on US law, but providing that foreign privilege protections generally would apply to communications relating to foreign law or legal proceedings).

77 See Case 155/79, *Austl. Mining & Smelting Europe Ltd.*, 1982 E.C.R. 1575; Case C-550/07, *Azko Nobel Chems.*, 2010 E.C.R. I-08301.

Even if certain privilege protections are available in the relevant jurisdictions, individual counsel should consider who holds the privilege under the relevant laws and the scope of the privilege. In the United States, for example, while interviews with employees conducted as part of an internal investigation are protected as privileged, the privilege belongs to the company, which may choose to waive the privilege at its discretion.[78] Because employees may mistakenly believe that their communications with in-house and company counsel are privileged, individual counsel should ensure that their clients understand the relevant privilege laws before speaking with company counsel. In addition, US counsel conducting an internal investigation on behalf of the company or its board of directors or audit committee typically will commence each witness interview by providing an *Upjohn* warning, informing the employee that the lawyer does not represent him or her, that the privilege covering the discussion belongs to the company or its board or audit committee, and that the contents of the discussion may be disclosed to outside parties at the privilege holder's discretion.[79]

In the United Kingdom, two recent court decisions have limited the scope of the attorney–client and attorney work-product privileges under English law, particularly in the context of cross-border internal investigations. In *Re The RBS Rights Issue Litigation* and *Director of the Serious Fraud Office v. Eurasian Natural Resources Corp Ltd*, the courts held that transcripts, notes, and other records of interviews of current and former employees, as well as employees of subsidiaries, suppliers, and customers, were not privileged under English law – including notes relating to interviews conducted by US lawyers of US employees in response to subpoenas from US regulators.[80] The courts reasoned, first, that the interview notes were not privileged because they did not record communications between lawyers and their clients, which the courts held were limited only to company employees who were authorised to seek and receive legal advice from the company's attorneys.[81] Second, the courts reasoned that the interview notes were not privileged because they did not contain any analysis or legal advice, despite the companies' assertion that the notes were not transcripts of the interviews and contained the 'mental impressions' of counsel.[82]

In the *Eurasian Natural Resources Corporation* litigation, the English court further held that attorney work-product created during the course of an internal investigation is not privileged unless the company reasonably anticipated that it would be subject to adversarial litigation or criminal prosecution.[83] Attorney work-product created during an internal investigation commenced to assess criminal exposure in response to an expected, or actual, criminal regulatory

78 See *Upjohn*, 449 U.S. at 390.

79 Model Rules of Prof'l Conduct r. 1.13(f), 4.3.

80 *Re The RBS Rights Issue Litigation* [2016] EWHC 311(Ch); *Director of the Serious Fraud Office v. Eurasian Natural Resources Corp. Ltd.* [2017] EWHC 1017 (QB).

81 Id.

82 Id.

83 *Director of the Serious Fraud Office v. Eurasian Natural Resources Corp. Ltd.* [2017] EWHC 1017 (QB).

investigation is insufficient to establish that the documents were created in anticipation of litigation and protected from disclosure.[84] Following these recent decisions, US counsel representing individuals in cross-border investigations involving litigation in the United Kingdom should, in consultation with UK counsel, anticipate that, if their client agrees to be interviewed, any notes, memoranda, or other records prepared by company counsel may not be protected from disclosure, even if the interview is conducted by US counsel pursuant to an *Upjohn* warning.

Finally, attorneys representing individuals who serve as in-house legal, compliance, or audit staff should be particularly focused on their client's role in any internal investigations (including whether their clients should participate at all) and any communications and other materials that their clients may create as a result. While, under US law, these materials may be privileged if created under the direction or supervision of counsel,[85] such materials may not be protected from disclosure in a number of other jurisdictions.[86]

Evidentiary issues 18.6

Production of documents in an investigation/proceeding before another 18.6.1

Individuals in complex cross-border investigations may be subject to requests for information, not only from multiple federal and state authorities within the United States, but from foreign authorities or courts as well. In the United States, authorities such as the DOJ have been increasingly focused on obtaining co-operation from companies and individuals, which may involve the waiver of privilege under US law and the disclosure of potentially privileged materials. While co-operation with US authorities may have certain benefits, counsel should consider the potential implications of voluntarily producing documents in one investigation on any future regulatory proceedings or private civil litigation. In addition, counsel should consider privacy and data protection legislation in the country in which the client or the client's documents reside, and factor that issue into discussions with US authorities as appropriate.

In particular, the voluntary production of documents in one jurisdiction may amount to a waiver of certain rights and privileges with respect to future proceedings.[87] While US authorities may agree to maintain the confidentiality of privileged materials as a condition to waiver, many courts have rejected the notion of a 'selective waiver' to a particular authority and have instead found that the production of privileged materials amounted to a wholesale waiver of

84 Id.

85 *Upjohn*, 449 U.S. at 397.

86 See, e.g., Case C-550/07, *Azko Nobel Chems.*, 2010 E.C.R. I-08301.

87 See, e.g., *In re Vitamins Antitrust Litig.*, No. 99-197, 2002 U.S. Dist. LEXIS 26490, at *105 (D.D.C. 23 January 2002) (concluding that disclosures to foreign regulators would be considered voluntary disclosures amounting to a privilege waiver unless they were made 'in response to a court order or subpoena or the demand of a governmental authority backed by sanctions for noncompliance,' and 'any available privilege or protection' was asserted at that time).

privilege.[88] As a result, privileged materials voluntarily produced to one authority may be subject to discovery, both by other authorities and by third parties in related civil litigation.

Another potential issue concerns the production of documents in a foreign jurisdiction that would otherwise be protected by privilege in the United States. In some instances, US courts have concluded that privilege may be waived if documents are voluntarily disclosed to foreign authorities (as opposed to in response to a court order, subpoena or other demand of a governmental authority backed by sanctions for non-compliance).[89] This means that when representing an individual whose documents have been requested by a foreign authority, attorneys should consider challenging that request to the fullest extent of the law to avoid a determination that the disclosure was voluntary and that privilege has been waived in any future proceedings in the United States.

Finally, whether or not the materials are potentially privileged, counsel should bear in mind that authorities have entered into bilateral, multilateral and other *ad hoc* agreements with one another to facilitate the sharing of information, both domestically and internationally.[90] On the one hand, if counsel can convince an authority to formally request documents from its counterparty in a foreign jurisdiction, the client may be viewed as having co-operated with the requesting authority by producing documents to its counterparty through formal procedures, while potentially avoiding a waiver of privilege. On the other, unless counsel has obtained a representation from the authority that any materials produced will remain confidential, counsel should assume that the materials may be disclosed to other interested authorities, both domestic and foreign, without the individual's knowledge or consent.

18.6.2 Interviews or testimony in civil proceeding prior to criminal proceeding

Attorneys considering a request to interview their individual client or a subpoena compelling their client to testify in a civil proceeding must consider a number of complex issues, particularly when their client faces or could face a parallel criminal proceeding. Many of these considerations are highly fact-specific and should form part of the overall strategy that will be discussed with the client.

Of particular concern is that any statements that an individual makes in a civil proceeding may be used against the individual in any related criminal proceedings or private civil actions in the future. For instance, an individual in a civil proceeding may make incriminating statements or statements that may otherwise

88 See, e.g., *In re Pacific Pictures Corp.* 679 F.3d 1121, 1128–29 (9th Cir. 2012) (holding that attorney–client privilege had been waived as to documents produced to the US Attorney's Office, despite the existence of a confidentiality agreement); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 234–35 (2d Cir. 1993) (rejecting the doctrine of 'selective waiver' for documents voluntarily disclosed to the SEC).

89 See, e.g., *In re Vitamins Antitrust Litig.*, 2002 U.S. Dist. LEXIS at *105.

90 See, e.g., Sec. Exch. Comm'n, Cooperative Agreements with Foreign Regulators, https://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml (providing a list of the SEC's enforcement-related co-operation arrangements with foreign regulators).

assist prosecutors in developing a criminal case. Moreover, providing testimony in a civil case may commit the individual to certain testimony for purposes of the criminal case as well as any private civil litigation that may follow. This also raises the risk that prosecutors may charge the individual with perjury or obstruction of justice if they perceive that the individual's testimony has materially and improperly changed.

In response to these risks, counsel should consider whether the Fifth Amendment right against self-incrimination under the US Constitution is available, and, if so, the tactical implications of asserting the Fifth Amendment privilege. An individual may not have recourse to the Fifth Amendment privilege, particularly in foreign civil proceedings. If the privilege is available, advantages of asserting the privilege include that the client may be prevented from making statements in a civil proceeding that could be used against him or her in future criminal or civil proceedings or private civil litigation.[91] In addition, testifying in a civil or criminal proceeding may, under certain circumstances, amount to a waiver of the Fifth Amendment privilege for purposes of the same proceeding and any future proceedings.[92] Conversely, risks of asserting the privilege include that adverse inferences may, under certain circumstances, be drawn in civil or administrative proceedings from an individual's assertion of Fifth Amendment rights in a prior civil or administrative proceeding.[93] Moreover, an individual's assertion of the privilege in a civil proceeding could factor into law enforcement's charging decisions.

Given these risks, counsel representing an individual in parallel proceedings should consider seeking to stay the civil proceeding pending the resolution of the criminal proceeding. The decision whether to grant a stay of civil litigation in light of parallel criminal proceedings is within the court's discretion.[94] In considering whether to grant a stay, courts balance a number of factors, including:

- the interests of the civil plaintiff in proceeding expeditiously with the civil litigation;
- the hardship to the defendant;
- the convenience to both the civil and criminal courts;
- the interests of any third parties;

91 See *Kastigar*, 406 U.S. at 444 (holding that the Fifth Amendment privilege may be asserted 'in any proceeding, civil or criminal, administrative or judicial, investigatory, or adjudicatory').

92 While many courts have held that giving testimony in an earlier proceeding or before a grand jury only amounts to a waiver of the Fifth Amendment privilege with respect to the same proceeding, see, e.g., *United States v. Gary*, 74 F.3d 304, 312 (1st Cir. 1996), a minority of courts have held that giving testimony may amount to a waiver at subsequent proceedings, see, e.g., *Walker v. Lockhart*, 763 F.2d 942, 951–52 (8th Cir. 1985).

93 See *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (holding that respondent's Fifth Amendment rights were not violated where he was advised that he was not required to testify but that his silence could be held against him); *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 n.5 (1977) (clarifying that *Baxter* permitted an adverse inference to be drawn in a civil case from a party's refusal to testify, but that the *Baxter* respondent's silence 'was only one of a number of factors to be considered').

94 *Microfinancial, Inc. v. Premier Holidays Int'l*, 385 F.3d 72, 77 (1st Cir. 2004).

- the public interest;
- the good faith of the litigants (or lack thereof); and
- the status of the cases.[95]

See Chapter 16 on representing individuals in interviews

In some instances, when faced with the prospect of US criminal prosecution, it may be in a client's interest to default in the civil proceeding rather than to expose himself or herself to US jurisdiction.

18.7 Settlement considerations

In the context of an investigation involving an individual's current or former employer, the company's decision to enter into a settlement agreement may have important implications for the individual. Although the individual will not have a seat at the negotiating table, the settlement agreement negotiated by the company may reference the individual by title or by name, reference the individual's conduct, or even include admissions by the company that implicate the individual. Often, these settlement papers are made public. Whether the settlement papers reference the individual, and if so, the specific language used, can have legal implications, including with respect to any ongoing civil or criminal investigations involving the individual, as well as professional implications, including disclosures in publicly accessible databases with bodies such as FINRA, and eligibility to practise before the SEC, to serve on the boards of directors of US-listed companies, or to be employed by government contractors.

Therefore, individual counsel's role should not be limited to advocating on behalf of their clients before the relevant authority, but should also extend to interacting with counsel for other relevant parties, including company counsel. Individual counsel who can establish and maintain a good rapport with company counsel may gain insight into any implications the company's settlement may have on the client, as well as, to the extent possible, engage in discussions with company counsel regarding the language used in the settlement papers to mitigate the risks to the client.

18.8 Reputational considerations

Individual counsel's role also extends beyond the confines of legal strategy to anticipating and addressing press exposure and other reputational considerations. While, in some circumstances, it may be helpful to hire outside public relations firms, counsel should consider whether communications between the client, counsel, and outside firms are considered privileged in the relevant jurisdictions.

See Chapter 39 on protecting corporate reputation

95 Id. at 78 (citing *Fed. Savs. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 889, 903 (9th Cir. 1989); *Arden Way Assocs. v. Boesky*, 660 F. Supp. 1494, 1496–97 (S.D.N.Y. 1987); *Digital Equip. Corp. v. Currie Enters.*, 142 F.R.D. 8, 12 (D. Mass. 1991)).

19

Whistleblowers: The UK Perspective

Peter Binning, Elisabeth Bremner and Catrina Smith[1]

Introduction 19.1

Firms should look to cultivate a working environment within which their employees feel confident in raising concerns about potential failings or misconduct. Fostering the right culture is key in identifying and combating damaging behaviours. Employees should feel able to raise issues without fear of retaliation or being disadvantaged in some way, whether within their current role or with a future employer.

Providing recourse to an external whistleblowing channel, through which individuals can make anonymous and confidential disclosures, can also assist public bodies in detecting areas of malpractice that are of wider interest. Many regulatory and prosecuting authorities have their own whistleblowing services that provide an important source of intelligence.

While employees have no general legal duty to disclose misconduct, senior individuals in a fiduciary position may owe a fiduciary duty to their employer to expose their own wrongdoing (or that of fellow employees) and those in the regulated sector may owe regulatory obligations to report certain matters internally or externally to regulatory authorities. Express contractual obligations may also be included in employment contracts (again, particularly in the regulated sector), which impose a duty of disclosure on employees.

The Public Interest Disclosure Act (PIDA) 1998 provides protection to whistleblowers. Any dismissal of an employee for making a 'protected disclosure' will automatically be unfair. Similarly, any detriment caused to such an employee will be unlawful. Employees may not, however, be protected from criminal liability

1 Peter Binning is a partner at Corker Binning and Elisabeth Bremner and Catrina Smith are partners at Norton Rose Fulbright LLP.

even if they may qualify for protection as whistleblowers. Prosecutors may still consider a prosecution where an employee has participated in criminal conduct, even if they later report their involvement. Advice about the risks involved may be important both for the corporate and the individual whistleblower. Criminal offences may also be committed by whistleblowers who mishandle confidential information even if it is in the course of whistleblowing.

19.2 The corporate perspective: representing the firm

19.2.1 FCA/PRA individual accountability

Under the FCA/PRA Individual Accountability Regime, the majority of those employees working in the UK banking sector are required to comply with the FCA/PRA's Individual Conduct Rules (COCON).[2] Senior Managers must comply with the FCA and PRA Senior Manager Conduct Rules. Similar Conduct Standards/Rules apply to those working in the insurance sector,[3] although they do not have such broad application.[4] Under the Bank of England and Financial Services Act 2016, the PRA and FCA may make rules of conduct applicable to non-executive directors (NEDs) who are not otherwise approved under the Senior Managers Regime and the Senior Insurance Managers Regime. From July 2017, certain of the FCA and PRA conduct rules now apply to these NEDs.[5] The FCA Handbook provides guidance on the application of these rules. The government intends to extend the new regime to the wider financial services sector in 2018.

19.2.1.1 Individual Conduct Rules

FCA/PRA Individual Conduct Rule 3: You must be open and co-operative with the FCA, the PRA and other regulators.

This rule applies not only to the FCA and PRA but also to any other regulator which has recognised jurisdiction. The obligation will most obviously apply where an express information request has been made. COCON 4.1.10 confirms that there is no duty to report information directly to the regulator unless they are one of the persons in the firm responsible for reporting matters to the authority. A report should generally be made through the firm's mechanisms for reporting

2 The Financial Conduct Authority (FCA) applies its Individual Conduct Rules (COCON) to the large majority of staff working in banking firms. The Prudential Regulation Authority (PRA) applies its Individual Conduct Rules (Conduct Rules) to those Senior Managers approved by the PRA or FCA and members of staff who fall within the PRA's Certification regime..

3 Solvency II firms.

4 The PRA's Conduct Standards apply to all approved persons performing a key function (standards 1 to 3) and SIMF and Key Function Holders (standards 1 to 8). The FCA's Conduct Rules apply to all FCA and PRA approved persons (individual rules 1 to 4) and FCA SIFs/PRA SIMFs (Individual Conduct Rules 1 to 4 and SIF Conduct Rules 1 to 4).

5 In May 2017, the FCA introduced final rules to extend certain of its conduct rules to standard NEDs in banks, building societies, credit unions and dual –-regulated investment firms (banks) and insurance firms (i.e., Solvency II firms). At the same time, the PRA also confirmed that certain of its conduct rules would apply to notified NEDs in the banking and insurance sectors.

information to the regulators. If a person influences or obstructs the reporting of information, they will be viewed as being one of those persons who has taken responsibility for the reporting.

Senior Manager Conduct Rules 19.2.1.2

FCA/PRA Senior Manager Conduct Rule 4: You must disclose appropriately any information of which the FCA or PRA would reasonably expect notice.

This obligation applies to Senior Managers only and again extends to other regulators which have recognised jurisdiction. COCON 4.2.26 confirms that while, for Senior Managers, this rule has some overlap with Individual Conduct Rule 3, the latter normally relates to responses from individuals to regulators' information requests. Senior Manager Conduct Rule 4 imposes a greater duty on Senior Managers than that set out in Individual Conduct Rule 3 in that there is a positive disclosure obligation even where no express regulator request has been made. Consequently, for Senior Managers, this rule creates a quasi-external whistleblowing obligation where the matter falls within the scope of their responsibilities.

Approved Persons 19.2.1.3

The Bank of England and Financial Services Act 2016 (the Act) includes statutory changes to the Individual Accountability Regime that will extend the scope to all firms authorised to provide financial services under the Financial Services and Markets Act 2000. The PRA and FCA will consult in due course on changes to the rules and guidance.

Until the extended regime is in force, individuals at firms outside the banking and insurance sectors will remain governed by the Approved Persons regime. Statement of Principle 4 for Approved Persons largely mirrors Senior Manager Conduct Rule 4, although there are some differences in the accompanying guidance.[6]

FCA systems and controls (SYSC) requirements 19.2.2

Chapter SYSC 18 of the FCA Handbook sets out rules and guidance for firms to apply in adopting appropriate internal whistleblowing procedures as part of an effective risk management system. The FCA says that it would regard as a serious matter any evidence that a firm had acted to the detriment of a worker because they had made a relevant protected disclosure. Such evidence would call into question the fitness and propriety of the firm or relevant members of its staff and could affect the firm's continuing satisfaction of Threshold Condition 5 (Suitability) or, for individuals, their status as an Approved Person, Senior Manager or certification employee.[7]

6 See APER 3 and APER 4.

7 See SYSC 18.3.9G.

19.2.3 FCA/PRA Rules and Guidance on whistleblowing

In February 2015, the FCA and PRA jointly proposed a package of measures to formalise firms' whistleblowing procedures in the banking and insurance sectors. These measures extend further than general requirements under whistleblowing legislation. These included a requirement to appoint a Senior Manager to take responsibility for the effectiveness of these processes.[8] The requirement to appoint a senior whistleblowers' champion took effect in March 2016. The remainder of the new measures came into force in September 2016. The new rules apply to banking[9] and insurance sector firms.[10] The rules currently apply as non-binding guidance to all other authorised firms, but this is likely to change with the extension of the Senior Manager's Regime to the wider financial services sector in 2018.

See Section 19.2.8.2

See Section 19.2.1

In September 2016, the FCA consulted on extending aspects of the new whistleblowing regime to UK branches of overseas (EEA and third-country) banks. The final rules come into effect in September 2017.[11] UK branches of overseas banks will be required to tell their UK-based employees about the FCA and PRA whistleblowing services. A UK branch of an overseas bank that has a sister or parent company that is subject to the regulators' whistleblowing rules will be required to tell staff in that branch that they are able to use the sister or parent company's whistleblowing arrangements. Firms may continue to have concurrent reporting obligations to their home state regulator.

The whistleblowers' champion (who will typically be a non-executive director) will have overall responsibility for 'overseeing the integrity, independence and effectiveness of the firm's policies and procedures on whistleblowing'[12] and, in effect, protecting whistleblowers from being victimised. This means that a very senior person in the firm will have to take responsibility for any inappropriate treatment of whistleblowers as well as the firm being potentially liable in an employment tribunal for any breach of PIDA. The individual will not need to have a day-to-day operational role handling disclosures from whistleblowers.

To encourage further openness, the regulators require firms to establish, implement and maintain appropriate and effective whistleblowing procedures enabling people to come forward with 'reportable concerns'. The regulators do not prescribe what these procedures should be, but the mechanism put in place should:

- be able to handle reportable concerns effectively – including in cases where confidentiality has been requested by the whistleblower or the individual has decided to blow the whistle anonymously;

8 In 2013, the Parliamentary Commission on Banking Standards recommended that banks put in place formal frameworks to encourage employees to raise concerns internally and expose the risk of potential wrongdoing at an early stage by protecting them from unfair treatment.

9 UK deposit-takers with assets of £250 million or greater and PRA-designated investment firms.

10 Insurance and reinsurance firms within the scope of Solvency II, the Society of Lloyd's and managing agents.

11 FCA PS17/7, Whistleblowing in UK branches of foreign banks, 3 May 2017.

12 SYSC 18.4.4.

- allow disclosures through a range of communication methods, for example, hotline, website, designated person;
- ensure that concerns are dealt with effectively and escalated appropriately, including to the regulator;
- ensure that whistleblowers are not victimised;
- provide feedback to the whistleblower where this is 'feasible and appropriate';
- keep records of concerns that are raised by whistleblowers, their treatment and the outcome of the process;
- ensure that the firm's up-to-date whistleblowing procedures are readily available to UK-based employees (though these do not have to be made available to the wider group of persons who are otherwise encouraged to blow the whistle);
- produce reports (at least annually) on the whistleblowing process and its effectiveness to the firm's governing body and to the regulator; and
- report to the FCA where the firm has lost a whistleblowing case in an employment tribunal.

There are also requirements to give appropriate training to employees and managers that also must comply with minimum standards.

Firms should guard against attempts to identify anonymous whistleblowers. In early 2017, it was announced that regulators were commencing an investigation into a firm and its chief executive when he sought to identify a whistleblower while trying to protect a colleague from what he considered was an unfair personal attack. The identity of the individual was not ultimately discovered. The FCA says firms should always be prepared to receive anonymous disclosures although firms may wish to discuss with whistleblowers the advantages of disclosing their identity. [13]

In any settlement agreement entered into with a worker, wording must be included making it clear that nothing in such an agreement prevents a worker from making a protected disclosure. In addition, a firm cannot request a worker to enter into a warranty requiring them to disclose that they have made a protected disclosure or they know of no information that could form the basis of a protected disclosure.

The firm's employee handbook (or equivalent document) must make it clear to employees that they are able to disclose reportable concerns to the regulator and how they can do so. This should explain that the employee can go straight to the regulator without having to make a disclosure to the firm internally and can do so simultaneously or consecutively.

FCA/PRA and whistleblower reports 19.2.4

The FCA encourages whistleblowers to use their own internal reporting processes at work but they are free to contact the FCA if there are none in place or if they are dissatisfied with, or lack confidence in, the firm's response. The FCA has

13 FCA PS15/24: Whistleblowing in deposit-takers, PRA-designated investment firms and insurers.

published statements on its website detailing how it treats whistleblower disclosures: 'Whistleblowing'[14] and 'How we handle disclosures from whistle-blowers'.[15] The identity of the whistleblower will not be revealed without consent unless required by law (in which case the views of the whistleblower will be sought in advance).

In the majority of cases the FCA is unable to tell the informant exactly what action it has decided to take and will not be able to provide regular updates given policy restrictions and the sensitivity surrounding investigations. The FCA does not investigate individual complaints, and it is rare for a single piece of whistleblower intelligence to lead to an enforcement investigation, but it may assist with lines of enquiry or corroborate other intelligence.

FSMA sets down restrictions on how the FCA or PRA can use and share information.[16] There are, however, a number of prescribed gateways that the authorities may use to carry out their functions effectively. These gateways include the ability to share information with other regulators and government agencies (including overseas).[17]

Financial incentives are not available to those who blow the whistle to the FCA or PRA. Both authorities consider financial rewards would be unlikely to increase the number, or quality, of disclosures they receive and could raise a number of moral implications. Firms should nonetheless be cognisant of the risk that whistleblowers may elect to make a report directly to the US authorities on matters within their jurisdiction where they may be able to take advantage of bounty payments.

19.2.5 Bribery Act 2010 and adequate procedures

Outside the financial services sector, there is no legal or regulatory requirement for firms in the United Kingdom to have whistleblowing arrangements in place, although many firms do. Most recently, many organisations have embedded formal whistleblowing programmes as part of their strategy for combating the risk of bribery being committed on their behalf.

The Bribery Act 2010 created a new offence under section 7 that can be committed by commercial organisations which fail to prevent persons associated with them from committing bribery on their behalf. It is a defence for a firm to prove that it had adequate procedures in place to prevent the commission of an offence. In March 2011, the Ministry of Justice published guidance on adequate procedures, which included the adoption of whistleblowing processes to allow confidential reporting of suspected bribery.

In a similar vein, the Criminal Finances Act 2017 introduces a new corporate offence of failure to prevent tax evasion offences, which is modelled on section 7 of

14 www.fca.org.uk/firms/whistleblowing.

15 www.fca.org.uk/publications/corporate/how-we-handle-disclosures-from-whistleblowers.pdf.

16 Section 348 FSMA.

17 A full set of gateways is set out in the Gateway Regulations, Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI2001/2188).

the Bribery Act. It will be a defence to show that the firm had reasonable procedures in place. Draft guidance issued by HM Revenue and Customs envisages that preventative measures will include a senior management commitment to whistleblowing processes.[18]

Serious Fraud Office (SFO) and online whistleblowing 19.2.6

In 2011, the SFO set up a special whistleblower service, SFO Confidential.[19] SFO Confidential was established to provide anyone with a suspicion of serious fraud or corruption with a channel for making a report. The service complements the SFO's national fraud reporting service. The aim is to enable workers, professional advisers and business associates to report serious or complex fraud or corruption in confidence. Whistleblowers are encouraged to follow the reporting procedures in their own organisation before going to the SFO, unless they feel uncomfortable in doing so.[20] As in the case of the FCA and PRA, the SFO cannot provide legal advice and does not offer financial incentives to whistleblowers. The SFO has broad powers to share information with other regulatory and prosecuting authorities.

Competition and Markets Authority (CMA) and whistleblowers 19.2.7

The CMA ostensibly offers financial rewards of up to £100,000 (in exceptional circumstances) for information about cartel activity. Cartels are generally hard to detect and prove, consequently the CMA believes it should offer financial incentives for information which assists the detection and investigation of cartels and which leads to the fining of companies or the criminal prosecution of the individuals concerned.[21] The CMA prefers whistleblowers to contact them early on so that they can assess how any further information might best be obtained and what would be of most value. Similar to the FCA/PRA, the CMA may share information that it receives with certain other parties. These prescribed gateways are set down in the Enterprise Act 2002.

Where the whistleblower has personally been involved in the cartel activity, it may be possible to seek civil and criminal immunity from sanction under the CMA's leniency policy[22] provided they are the first to report and confess their involvement, co-operate fully and there was no pre-existing investigation by the CMA.

---

18 See HMRC Tackling tax evasion: Government guidance for the corporate offence of failure to prevent the criminal facilitation of tax evasion, Draft Government Guidance, updated October 2016.

19 While the telephone hotline was closed in June 2012, reports can still be made electronically. See https://www.sfo.gov.uk/contact-us/reporting-serious-fraud-bribery-corruption/.

20 See https://www.sfo.gov.uk/publications/information-victims-witnesses-whistle-blowers/ for further information.

21 See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299411/Informant_rewards_policy.pdf for more information.

22 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418018/Leniency_60-second_summary.pdf.

19.2.8 Employment Rights Act 1996 and PIDA

19.2.8.1 Scope of protection

In brief, workers are protected against detriment and (in the case of employees) from being dismissed because they have made a protected disclosure. To be protected, the disclosure must be made by a worker, it must be a qualifying disclosure, and it must have been made in the correct way. To be a qualifying disclosure:

- the worker must disclose information (and not just, for example, a mere allegation);
- the disclosure must be made in the public interest; and
- the worker must have a reasonable belief that the facts tend to show one or more of six categories of failure (it does not matter that they subsequently turn out to be untrue), which are:
  - the commission of a criminal offence;
  - failure to comply with any legal obligation;
  - miscarriage of justice;
  - putting the health and safety of an individual in danger;
  - damage to the environment; or
  - deliberate concealment of any of the above.

The courts have shown themselves willing to interpret these categories widely. This is despite the introduction of the public interest test in June 2013. The threshold for something being held to be 'in the public interest' has been relatively low. For example, complaints by an estate agent in Mayfair about his bonus (the basis for which potentially affected colleagues as well) and about the allocation of overtime among a group of four employees were held to be in the public interest.[23] Since 2013, there is no longer any requirement for the disclosure to be 'in good faith' – but a disclosure that is not in good faith may impact any compensation ultimately awarded to an employee in the event of an employment tribunal claim.

For a qualifying disclosure to be protected, the qualifying disclosure must be made in the right way to the right person. Who this is varies depending on the circumstances, but if the disclosure is to be made to anyone other than the worker's employer, his or her legal adviser for the purposes of obtaining legal advice, ministers of the crown or 'prescribed persons', additional requirements apply.

As a result of the introduction of whistleblowing laws, many employers introduced whistleblowing procedures and some set up hotlines (often anonymous) to encourage employees to come forward with their concerns internally. However, a number of concerns and issues have been identified over the years during which the procedures have been in operation. Because of the very wide definition of what constitutes a qualifying disclosure, many things that would previously typically have been dealt with through a grievance procedure or equal opportunities procedure could also be dealt with under the whistleblowing procedure, which is not always the most suitable mechanism for raising such concerns.

23 *Chesterton Global Ltd (t/a Chestertons) and another v. Nurmohamed* UKEAT/0335/14.

FCA/PRA whistleblowing in context and PIDA 19.2.8.2

Notwithstanding the potentially wide scope of the existing whistleblowing regime, as referenced earlier, the FCA and PRA have sought to create an environment within the financial services sector which encourages and protects whistleblowers and goes above and beyond the requirements of general employment law. Their motivation for doing so, fuelled by the recommendations of the UK legislature's Parliamentary Commission on Banking Standards, was that '[i]ndividuals working for financial institutions may be reluctant to speak out about bad practice for fear of suffering personally as a consequence.'[24]

The regulators have decided that whistleblowing arrangements should be wider than simply covering those disclosures that would be regarded as protected under PIDA. To do this, they have the concept of a 'reportable concern'. The first category of a reportable concern is anything that could be the subject matter of a protected disclosure under PIDA.

The regulators have added two further categories of 'reportable concerns', which are:

- a breach of the firm's policies and procedures; and
- behaviour that harms or is likely to harm the reputation or financial well-being of the firm.

The regulators have not restricted themselves to matters that might reasonably be said to come within their remit and in respect of which they are ultimately empowered to take action. In addition, firms are required to receive disclosures from any person (although the FCA does not expect whistleblower arrangements to be promoted to anyone other than the firm's UK-based employees). This means that the range of whistleblowers extends beyond the definition of 'worker', and they would therefore not all be protected by PIDA. Firms in the financial services industry may find themselves inundated with reports that ought more properly to be channelled through other routes and that, on the face of it, are not really of concern to the authorities. During the consultation process, some respondents queried whether firms' whistleblowing channels may become overwhelmed by trivial matters that might take up time more valuably directed towards encouraging workers to come forward on matters of financial regulation. The regulators declined to limit the scope of the obligation, commenting that they judged the benefits to outweigh the risks.

Senior Managers will want to ensure that matters of serious concern are identified and investigated without delay, without being drowned out by less significant issues. They may wish to consider providing training to workers on the appropriate channels through which concerns can be escalated, informing them that grievances and everyday differences of opinion can more properly be dealt with through other processes such as customer complaints or grievance procedures. That said, it should be made clear to workers that the whistleblowing line does remain an option.

24 PS15/24: Whistleblowing in deposit-takers, PRA-designated investment firms and insurers.

Another area that may be of concern to lawyers, particularly those in-house, is that under PIDA a disclosure is not a qualifying disclosure if it discloses a matter covered by legal professional privilege. While there are general notification obligations under the regulatory regime and rules of professional conduct for lawyers, some query whether an unintended consequence of the new FCA/PRA regulatory regime (which provides that protections should apply to all whistleblowers) will be a concern for firms over the sanctity of their discussions with their legal counsel. On a related point, the FCA has announced its intention to consult on whether an individual in charge of a firm's legal function requires approval under its Senior Managers regime. It has said that following the consultation, it will seek to ensure that it is entirely clear what is required in this area. The Law Society has said that inclusion within the Senior Managers regime could place in-house counsel in direct conflict with their employers, affecting their ability to provide full and frank legal advice. There are concerns that requiring general counsel to be a Senior Manager could create an expectation of disclosure of privileged information where legal functions are required to defend their conduct.

PIDA also only protects employees and workers of the institution in respect of whom the whistleblowing is made. However, under the new regulatory regime, relevant firms must take disclosures from any person. This may put the recipient in a difficult position as the individual in question may well not have the protection of PIDA and if his or her employer is not covered by the regulatory regime, may not have protection under that regime either. While keeping the identity of the whistleblower confidential will help – the person's identity may inevitably come out or may be required to enable the issues to be investigated.

19.3 The individual perspective: representing whistleblowers

The limitations on the protection afforded to whistleblowers by PIDA, which is a purely civil law statute, is often not fully understood by would-be whistleblowers. The exposure to criminal prosecution where an individual has played any part in alleged wrongdoing is very real. An employer may be restricted in what action it can lawfully take against an individual whistleblower but an investigator or prosecutor is not bound to exercise leniency and may not do so. In some cases, the potential whistleblower may initially be treated as a suspect and interviewed under caution.

There may also be exposure to foreign criminal liability and so individuals who seek advice about their rights in relation to whistleblowing often need to consider whether they may have overseas exposure too.

Even where an individual secures an assurance of non-prosecution, being a whistleblower may carry a very heavy and often unforeseen burden in the form of obligations to offer continuing assistance to regulators or prosecutors in different countries, sometimes lasting years.

Where an individual does not qualify for whistleblower protection, perhaps because of the degree of involvement in the alleged misconduct, it may be necessary to consider whether some form of co-operation agreement with the authorities would be available, assuming that the individual wishes to mitigate his or her

involvement in criminal conduct and there is a high risk of prosecution. There may be circumstances where an investigating authority will agree to treat an individual as a witness, in very rare and extreme circumstances by an immunity agreement. More often such agreements will require a plea of guilty and continuing co-operation, including giving evidence in criminal proceedings followed by a sentence discounted to reward co-operation.[25]

Whistleblowers can commit serious criminal offences by mishandling information they use to support their disclosures. When information is removed from an employer's computer system as a result of unauthorised access, an offence may be committed.[26] A summary offence of unlawful obtaining of personal data may apply,[27] and in some cases theft of documents or other records such as CDs or memory sticks, although not the information contained on them.[28] Offences under the Fraud Act 2006 may also apply, such as fraud by abuse of position. In other cases would-be whistleblowers have been accused of blackmail where inappropriate demands are made to employers and where unlawful interception or recording is involved there are potential offences of unlawful interception of communications.[29] In addition, there may be civil exposure to action for breach of confidence, injunctions and costs.

How the role of the individual affects the representation 19.3.1

In-house counsel 19.3.1.1

For in-house counsel there is a significant obstacle to securing protection under PIDA because where legal professional privilege may apply to the subject matter of the contemplated disclosure, as noted earlier, there can be no statutory protection for the employee. In-house counsel may therefore need to think carefully about other means of bringing concerns to the attention of their employers; whether via a non-executive director or perhaps through an external lawyer instructed by the in-house counsel to assist in this task. There may be another route via a disclosure to a professional body.

People with professional licences or certifications 19.3.1.2

Those with other professional qualifications or regulatory approval may also face investigative scrutiny from their professional bodies or regulators as a result of a whistleblowing disclosure. Just as with a criminal prosecutor, such external bodies are not bound by PIDA and may not exercise leniency in relation to those who have participated in misconduct, even if the individual initiates a disclosure via the regulatory or disciplinary organisation's whistleblowing procedure. A decision

25 See sections 71-73 of the Serious Organised Crime and Police Act 2005.

26 Section 1 Computer Misuse Act 1990 – maximum two years' imprisonment, or a fine, or both.

27 Section 55 of the Data Protection Act 1990 – a fine.

28 *Oxford v. Moss* (1979) 68 Cr App Rep 183.

29 See section 1(1) of the Regulation of Investigatory Powers Act 2000. This Act is due to be replaced by new legislation: the Investigatory Powers Bill has been passed by both Houses of Parliament and is due to come into force by the end of 2016.

to make a disclosure, particularly one made to an external organisation and not the employer, can have far-reaching and long-term consequences. Once an external disclosure is made it can be very hard to control how an investigation develops and whether sanctions are applied to the whistleblower.

There may also be professional obligations to consider. Individual professionals will often have a duty to report their own serious misconduct and that of other persons in the same profession.[30] These professional obligations exist entirely independently of whistleblowing protection but there may be overlapping considerations so professional duties must always be examined alongside any whistleblowing procedures.

19.3.1.3 Junior employees

For junior employees similar considerations apply, but it can be harder to convince employers and others to take the disclosure seriously or to prevent the disclosure being dismissed without being properly considered. This can happen where the junior employee has limited access to information about the wrongdoing concerned and an employer is able to respond to the disclosure without conducting a sufficiently detailed investigation. Where the junior status of the employee means that they have a limited notice period and exposure to damages for unfair dismissal is low, employers may be able successfully to manage an employee out of the organisation without being in breach of PIDA. As with all whistleblowing situations, independent legal advice is very important to safeguard the interests of the whistleblower and guard against any unlawful retaliation by the employer.

19.3.1.4 More senior employees

For more senior managers and board members, there may be potential issues of breach of fiduciary duty or duty of loyalty where a disclosure is being considered. Senior employees will need to pay careful attention to their contractual obligations and to the internal procedures available for the reporting of concerns and whistleblowing. Individuals who may be tempted to leak information to the press or other third parties may be vulnerable to injunctive relief by their employer where there is evidence to suggest unlawful disclosure of confidential information. This may be so even where the employer is itself the subject of a serious fraud investigation.[31] However, there are limitations on what an employer can do where the individual has been made subject to an order or statutory notice to produce

30 See for example SRA Outcome 10.3 – you notify the SRA promptly of any material changes to relevant information about you including serious financial difficulty, action taken against you by another regulator and serious failure to comply with or achieve the Principles, rules, outcomes and other requirements of the Handbook; and FCA APER Statement of Principle 4: An approved person must deal with the FCA, the PRA and other regulators in an open and co-operative way and must disclose appropriately any information of which the FCA or the PRA would reasonably expect notice.

31 See *Eurasian Natural Resources Corporation Ltd v. Sir Paul Judge* [2014] EWHC 3556 (QB).

confidential information to an investigating authority.[32] Such an order or notice will take precedence over an employer's right to the return of confidential information and delivery up or destruction of all copies.

Public servants 19.3.1.5

Public servants are especially at risk in whistleblowing cases where their conduct may leave them exposed to allegations of misuse of their privileged access to confidential information protected by state secrecy laws. Adherence to internal whistleblowing procedures will be of particular importance. Public servants are exposed to the risk of significant special criminal offences depending on the nature of their employment, including the Official Secrets Act 1989 and the common law offence of misconduct in a public office.

Blowing the whistle internally or externally 19.3.2

Where employees have not blown the whistle externally, it will be important to maintain the confidentiality of the information disclosed and to ensure that the internal whistleblowing procedures are followed. Failure to observe confidentiality is likely to render the individual more vulnerable to the various criminal offences applicable in whistleblowing cases and to civil action for breach of confidence. See Section 19.3 An employee will need to give careful consideration to a decision to blow the whistle externally because doing this may result in loss of the statutory protection afforded by PIDA. This is especially so if the whistleblower makes an external disclosure other than to a prescribed person such as a regulator or prosecutor.[33]

Determining whether to report to a prescribed person will involve a careful assessment of the individual's own exposure to criminal, regulatory or disciplinary sanctions and the likely consequences of a report to a regulatory or disciplinary body. A report may often lead to an onward referral to a criminal investigating authority so that the person making the disclosure risks becoming the subject of investigation by multiple authorities, possibly in overseas jurisdictions as well.

Only in exceptional circumstances will an employee be able to maintain his or her employment protections rights under PIDA when a disclosure is made to the media as opposed to the employer or a prescribed person. To maintain protection, an employee must reasonably believe that the information disclosed and any allegation contained in it is substantially true and the employee must not be acting for personal gain. Unless the wrongdoing disclosed is exceptionally serious, if an approach has not already been made to the employer or a prescribed person, the employee must reasonably believe that the employer will subject him or her to detriment or conceal or destroy evidence. The employee's choice to make the disclosure must still be reasonable.

32 Ibid.

33 See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510962/BIS-16-79-blowing-the-whistle-to-a-prescribed-person.pdf.

19.3.3 Dealing with the employer

At an early stage it must be established whether the employee is likely to be able to continue in employment following the disclosure. This will depend on the nature of the disclosure and whether it is likely to remain possible for the employee to continue working having regard to the disclosure, which may implicate his or her colleagues in alleged misconduct. It will be necessary to consider the employee's reputation and future employment prospects in the industry depending on the extent of the disclosure and any consequential publicity.

19.3.4 Dealing with the investigating authority

Before any approach to an investigating authority is made it will be necessary to assess the potential vulnerability of the employee to criminal, regulatory or disciplinary sanctions. Such exposure may arise from the conduct that is the subject of the whistleblowing disclosure itself or from potential misconduct by the whistleblower in making the disclosure, particularly if the disclosure was not made to a prescribed person; for example, to the media.

19.3.5 Co-operating witness or suspect

Where an employee has been personally involved in the misconduct reported, he or she should bear in mind that an investigating authority will need to take an objective view of the conduct and to assess whether the individual whistleblower can fairly be treated as a witness as opposed to a suspect or focus of a regulatory investigation.

In cases where the individual has played no part in the alleged misconduct, an investigator will want to establish what evidence that individual can give that will benefit the investigating authority. Legal advisers should also ensure that appropriate safeguards are agreed covering the maintenance of confidentiality in relation to the individual witness and the use to which the information will be put. Individuals who become witnesses and are relied on by the investigating authority must understand the extent of their obligations, which may extend for months or even years depending on the nature of the investigation. Witnesses may need to appear in subsequent proceedings and, having given evidence to one authority, may find themselves the subject of requests from others seeking similar testimony in the UK or elsewhere. Whistleblowers and co-operators should not underestimate the significant burden this may entail.

In situations where an individual is exposed to criminal, regulatory or disciplinary sanctions, it will be necessary to analyse, using the information available, the extent of that exposure. It may be difficult to get full information to assess the risk. This is because the employer and the investigating authority may be reluctant to make available relevant documentation and information outside the controlled process of the investigation. Therefore it may be extremely difficult, at an early stage, to establish the full extent of the evidence that may expose an individual to sanction.

Where an individual is exposed to criminal sanctions, in extremely rare cases, it may be possible to obtain an immunity from prosecution or at least an assurance from the prosecutor that no criminal proceedings will be started against the individual if they provide truthful evidence to the investigation.

A statutory immunity is available under section 71 of the Serious Organised Crime and Police Act 2005 (SOCPA). Most but not all criminal prosecutors may issue such immunities. One example of a prosecutor without access to the statutory scheme is the CMA.[34] The common law power of a prosecutor to issue an immunity or to exercise discretion in other ways against prosecution of a witness is preserved and runs in parallel with the statutory scheme under SOCPA.

Such an immunity from criminal prosecution, whether statutory or at common law will only be available in the most extreme and exceptional situations. In fraud and corruption cases in the United Kingdom the law enforcement authorities are exceedingly reluctant to issue immunities from prosecution, and where an individual who has been involved in criminal conduct seeks a lenient outcome without a trial there will often be a stark choice of entering a co-operation agreement or negotiating a plea of guilty.

A co-operation agreement is where the individual pleads guilty to one or more criminal offences and agrees to give evidence for the prosecution in exchange for becoming eligible for a reduced sentence. The alternative is to enter plea negotiations with a view to agreeing a basis of plea with the prosecutor and securing a lower sentence by virtue of that early negotiated plea.[35] The latter option does not involve any obligation to co-operate with the prosecutor.

Over the past few years, there has been a growing number of appeal cases involving co-operating witnesses in fraud and corruption cases under the section 73 sentence discount scheme. The trend in sentencing in this type of case appears to be towards a form of super-discount by which, in some cases, custodial sentences have been suspended resulting in an effective 100 per cent discount on the actual prison time imposed.[36]

Nevertheless, the commitment required to undergo the rigorous process to obtain a section 73 agreement or its common law equivalent is never to be underestimated.[37] There have also been at least two notable cases in the UK where co-operators pleaded guilty and gave evidence at the trial of their co-defendants only to see the prosecution collapse, meaning nobody else was convicted. The

34 Although the CMA has the power to issue a no-action letter under the cartel leniency regime, this does not cover the situation of a co-operating suspect who fails to obtain a no-action letter and during the criminal investigation seeks to achieve the same sentence discount outcome as the statutory SOCPA scheme provides. The only option is to pursue negotiations based on the common law arrangements for co-operating defendants.

35 Attorney General's Guidelines on plea negotiations and relevant Sentencing Guidelines.

36 David Corker, SOCPA: Immunity, leniency and white collar crime, 3 February 2016, available at http://www.corkerbinning.com/socpa-immunity-leniency-and-white-collar-criminals/.

37 The process includes in most cases a requirement for a suspect to be 'cleansed' of all prior wrongdoing by admitting in interview all previous criminal conduct whether or not it has been the subject of investigation or prosecution.

burden of giving evidence, which defendants who plead guilty rarely have to do, carries a significant risk. If the prosecutor or the judge takes a negative view of the credibility of the testimony given, the sentence discount may well not be as great, and it may certainly prove much harder to achieve a suspended sentence.

20

Whistleblowers: The US Perspective

Kevin J Harnisch and Ilana B Sinkin[1]

Anti-retaliation policies and related law[2] 20.1

Anti-retaliation policies 20.1.1

In the United States, the government believes that whistleblowers can play an important role in exposing corporate corruption and collusion. To encourage whistleblowers to come forward, Congress inserted a provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), which provided whistleblowers with protection from retaliation, anonymity and the potential for obtaining significant monetary awards.

The implementation of and adherence to an anti-retaliation policy are the first steps in avoiding and defending whistleblower claims. A typical anti-retaliation policy prohibits any form of retaliation against individuals who report alleged violations of law or company policy, or who co-operate in an investigation of such reports. Further, the anti-retaliation policy should provide that any form of retaliation violating the policy will result in disciplinary action, up to and including termination of employment. Finally, the policy should provide a mechanism for reporting alleged retaliation.

Dodd-Frank Act 20.1.2

Dodd-Frank was enacted in the wake of the financial crisis, in an effort to curb the type of behaviour that led to it. Accordingly, Congress included provisions that encourage employees to report misconduct and that protect employees against retaliation for doing so. Dodd-Frank has three separate whistleblower provisions.

---

1 Kevin J Harnisch is a partner, and Ilana B Sinkin is an associate, at Norton Rose Fulbright US LLP.

2 Every state and federal law that prohibits employment discrimination also prohibits retaliation. A detailed discussion of these laws, however, is beyond the scope of this chapter.

First, it protects employees who report a violation of the Commodity Exchange Act (CEA) to the Commodity Futures Trading Commission (CFTC) or who assist any investigation or judicial or administrative action of the CFTC.[3]

Second, Dodd-Frank shields whistleblowers who provide information related to a violation of the securities laws to the Securities and Exchange Commission (SEC) or who initiate, testify in, or assist in any investigation or judicial or administrative action of the SEC.[4] It also protects those who make disclosures that are required or protected by the Sarbanes-Oxley Act (SOX), the Securities Exchange Act (SEA), provisions of the Federal Witness Protection Act or any other law subject to the SEC's jurisdiction.[5]

The precise scope of this provision, Section 78u-6(h)(1)(A) of Title 15 of the United States Code, has divided the federal courts of appeals. Specifically, the Second and Ninth Circuits on the one hand and the Fifth Circuit on the other have diverged on whether a whistleblower must report misconduct to the SEC, rather than just elevating his or her concerns internally, to qualify for statutory anti-retaliation protection.[6] The controversy turns on an arguable ambiguity in the text of the statute: Section 78u-6(h)(1)(A) is directed specifically to 'whistleblowers' – meaning 'any individual who provides . . . information relating to a violation of the securities laws *to the Commission*'[7] – yet the third class of protected conduct in subsection (A) involves disclosures that *need not be made to the SEC*.[8] Citing this apparent discrepancy as well as the whistleblower-incentivising purposes of Dodd-Frank, the SEC has taken the position in regulations,[9] interpretive rules[10] and *amicus* briefs[11] that purely internal reports are shielded against retaliation.

3 7 U.S.C. § 26 (2016).

4 15 U.S.C. § 78u-6(h)(1)(A)(i)–(ii) (2016).

5 Id. § 78u-6(h)(1)(A)(iii).

6 Compare *Berman v. Neo@Ogilvy LLC,* 801 F.3d 145, 155 (2d Cir. 2015) (holding that Dodd-Frank prohibits retaliation for both internal reporting and disclosure to the SEC), with *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 629 (5th Cir. 2013) (holding that Dodd-Frank prohibits retaliation only for disclosure to the SEC).

7 15 U.S.C. § 78u-6(a)(6) (emphasis added).

8 See id. § 78u-6(h)(1)(A)(iii) (characterising as protected activity 'making disclosures that are required or protected under' SOX, the SEA, the Federal Witness Protection Act, or 'any other law, rule, or regulation subject to the jurisdiction of the Commission').

9 See 17 C.F.R. § 240.21F-2(b)(iii) (2016) ('The anti-retaliation protections [of Dodd-Frank] apply whether or not you satisfy the requirements, procedures, and conditions to qualify for an award.').

10 See Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934, 80 Fed. Reg. 47,829, 47,830 (10 August 2015) ('[W]e are issuing this interpretation to clarify that, for purposes of Section 21F's employment retaliation protections, an individual's status as a whistleblower does not depend on adherence to the reporting procedures specified in Rule 21F–9(a).').

11 See, e.g., Brief of the Securities and Exchange Commission *Amicus Curiae* in Support of the Appellant at 38, *Verble v. Morgan Stanley Smith Barney LLC*, No. 15-6397 (6th Cir. 4 February 2016) ('[T]his Court should defer to the Commission's rule and hold that individuals are entitled to employment anti-retaliation protection if they make any of the disclosures identified in Section 21F(h)(1)(A)(iii) of the Exchange Act, irrespective of whether they separately report the information to the Commission.').

While the Second[12] and Ninth[13] Circuits have agreed, the Fifth Circuit has held that Section 78u-6(h)(1)(A) unambiguously requires a report to the SEC to trigger anti-retaliation protection.[14] On 26 June 2017, the Supreme Court agreed to resolve the circuit split and to review whether Dodd-Frank prohibits retaliation against internal whistleblowers who have not reported concerns to the SEC.[15] The case will be heard during the October Term of 2017.

Third, Dodd-Frank protects whistleblower activity under the Consumer Financial Protection Act, described below.[16]

Since the passage of Dodd-Frank, the SEC has instituted, and settled, several whistleblower retaliation cases. For example, in June 2014, an investment adviser settled on a no-admit-no-deny basis[17] the SEC's charges of violating Section 78u-6(h) after it reassigned and ultimately terminated its head trader for reporting company misconduct to the SEC.[18] The day after the trader revealed to his superiors that he had reported certain conflicted transactions to the SEC as possible violations of the Investment Advisers Act, he was removed from the trading desk and relieved of his day-to-day trading and supervisory responsibilities.[19] Following unsuccessful severance negotiations, culminating in the company's offer to permit the trader to return to work with the same compensation but without his former title and duties, the trader was instructed to perform several tedious compliance-related tasks – namely, reviewing more than 1,900 pages of hard-copy trading data and consolidating multiple trading procedure manuals into a single comprehensive document.[20] Then, despite approving the trader's use of his personal email address to prepare a report to the company on his whistleblower claims, the company terminated the trader for misusing proprietary information in violation of the company's confidentiality policy.[21]

Four aspects of the settlement merit particular attention. First, the SEC brought charges under both Dodd-Frank and the Investment Advisers Act, suggesting that the whistleblower's complaint was at least colourable. Second, the whistleblower reported directly to the SEC, bringing his actions within the scope of Section 78u-6(h)(1)(A)(i)–(ii) and avoiding the circuit split on internal reporting. Third, the timing and the nature of the company's retaliatory acts were more

12 *Berman v. Neo@Ogilvy LLC,* 801 F.3d 145, 155 (2d Cir. 2015).

13 *Somers v. Digital Realty Trust Inc.,* 850 F.3d 1045, 1048 (9th Cir. 2017), cert. granted, No. 16-1276 2017 WL 1480349 (U.S. 26 June 2017).

14 *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 629 (5th Cir. 2013).

15 *Digital Realty Trust, Inc. v. Somers*, No. 16-1276, 2017 WL 1480349 (U.S. 26 June 2017).

16 12 U.S.C. § 5567 (2016).

17 While subject to some exceptions, the SEC generally permits defendants to enter into settlement agreements without admitting or denying wrongdoing. This has the practical impact of inducing companies to settle with the SEC because the settlements do not entail binding admissions that could be used against them in other proceedings, such as in related class action litigation.

18 *Paradigm Capital Mgmt., Inc.*, Exchange Act Release No. 72393, at 1–2 (16 June 2014).

19 Id. at 6.

20 Id. at 7–8.

21 Id. at 8.

attenuated than the paradigm case of retaliation. And fourth, the settlement included an undifferentiated civil penalty of US$300,000 – leaving unclear the portion of the fine attributable to each violation.

In another case, also settled on a no-admit-no-deny basis, the SEC charged a gaming company with prohibited retaliation under Dodd-Frank after it terminated a successful employee with uniformly positive performance reviews following a whistleblower report.[22] Notably, the employee reported the suspected improprieties both to the company and to the SEC essentially simultaneously, he informed the company before his termination that he had notified the SEC, and the company determined in an internal investigation that the conduct identified by the whistleblower was lawful.[23] In this case, the SEC, for the first time, charged the company exclusively with unlawful retaliation and not with violations of other securities laws. The settlement therefore signals the Commission's view that a whistleblower's good faith report of a suspected securities law violation is protected under Dodd-Frank, even if the report is later found to be erroneous.

The SEC has also devoted considerable attention to so-called 'pretaliation' cases. As discussed below, in addition to prohibiting retaliation for protected whistleblowing, Section 78u-6(b) authorises the SEC to pay monetary awards to whistleblowers who voluntarily provide original information to the Commission that leads to the successful enforcement of a covered judicial or administrative action or related action.[24] Under Rule 21F-17, which the SEC promulgated to implement Section 78u-6(b), 'No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.'[25] Although SEC Chair Mary Jo White has stated that 'The rule is not . . . a sweeping prohibition on the use of confidentiality agreements,' acknowledging that 'Companies may continue to protect their trade secrets or other confidential information through the use of properly drawn confidentiality and severance agreements,' the SEC has taken a hard stance against agreements that even potentially could discourage whistleblowing.[26]

22 *Int'l Game Tech.*, Exchange Act Release No. 78991, at 2 (29 September 2016).

23 Id. at 4–5.

24 15 U.S.C. § 78u-6(b) (2016).

25 17 C.F.R. § 240.21F-17(a) (2016).

26 Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Remarks at the Ray Garrett, Jr. Corporate and Securities Law Institute at Northwestern University School of Law: The SEC as the Whistleblower's Advocate (30 April 2015), available at https://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html. Plainly, in the SEC's view, agreements that have demonstrably discouraged whistleblowing violate § 78u-6(b) and Rule 21F-17. See, e.g., *Anheuser-Busch InBev SA/NV*, Exchange Act Release No. 78957, at 6–7 (28 September 2016) (charging a violation of § 78u-6(b) where a severance agreement forbade disclosure of confidential information, except as 'required for accounting or tax purposes or as otherwise required by law,' on threat of US$250,000 in liquidated damages, and the whistleblower ceased communications with the SEC after signing the agreement).

Indeed, in three recent cases, the SEC charged companies with violating Section 78u-6(b) by including clauses in severance agreements that purportedly restricted their employees' right to receive financial awards for whistleblowing, even absent evidence that any employees were in fact discouraged from providing information to the Commission.[27] In all three cases, the SEC took the position that the subject provisions violated Rule 21F-17, and undermined the purposes of Section 78u-6(b), by eliminating 'the critically important financial incentives' to report financial misdeeds to the SEC and impeding free communication with the agency.[28]

In December 2016, the SEC brought a US$1.4 million penalty against a defendant company for both 'pretaliation' – for using restrictive language in employee separation agreements that barred former employees from serving as whistleblowers – and retaliation – for firing an internal whistleblower who raised concerns regarding the company's process for calculating oil and gas reserves.[29]

Lastly, the only federal court of appeals to have considered the question has held that Dodd-Frank's anti-retaliation provision does not apply extraterritorially, at least in the absence of some 'meaningful relationship' to the United States.[30]

---

27 See *Health Net, Inc.*, Exchange Act Release No. 78590, at 3 (16 August 2016) (charging a violation of § 78u-6(b) where a severance agreement provided that, while 'nothing in this Release precludes Employee from participating in any investigation or proceeding before any federal or state agency, or governmental body . . . , by signing this Release, Employee, to the maximum extent permitted by law, . . . waives any right to any individual monetary recovery . . . in any proceeding brought based on any communication by Employee to any federal, state or local government agency or department'); *BlueLinx Holdings, Inc.*, Exchange Act Release No. 78528, at 3–4 (10 August 2016) (charging a violation of § 78u-6(b) where a severance agreement (1) prohibited employees from 'us[ing] or disclos[ing]' confidential information regarding the company unless compelled by law or authorised by the company, (2) obligated employees to notify the company in advance of any disclosure, and (3) 'waiv[ed] the right to any monetary recovery in connection with any . . . complaint or charge that [the employees] may file with an administrative agency'); *Homestreet Bank and Darrell Van Amen*, Exchange Act Release No. 79844, at 2, 11 (19 January 2017) (ordering HomeStreet to cease and desist from committing or causing any future violations of Rule 21F-17 violations when it included language in employee severance agreements that removed financial incentives for whistleblowers).

28 *BlueLinx*, Exchange Act Release No. 78528, at 4–5; see also *HealthNet, Inc.*, Exchange Act Release No. 78590, at 4–5.

29 See *In re SandRidge Energy, Inc.*, Administrative Proceeding No. 3-17739 (SEC 20 December 2016).

30 *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 180, 183 (2d Cir. 2014). In *Liu*, 'the whistleblower, his employer, and the other entities involved in the alleged wrongdoing [were] all foreigners based abroad, and the whistleblowing, the alleged corrupt activity, and the retaliation all occurred abroad.' Id. at 179. Indeed, '[t]he facts alleged in the complaint reveal[ed] essentially no contact with the United States regarding either the wrongdoing or the protected activity.' Id. Accordingly, in the Second Circuit's view, 'this case is extraterritorial by any reasonable definition.' Id. To date, no court of appeals has confronted an extraterritorial case with facts presenting a closer connection to the U.S.

20.1.3 Sarbanes-Oxley Act

SOX protects employees of publicly traded companies (including any subsidiaries or affiliates whose financial information is included in the consolidated financial statements of such companies), and nationally recognised statistical rating organisations, who provide information, assist in an investigation or file, testify or participate in a proceeding regarding any conduct that the employee reasonably believes is a violation of SOX, any SEC rule or regulation or any federal statute relating to fraud against shareholders.[31] The statute reaches not only employees of public companies, but also employees of private contractors and subcontractors who perform work for public companies.[32]

The disclosure or assistance must be provided to a federal regulatory or law enforcement agency, any member or committee of Congress, or a person with supervisory authority over the employee or investigative authority for the employer, regarding any violation of Sections 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud) and 1348 (securities fraud against shareholders) of Title 18 of the United States Code or any SEC rule or regulation or of any federal law regarding fraud against shareholders.

Three critical issues surrounding the scope of SOX's anti-retaliation provision remain unsettled: first, whether a household employee of a public-company officer or employee can bring a SOX retaliation claim against that individual;[33] second, whether the alleged fraud must affect shareholders for the whistleblower's report to qualify for protection;[34] and third, how exactly the reasonableness of the whistleblower's belief as to the fraud is to be measured.[35]

---

31 18 U.S.C. § 1514A (2016).

32 *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1161 (2014).

33 See id. at 1172–73 ('The dissent's fears that household employees and others, on learning of today's decision, will be prompted to pursue retaliation claims, and that OSHA will find them meritorious under § 1514A, seems to us unwarranted. If we are wrong, however, Congress can easily fix the problem by amending § 1514A explicitly to remove personal employees of public company officers and employees from the provision's reach.').

34 *Compare Beacom v. Oracle Am., Inc.*, 825 F.3d 376, 380 (8th Cir. 2016) ('Sarbanes-Oxley requires the employee to hold a reasonable belief that the employer's conduct amounts to fraud against the shareholders.'), *with Lockheed Martin Corp. v. ARB*, 717 F.3d 1121, 1131 (10th Cir. 2013) ('[T]he proper interpretation of § 1514A(a) gives each phrase a distinct meaning and holds a claimant who reports violations of 18 U.S.C. §§ 1341, 1343, 1344, or 1348 need not also establish such violations relate to fraud against shareholders to be protected from retaliation under the Act.').

35 Although it is universally agreed that the 'reasonable belief' standard has both an objective and a subjective component, the Administrative Review Board (ARB) has set forth conflicting standards for assessing the objective component, which the circuits have not uniformly adopted. *Beacom*, 825 F.3d at 380. The ARB first concluded, in 2006, that an employee's complaint 'must (1) "definitively and specifically" relate to one of the categories of fraud or securities violations listed [in § 1514A] and (2) "approximate . . . the basic elements" of the fraud or securities violation to which the complaint relates.' Id. (quoting *Platone v. FLYI, Inc.*, ARB No. 04-154, 2006 WL 3246910, at *8 (ARB 29 September 2006)). Then, in 2011, the ARB rejected this standard and held that, rather, 'the employee must simply prove that a reasonable person in the same factual circumstances with the same training and experience would believe that the employer violated securities laws.' Id. (citing *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, 2011 WL 2165854, at

False Claims Act 20.1.4

The False Claims Act (FCA) protects employees who file a civil action, known as a *qui tam* action under the Act, on behalf of the federal government.[36] Generally, the action must be based on allegations that the employer has knowingly made a false or fraudulent claim for payment to the federal government. Violations of the FCA are punishable by treble damages of the amount of harm to the government and statutory civil penalties of US$5,500 to US$11,000 per false claim.[37] Under the FCA's *qui tam* provisions, a whistleblower can receive between 15 per cent and 30 per cent of the amount the government collects as well as attorneys' fees and costs, and is protected from any type of retaliation.

Consumer Financial Protection Act 20.1.5

As part of Dodd-Frank, the Consumer Financial Protection Act (CFPA) prohibits employers that provide consumer financial products or services (and employers that provide a material service in connection with the provision of such products or services) from terminating or in any other way discriminating against a covered employee because the employee has: (1) provided, caused to be provided, or is about to provide or cause to be provided, information relating to a violation of the CFPA or any other provision of law that is subject to the jurisdiction of the Bureau of Consumer Financial Protection (Bureau) to the employer, the Bureau, or a state, local, or federal government authority or law enforcement agency; (2) testified or will testify in any proceeding resulting from the administration or enforcement of the CFPA or any other provision of law that is subject to the jurisdiction of the Bureau; (3) filed, instituted, or caused to be filed or instituted any proceeding under any federal consumer financial law; or (4) objected to or refused to participate in any activity that the employee reasonably believed to be in violation of any law subject to the jurisdiction of, or enforceable by, the Bureau.[38]

Department of Defense Authorization Act 20.1.6

The Department of Defense Authorization Act of 1987 (DDAA) protects employees of defence contractors and subcontractors who disclose to a member of Congress, an inspector general or other specified entities evidence of gross mismanagement or a substantial and specific danger to public health or safety.

---

*11–12 (ARB 25 May 2011) (en banc)). Under this new standard, 'an employee's mistaken belief may still be objectively reasonable.' Id. The Fourth, Fifth, Ninth and Tenth Circuits have deferred to *Platone* and have declined to revisit the issue in the wake of *Sylvester*. Id. By contrast, the Second, Third, Sixth and Eighth Circuits have adopted the new *Sylvester* standard. Id.

36 31 U.S.C. § 3730(h).

37 The US Department of Justice has announced that amount of civil penalties will increase to between US$10,781 and US$21,563 per false claim. These increases will be effective 1 August 2016 and will apply to violations that occurred after 2 November 2015.

38 12 U.S.C. § 5567.

20.1.7 Defend Trade Secrets Act

The Defend Trade Secrets Act of 2016 (DTSA) creates a private cause of action for civil trade secret misappropriation under federal law. However, it does not pre-empt or eliminate existing state law remedies for trade secret misappropriation. Further, whistleblowers are protected from DTSA claims when they disclose trade secrets to the government or an attorney to report wrongdoing or include them in sealed filings in anti-retaliation lawsuits. The law also requires employers to give notice to employees, contractors and consultants of this potential immunity in any policies, handbooks or employment agreements that govern access to or use of trade secrets or 'other confidential information'. Specifically, any such documents entered into or updated after the law goes into effect must provide notice of the immunities for whistleblowing and anti-retaliation suits. Employers who fail to give this notice are barred from recovering exemplary damages or attorneys' fees in an action under the DTSA.

20.2 Documentation of company's response to the whistleblower

As noted previously, in addition to adopting a strong anti-retaliation policy, the implementation of a documented complaint or compliance procedure is another critical step in avoiding whistleblower claims. The typical complaint procedure should direct employees to submit their concerns as soon as possible to a defined individual. Often, these policies draw a distinction regarding the individuals to a report must be directed to based on the concern being raised. For example, a complaint of discrimination or harassment based on an employee's protected characteristic (race, colour, religion, sex, national origin, ethnicity, age, disability, citizenship, veteran or military status, or any other characteristic protected by local, state or federal employment discrimination laws) might typically go to the human resources department, whereas, a concern about improper deductions from payroll might go to the payroll department. Meanwhile, all other concerns will generally be directed to the employer's compliance officer.

While a compliance policy should be designed to handle the concern promptly, efficiently and effectively, a policy that directs such concerns to high-ranking individuals within the organisation can be self-defeating. If this individual does not have the time and proper training to handle the complaint, in addition to juggling all of his or her other duties, the report may not be handled appropriately. Furthermore, the organisation may be opening itself to discovery in any subsequent litigation regarding that individual, including depositions, that may not be beneficial for the organisation. By concentrating all compliance responsibilities in a single individual, the company may be exposing itself to additional litigation for the company's and the individual's handling of compliance matters.

Many organisations have adopted ombudsman programmes that serve as a general clearing house for concerns employees raise. Sometimes, an ombudsman will direct the concern to the appropriate department or launch an investigation on his or her own, again depending on the claim.

Finally, many organisations have adopted anonymous hotlines to which employees are encouraged to report any type of concerning activity. In fact, under

SOX, public companies must set up anonymous hotlines so that employees can file internal reports of concerns regarding auditing or accounting matters.

The ultimate goal with these policies is to create a culture of compliance, where employees feel protected in raising concerns to the appropriate individuals within the organisation and where the organisation addresses the concerns raised promptly and effectively. Moreover, by documenting each step of the complaint procedure, the company creates a record that can assist it in defending any whistleblower claim.

Whistleblower direct reporting to regulators 20.3

The implementation of internal complaint or compliance programmes may not shield the company from all whistleblower claims, however. Under several statutes, there is no explicit requirement that the whistleblower report suspected wrongdoing internally: the first indication the company will have that it is facing a whistleblower action will come in a notification that it is under federal investigation. Recognising that the goal of corporate compliance programmes is to address possible wrongful conduct before a federal investigation is instituted, Dodd-Frank in particular implemented steps to encourage use of the company's internal reporting mechanisms by offering incentives to whistleblowers not otherwise available.

Dodd-Frank incentives to report internally 20.4

Dodd-Frank provides for payment to the whistleblower of an award between 10 per cent and 30 per cent of the monetary sanctions imposed in any action brought by the CFTC or SEC resulting in sanctions exceeding US$1 million.[39] To qualify for a whistleblower award, the individual must voluntarily provide to the SEC or CFTC original information related to a possible violation of federal securities laws.[40] This information must lead to a successful enforcement action and monetary sanctions exceeding US$1 million, as noted. In addition, to incentivise the use of a company's internal complaint or compliance procedures, this award is available to individuals who report internally where that report leads to a later successful enforcement action. These individuals can also take advantage of a 120-day window in which a report to the SEC or CFTC may be made and considered filed as of the date of the internal complaint.[41] In other words, a whistleblower may

39 7 U.S.C. § 26(b); 15 U.S.C. § 78u-6(b).

40 17 C.F.R. § 240.21F-2(a)(1)–(2) (2016). The SEC's regulations define 'original information' to mean information that is: (1) '[d]erived from [the whistleblower's] independent knowledge or independent analysis'; (2) '[n]ot already known to the Commission from any other source, unless [the whistleblower is] the original source of the information'; (3) '[n]ot exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless [the whistleblower is] a source of the information'; and (4) '[p]rovided to the Commission for the first time after 21 July 2010 (the date of enactment of [Dodd-Frank]).' Id. § 240.21F-4(b)(1). As explained below, the regulations generally treat information obtained by executives, compliance personnel, and attorneys as derived not from 'independent knowledge or independent analysis', subject to several exceptions. Id. § 240.21F-4(b)(4).

41 Id. § 240.21F-4(b)(7).

hold their place in line, establishing that their information was 'original' despite the subsequent emergence of the information through other sources, by reporting internally before proceeding to the SEC. Further, as noted, the SEC reviews the individual's compliance with the company's internal procedures in determining the amount of the whistleblower award. And, critically, even the perpetrators of the misconduct may be eligible for awards, provided that they satisfy each of the requisites of the statute and corresponding regulations – specifically, they timely provide 'original information' leading to a qualifying sanction, which exceeds the US$1 million threshold exclusive of 'any sanctions that the whistleblower is ordered to pay, or that are ordered against any entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated.'[42]

20.5 Whistleblower awards for attorneys and compliance personnel

Although information obtained by attorneys and compliance personnel in the scope of their duties generally does not constitute 'original information' under the SEC's regulations, a number of exceptions permit these individuals to claim whistleblower awards.

Regarding attorneys, Exchange Act Rule 21F-4 provides that the SEC 'will not consider information to be derived from [an attorney whistleblower's] independent knowledge or independent analysis' in two relevant contexts: first, when the whistleblower 'obtained the information through a communication that was subject to the attorney–client privilege, unless disclosure of that information would otherwise be permitted by an attorney pursuant to [the SEC's standards of professional conduct], the applicable state attorney conduct rules, or otherwise;' or second, when the whistleblower obtained the information in connection with the legal representation of a client on whose behalf the whistleblower or his or her employer or firm are providing services, and the whistleblower seeks to use the information to make a whistleblower submission for his or her own benefit, unless disclosure would otherwise be permitted by an attorney under the same conduct rules identified above.[43]

The SEC's professional conduct rules, codified in 17 CFR Part 205, provide that an attorney representing an issuer:

> *may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary: (i) [t]o prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors; (ii) [t]o prevent the issuer, in a Commission investigation or an administrative proceeding, from committing . . . [or] suborning perjury . . . [or making false statements]; or (iii) [t]o rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury*

42 Id. § 240.21F-16.

43 Id. § 240.21F-4(b)(4)(i)–(ii).

> *to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.*[44]

Importantly, Part 205 sets out minimum standards of professional conduct for attorneys appearing and practising before the SEC, and to the extent that the standards of a state or other US jurisdiction where an attorney is admited or practises conflict with Part 205, the SEC's rules govern.[45]

Generally speaking, then, an attorney may ethically report privileged information, and receive a corresponding whistleblower award, under any of the three circumstances outlined in Part 205.[46]

Regarding compliance personnel, Exchange Act Rule 21F-4 similarly excludes from a whistleblower's 'independent knowledge or independent analysis' information obtained because the whistleblower was:

> *(A) An officer, director, trustee, or partner of an entity and another person informed [the whistleblower] of allegations of misconduct, or [the whistleblower] learned the information in connection with the entity's processes for identifying, reporting, and addressing possible violations of law; (B) An employee whose principal duties involve compliance or internal audit responsibilities, or [was] employed by or otherwise associated with a firm retained to perform compliance or internal audit functions for an entity; (C) Employed by or otherwise associated with a firm retained to conduct an inquiry or investigation into possible violations of law; or (D) An employee of, or other person associated with, a public accounting firm, if [the whistleblower] obtained the information through the performance of an engagement required of an independent public accountant under the federal securities laws . . . and that information related to a violation by the engagement client or the client's directors, officers or other employees.*[47]

However, these exclusions do not apply in three broad settings. First, when the whistleblower has 'a reasonable basis to believe that disclosure of the information

44 Id. § 205.3(d)(2).

45 Id. § 205.1. In practice, this means that if the SEC's rules would permit the release of client confidences, reporting is permissible even if the pertinent state rules of professional conduct would prohibit disclosure.

46 Although Part 205 never requires disclosure of privileged information to the SEC, see id. §§ 205.1–205.7, state laws or rules of professional conduct may mandate reporting of certain potentially criminal activity, see, e.g., Model Rules of Prof'l Conduct R. 1.6 cmt. 12 (2016). In these circumstances, an attorney whistleblower may still be eligible for an award as long as the applicable law does not require disclosure specifically to the Commission. See 17 C.F.R. § 240.21F-4(a)(3) ('[Y]our submission will not be considered voluntary if you are required to report your original information *to the Commission* as a result of a pre-existing legal duty, a contractual duty that is owed to the Commission or to one of the other authorities set forth in paragraph (a)(1) of this section, or a duty that arises out of a judicial or administrative order.' (emphasis added)).

47 17 C.F.R. § 240.21F-4(b)(4)(iii).

to the Commission is necessary to prevent the relevant entity from engaging in conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors;'[48] second, when the whistleblower has 'a reasonable basis to believe that the relevant entity is engaging in conduct that will impede an investigation of the misconduct;'[49] or, third, when at least 120 days have elapsed since (1) the whistleblower provided the information to the relevant entity's audit committee, chief legal officer, or chief compliance officer, or to the whistleblower's supervisor, or (2) the whistleblower received the information, if the whistleblower received it under circumstances indicating that the entity's audit committee, chief legal officer, or chief compliance officer, or the whistleblower's supervisor, was already aware of the information.[50] After a federal jury in San Francisco awarded a former general counsel US$8 million in February 2017 for his retaliation claim,[51] attorneys may increasingly come forward as whistleblowers against their companies.

As with attorney whistleblowers, provided that any one of the above conditions is met, compliance professionals may be entitled to awards as well. Since the passage of Dodd-Frank, the SEC has issued two whistleblower awards to individuals performing compliance or audit functions. In the first case, an employee assigned audit and compliance responsibilities reported concerns of wrongdoing internally, then, when the company failed to take action within 120 days, communicated the same information to the SEC.[52] In the second case, a compliance officer reported misconduct directly to the SEC 'after responsible management at the entity became aware of potentially impending harm to investors and failed to take steps to prevent it.'[53]

48 Id. § 240.21F-4(b)(v)(A).

49 Id. § 240.21F-4(b)(v)(B).

50 Id. § 240.21F-4(b)(v)(C).

51 *Wadler v. Bio-Rad Laboratories, Inc. et al*, No. 3:15-cv-02356 (N.D. Cal. 6 February 2017).

52 Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces $300,000 Whistleblower Award to Audit and Compliance Professional Who Reported Company's Wrongdoing (29 August 2014), available at https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542799812.

53 Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Million-Dollar Whistleblower Award to Compliance Officer (22 April 2015), available at https://www.sec.gov/news/pressrelease/2015-73.html.

21

Whistleblowers: The In-house Perspective

Steve Young[1]

Initial considerations 21.1

Most whistleblowing policies provide several channels for staff to raise concerns. These often include the staff member's line manager (or a more senior manager), human resources, audit, legal, compliance or dedicated ethics, or integrity, departments.

The desired culture of any corporate must be that staff feel entirely comfortable raising concerns with their immediate line manager, who in turn will escalate the issue to the appropriate department. Should whistleblowers prefer not to go to their line manager, they should feel able to approach someone in the organisation they trust. The culture corporates should aspire to must be one where employees may raise concerns with the full confidence they will be treated with respect, will be taken seriously and will suffer no retaliation in any form.

From an in-house perspective it is always an initial concern that an employee has not had sufficient confidence in the organisation to raise the concern via internal personnel in the normal course of business. Resorting to the whistleblowing channels sends a message itself and more so if the employee has chosen to remain anonymous. Monitoring and analysing whistleblowing cases can provide a measure of the organisation's culture and confidence levels for raising concerns. While much depends on the nature of the concern, the tone from the top and creating a culture that speaking up is the right thing to do are imperative. Many organisations now include questions in employee opinion surveys to try and gauge the level of confidence staff have in raising their concerns. Some other initial considerations are pointed out below.

1 Steve Young is group compliance head of fraud and investigations at Banque Lombard Odier & Co Ltd.

Anonymity: Anonymous whistleblowers can deny the investigator the opportunity to open a constructive dialogue to seek further information, put matters into context and limit feedback. A key challenge for the investigator is why the whistleblower wished to remain anonymous. It can be helpful to simply ask the question if there is a communication channel, such as webmail, open with the whistleblower.
The nature of the allegation and motive for reporting: While investigators should always keep an open mind, the motive of the whistleblower often becomes apparent as the facts are established. If a dialogue with the whistleblower exists, they can be asked their motive for reporting.
Duration: How long the alleged conduct has been taking place is material. Aged issues can present problems such as records retention periods. In addition, because of staff turnover, accessibility to ex-employees can be a problem.
Existing knowledge from another source: Investigators should check corporate records, such as audit, risk, legal and compliance to check if the alleged activity is known and was previously or is currently the subject of investigation.
Need for external counsel: Investigators should lean towards caution during the initial review of a whistleblower allegation and take legal advice at an early stage. Assessment of the legal risks by an internal or external lawyer will prevent problems arising later if the investigation uncovers serious wrongdoing.
The welfare of the whistleblower and duty of care: Investigators should keep in mind the welfare of the whistleblower. For most it will not have been an easy decision to speak up. Stay mindful of health and performance impacts – and the legal risk of these to the organisation.
Protecting the whistleblower from retaliation: In the event that a whistleblower is identified, immediate steps may need to be considered to prevent retaliation. These could include moving the whistleblower to another part of the organisation, or transferring to an alternative line manager. Much depends on the nature of the case.

21.2 Identifying legitimate whistleblower claims

Given the wide range of concerns raised by whistleblowers, distinguishing between legitimate and non-legitimate allegations should be dictated by the facts gathered during the the investigation. In some cases, a prompt review of the matters alleged by a subject-matter expert can quickly point to whether something is 'off-target' or requires further investigation. During the normal course of document examination, email reviews, staff interviews and data analysis generally the allegations can be substantiated or disproved. While some allegations will always be inconclusive, more frequently in human resources cases, generally a determination can be reached on the facts. Whistleblowing cases that contain multiple allegations require a detailed breakdown of each allegation as some parts may prove substantive while others will be off-target. Whistleblowing allegations are never suited to a one-size-fits-all approach and much depends on the nature of each case.

On receipt of a whistleblowing allegation, first steps should include checks to ascertain if the matters raised are known or the subject of an ongoing or previous investigation.

Generally, allegations can be split into three categories:

- Material allegations that expose the corporate to regulatory action, civil claims or criminal investigation. These require experienced legal advice and depending on the jurisdiction investigation by external counsel to preserve privilege and advise the corporate accordingly.
- Allegations of wrongdoing, including internal fraud and breaches of the code of conduct or policies and procedures. These generally can be investigated by internal corporate investigators, or external forensic firms with internal or external legal advice and oversight if required.
- Behavioural allegations such as bullying, harassment, inappropriate relationships, etc., which can generally be investigated by human resources or independent line management.

Employee approaches to whistleblowers 21.3

A key component of any corporate whistleblowing policy must include a zero-tolerance approach to any retaliation against a whistleblower. Retaliation or perceived retaliation against a whistleblower raises cultural and legal risk, and undermines the effectiveness of a whistleblowing programme. Frequently during whistleblowing investigations, especially ones involving allegations of wrongdoing by senior management, interviewees speculate as to who the whistleblower might be. Ideally, in the absence of a legal obligation to do so (e.g., in litigation or in some jurisdictions) it is preferable that there is no such disclosure.

Speculation among staff should be discouraged, as it can increase the risk of retaliation.

Retaliation against whistleblowers can take many forms; examples include silence, isolation, inappropriate remarks, threats and work sabotage. In the event that a staff member or number of staff members are acting inappropriately towards a whistleblower, action will need to be taken.

Good investigation process separates the collection of facts and evidence gathering from decision making to determine outcomes. This is particularly important when an investigator is putting forward information concerning retaliation against a whistleblower. As a general rule the investigator should not be involved in the sanctions or enforcement actions against retaliators – it is a separate legal and HR issue.

If the whistleblower's identity is known, dialogue should take place about the treatment the whistleblower is receiving and whether he or she has disclosed to anyone that they have raised the matter. Special care is required if the retaliation is by a line manager. The whistleblower should be given an opportunity to express his or her expectations and view as to what could be done. Investigators should be mindful that the organisation will generally have a duty of care and the whistleblower could take action against the organisation in the future.

Frequently whistleblowers experiencing retaliation or those believing they are being treated differently suffer health problems, such as stress leading to time off work. In these circumstances referrals via human resources to confidential staff welfare support schemes should be considered. In determining the action to be taken against staff involved in retaliation against a whistleblower the investigator

should consult with human resources, legal, compliance and business management functions for the next steps, which could include disciplinary action up to and including dismissal.

Appropriate action taken against those who retaliate against whistleblowers can send a strong message to reinforce the culture of the organisation.

21.4 Distinctive aspects of investigations involving whistleblowers

Corporates with in-house investigation departments generally have investigation procedures in place that also apply to whistleblowing cases. The substantive difference is how the matter was raised. Investigators should proceed with the protection of the whistleblower as a top priority. Thought should be given to lines of enquiry or staff interviews that could identify the whistleblower. The general rule to note is that it is the matter under investigation is the issue, not how the matter came to the organisation's attention.

Investigators should check if local law requires disclosure that the matter was raised as the result of a whistleblower. It is generally not a requirement in law to disclose to those facing allegations that the matter under investigation was raised by a whistleblower.

A good example of an exception is France, where it is generally required that accused persons be informed of whistleblowing allegations made against them so they may respond to them. They also have protection against malicious allegations. In this respect investigators should be mindful that in the rare cases of malicious allegations the alleged party, or the employer, may consider legal action against an identifiable whistleblower.

Equally, as with many investigations, consideration must be given to the collection and recording of personal data. Legal advice should be taken on data protection obligations, as again, in some jurisdictions such as France, an accused person may be informed of the accusation and have a right of challenge when his or her personal data is recorded during a whistleblowing investigation.

With the protection of the whistleblower and disclosure obligations at the top of the investigator's priority list, it is important the internal investigation proceeds as with any other investigation to establish the facts. Establishing a dialogue with the whistleblower, if possible, allows for further information, context and feedback to take place. It can be that allegations are raised in good faith but are off-target owing to facts unknown to the whistleblower.

In the event the allegation, or allegations, are substantiated and lead to regulatory enforcement action, litigation by way of civil claims or criminal investigation, or all three, it may be that the identity of the whistleblower, if known, must be disclosed. Investigators should be mindful not to give whistleblowers definitive commitments of non-disclosure, even if authorities have whistleblower protections in place. In serious cases this aspect requires early legal advice when the allegation is first received and assessed, as the legal risks will require consideration.

Everyone involved in the whistleblowing investigation and management process should remain aware that whistleblowers are free to speak to whoever they wish and this can include law enforcement, external regulators and taking their own external legal advice.

22

Forensic Accounting Skills in Investigations

Glenn Pomerantz[1]

Introduction 22.1

The purpose of this chapter is to explain key steps and best practices in investigations from an accounting perspective. The term forensic, as defined in Webster's Dictionary, means 'belonging to, used in or suitable to courts of judicature or to public discussion and debate'. Accordingly, forensic accounting involves the application of specialised knowledge and investigative skills to matters in anticipation of possible litigation or dispute resolution including in civil, administrative or criminal enforcement matters. Forensic accounting skills can be applied to a wide variety of investigations into alleged corporate and individual wrongdoing, including:

- misappropriation of assets by employees;
- bribery and corruption;
- money laundering;
- financial reporting fraud;
- non-compliance with laws, regulations or provisions of contracts; and
- fraud perpetrated by vendors/suppliers and other third parties.

We may refer to non-compliance instead of fraud. Non-compliance often lacks the intent of fraud and may manifest itself in the violation of an agreement, policy or otherwise acceptable behaviour. Investigations may focus on allegations of fraud or non-compliance.

1 Glenn Pomerantz is a partner at BDO USA, LLP. The author wishes to acknowledge the contribution of Gerard Zack, formerly of BDO and now CEO of the Society of Corporate Compliance and Ethics, for his contribution to this chapter.

The range of specialisations within the field of forensic accounting is diverse. But at the core is a focus on accounting systems, processes, records, data and reports. A logical order in which forensic accountants will proceed in an investigation is as follows:

- gaining a broad understanding of allegations, accounting systems, employee responsibilities and business processes;
- preserving records and other evidence;
- mitigating losses;
- developing a workplan for the investigation;
- considering and carrying out data analytics, email review (often with counsel) and review of books and records;
- conducting (often with counsel) information-gathering interviews; and
- conducting (often with counsel) investigative interviews.

Many of the most important steps involved in this process are explained below.

22.2 Preservation, mitigation and stabilisation

See Chapters 5 and 6 on beginning an internal investigation

An important consideration at the outset of an investigation is to identify the necessary steps to mitigate loss of funds or other assets and to preserve data and relevant records. This may entail closing of bank accounts, freezing of email and other communications, deactivating user passwords and other steps to deny access to subjects of the investigation. Where the nature of the investigation requires it, financial and accounting information will need to be preserved and stabilised. Physical documents in this category may include a wide variety of records, such as purchase orders, invoices, customer orders, delivery records, etc. Every step of the transaction cycles involved in the scheme under investigation should be considered at this stage to identify all potentially relevant documents and electronic records.

22.3 e-Discovery and litigation holds

Owing to the proliferation of electronic data, an increasingly important early step in many investigations is to determine what relevant information exists, in what form (paper or electronic), where it is located (e.g., an on-site data centre, off-site at vendors, in the cloud), what security measures are in place over the data, and what the organisation's standard record retention and destruction policies and practices are. The process of identifying, taking inventory of, and preserving relevant data that may be of use in an investigation is often referred to as e-discovery.

In addition, as soon as it becomes apparent that an investigation is necessary, a litigation or preservation hold notice should be issued. These notices require the suspension of any destruction or deletion of paper or electronic records that could be relevant to the investigation. Proper communication of a litigation hold or preservation order to all pertinent individuals and departments is important to avoid accidental destruction of critical records.

Violation of internal controls 22.4

An important part of an investigation is establishing whether the act was intentional. Demonstrating that a subject was aware of and violated a documented, well-established internal control is often a relevant factor. For example, determining how an internal control was circumvented or otherwise violated is also an important part of understanding how fraud or corruption was perpetrated, because establishing that a subject intentionally violated internal controls can be important in connection with criminal prosecution or the regulatory enforcement process, and understanding precisely how internal controls were violated is critical to developing a remediation plan to enhance controls and to prevent future occurrences. In addition, understanding how internal controls were bypassed or overridden will often provide critical insight into who knew what and when.

The first step in determining whether policies or procedures were violated is to gain a thorough understanding of the accounting behind the controls as well as the identities of employees responsible for accounting, internal controls and the business processes being investigated. Upon gaining this basic knowledge, we identify the established policies and procedures (the current state). This normally entails reviewing documented policies and procedures, and walkthroughs, and may also include interviews with employees to help clarify any ambiguities in the documentation. Some considerations include:

See Chapters 7 and 8 on witness interviews

- which employees are authorised to initiate and process a transaction;
- which employees are authorised to approve a transaction;
- which employees can approve new vendors;
- which employees are responsible for account reconciliations;
- which employees have physical access to assets, including cash;
- documentation requirements for the transaction;
- how and where electronic and paper records are stored; and
- how exceptions or unusual transactions are handled, including budget variance analysis.

It may also be important to review any training programmes that the subject of the investigation has received. Doing so can establish more firmly that the subject had an understanding of the proper method of handling the transactions.

Most accounting cycles, such as procurement, disbursement of funds and payroll include many steps. Some of these are evidenced manually, such as with written approvals by signature and supporting documents such as invoices and delivery confirmations. Other steps require analysis of electronic records. Examples of critical pieces of electronic evidence related to internal controls include:

- *Date and time stamps:* Most systems leave a valuable trail that can be used to establish an accurate and detailed timeline of events. For example, a vendor invoice may be put into the accounts payable system late at night during non-work hours, approved for payment moments later and payment is made to the vendor the very next day. Why the rush? Is there a legitimate need or is something more devious involved? Does payment so quickly comply with the organisation's normal cash management and bill-paying policies?

- *User identification numbers:* Systems maintain a record of user log-ins, along with date and time of information access and updates. Directly or indirectly, it is often possible to determine exactly which user of a system performed each step in the chain of activities comprising a transaction – who set a vendor up in the master file, who authorised the purchase and whether it was competitively bid, who entered the vendor invoice, who approved it for payment, who scheduled it for disbursement, who transmitted payment, etc.
- *Security matrices:* Often reviewed in connection with the preceding step, determining which users have access to specific components of each system can play a vital role in assigning responsibility for specific steps in a matter under investigation. Access to a system often does not mean access to every part of that system. Analysis of a security matrix provides details of this information. Who has 'read only' access to vendor and invoice data? Who has input capability? Who has approval authority to release payments to vendors? Aligning this information with information gleaned from the preceding steps can find exactly where internal controls were compromised, including identification of instances of unauthorised access through password theft or sharing.

Physical documents are often important pieces of evidence in an investigation. But electronic evidence associated with a transaction cycle tends to be equally or more important. Proper analysis of this evidence enables an investigator to draw conclusions and gain insight that would be impossible in an entirely paper-based system. For example, a paper copy of a vendor invoice can be analysed to establish whether a subject signed or initialled it, and perhaps whether any alterations were made to the document. But if the organisation's vendor invoice approval and payment system is electronic, the investigator can also determine with precision the date and time of the approval of the invoice and perhaps even where the subject performed these steps (from home, from a workstation in the office, etc.).

22.5 Forensic data analysis

Forensic analysis of data refers to analysis of electronically stored data. The most commonly analysed data are accounting and financial, but several non-financial categories of data are also very useful to investigators. Each is explored below.

Data analysis generally has three applications in the investigative process:

- to initially detect fraud or non-compliance (e.g., monitoring performed by internal audit);
- to corroborate an allegation in order to justify launching an investigation (e.g., proving that an allegation received via a hotline appears to have merit); and
- to perform certain parts of the investigation (e.g., analysis of payments made to suspicious vendors).

Each of these will be explained further. But first, a few important points about data analytics are essential.

Data analytics rarely prove that fraud or non-compliance occurred. Rather, data analysis identifies transactions or activities that have the characteristics of

fraud or non-compliance, so that they can be examined further. These are often referred to as anomalies in the data.

If an investigation ultimately leads to employee terminations or legal proceedings to recover losses, it is critical to have properly analysed the anomalies that data mining has identified. Could the anomaly in the data, or an anomaly in a document, while often identified as a characteristic of fraud, also simply indicate a benign deviation? Failing to investigate and rule out non-fraudulent explanations for anomalies can have consequences that many investigators have learned about the hard way.

Identifying and exploring all realistically possible non-fraudulent, non-corrupt explanations for an anomaly is also called reverse proof. Examining and eventually ruling out all of the valid possible non-fraudulent explanations for an anomaly in the data or documentation can prove that the only remaining reasonable explanation is fraud or corruption.

Take a simple example to illustrate this important concept. An employee is found to have submitted the same business expenditure twice for reimbursement (paid for using a personal credit card). Further analysis shows that this is not an isolated incident. In fact, the rate at which the employee submitted duplicate expenditures has increased over time – a classic red flag commonly associated with perpetrators of fraud. Is this a sufficient basis to support an allegation of misconduct?

This would be premature. What if on further analysis, the investigator also finds that the employee has been asked to work an increasing number of hours every week and travel much more extensively over time. Investigating further, it is found that this employee is particularly disorganised and has never been asked to do this much business travel before. These additional facts make the distinction between an intentional act of fraud and an escalating series of honest mistakes a bit blurry.

Careful consideration of alternative theories for data and document anomalies is critical to protecting the organisation and the investigator from liability stemming from falsely accusing someone of wrongdoing.

Data mining to detect fraud or non-compliance 22.5.1

Depending on which application or phase of the investigative process is involved, the nature of forensic data analysis can vary. For example, as an initial detector of fraud or non-compliance through ongoing monitoring, forensic data analytics usually takes one of two broad, but opposite, approaches: identification of any activity that deviates from expectations, or identification of activity that possesses specific characteristics associated with fraudulent or corrupt behaviour or other non-compliant conduct.

The former approach is taken when acceptable behaviour is narrowly defined, such that the slightest deviation warrants investigation. The latter approach is the more common. It is driven by a risk assessment and is based on what this type of fraud or non-compliance would look like in the data. For example, a shell company scheme might evidence itself by an address in the vendor master file

matching an address in the employee master file. Any instances of such a match would be investigated.

In some cases, basing the 'investigate' or 'don't investigate' decision on a single characteristic in the data can result in numerous false positives. For this reason, more sophisticated data analytics often rely on the consideration of multiple characteristics in assessing the risk of activity being fraudulent or corrupt.

Regardless of which of these two approaches is taken, data analytics often represents an essential tool for gathering evidence to lay the foundation for substantive examination of books, records and other evidence. Following the reverse-proof concept described above is critical once anomalies indicative of possible wrongdoing are uncovered.

22.5.2 Corroborating allegations

See Chapters 19 and 20 on whistleblowers

As a method of corroborating an allegation that has been received, data analysis can be of great value. It is a significant advantage to the investigator because, more often than not, it can be performed on electronic data without alerting the subject of the allegation. In this application, the allegation is first assessed in terms of what impact the alleged fraudulent or corrupt act would have on financial or non-financial data. To illustrate, take the example of an allegation that workers in the shipping department of a warehouse are stealing inventory by short shipping orders to customers. There are numerous sources of data, both financial and non-financial, that could be analysed to assess the validity of this allegation:

- gross profit margins – an unexplained decline in gross profit margins by product, or by location (as a result of having to re-ship additional items, with no associated revenue, to satisfy the customer);
- inventory purchases – unexplained increases in purchases of certain inventory items without a corresponding increase in sales;
- customer complaints – customer service data indicating complaints about incomplete shipments, especially if those complaints can be correlated back to specific orders; and
- shipping records – using the customer complaint data, orders are correlated to specific shipments and employee names associated with filling and shipping these orders. Shipping records might also reveal more shipments to a customer than orders, indicating a second shipment was needed to complete the order after the customer complained.

This is a simple example, but one that illustrates that for every allegation, there likely exists data associated with either the perpetration or concealment of the fraud or non-compliance. And this data normally exhibits one or more anomalies in comparison with data from similar transactions that do not involve fraud or non-compliance.

22.5.3 Using data analysis in an investigation

The final application of forensic data analysis is performed during the investigation itself. Once an anomaly has been found to involve fraud or non-compliance,

additional forensic data analysis, along with substantive forensic examination of the evidence, may be performed to:

1 determine how long the activity has occurred;
2 determine which employees (or third parties) have participated in the fraud (i.e., assessing whether collusion was involved);
3 measure the financial damage resulting from the activity;
4 identify other fraudulent or corrupt conduct by the same individuals; and
5 determine how the fraudulent or corrupt act was concealed and how internal controls were circumvented.

Determining who is involved in the fraud as well as who possessed knowledge of it is critical to the mitigation and control enhancement objectives. According to a recent report by the Association of Certified Fraud Examiners (ACFE), nearly 45 per cent of all fraud and corruption schemes investigated involve multiple perpetrators.[2] This figure has been steadily rising since the ACFE began studying fraud. The 45 per cent is split nearly evenly between cases involving multiple internal perpetrators and those involving collusion between insiders and outsiders, such as vendors or customers.

Point 4, above, may also come as a surprise to some, but is important. The ACFE report indicates that 31.8 per cent of the time an individual engages in fraud (especially with respect to asset misappropriations) they employ multiple methods to commit their crimes. The allegation or investigation may have initially focused on only one specific method. Exploring what other activities the subject might have the capability of engaging in is an integral element of the investigation. Investigators and victims attempt to 'put a fence around the fraud' as early in the investigative process as possible. Understanding the responsibilities of the subject and the potential for unrelated schemes is essential for erecting the fence. Victims often desire a narrow investigative scope – a sort of wishful thinking. An investigator's worst case scenario is missing a scheme conducted by a subject despite investigating the subject.

The question of who knew what and when can be particularly important in satisfying auditors in the context of financial reporting fraud. In addition to quantifying the financial statement impact from fraud, auditors rely on representations from management. Knowledge of whether previous representations came from fraudsters and the auditor's assessment of management's integrity are often important aspects of financial reporting fraud investigations.

In the next sections, the distinction between financial and non-financial data will be explored, followed by a discussion of internal versus external data.

2 2016 ACFE Report to the Nations on Occupational Fraud and Abuse, published by the Association of Certified Fraud Examiners. Available at http://www.acfe.com/rttn2016.aspx.

22.6 Analysis of financial data

Most analyses of internal data relevant to an investigation begin with financial data, much of which comes from the organisation's accounting system. Accounting data can exist in several separate systems, such as:

- general ledger, the master ledger that reflects all accounts and the sum of all accounting activity for the organisation;
- general journal, where journal entries are initially recorded before being posted to the general ledger;
- books of original entry, which contain details of certain types of financial transactions, summaries of which are posted to the general ledger. Examples of books of original entry include sales, cash receipts, cash disbursements and payroll; and
- subsidiary ledgers, which contain additional details of transactions and activities that appear only in summary form in the general ledger. Examples of subsidiary ledgers are accounts receivable and accounts payable ledgers.

Performing an investigation often requires the extraction and analysis of data from all these systems to see the big picture or to properly trace the history of a transaction or series of activities. The days of manually maintained books of original entry are gone. The vast majority of organisations now use electronic accounting and financial software, and in larger organisations these systems are included as part of a broader ERP system.

Some systems are hybrids of financial and non-financial information. Examples of these systems include:

- *Inventory:* in addition to cost information associated with purchases, the system may also provide data on quantities and dates of purchases, deliveries, shipments, inventory damaged or scrapped, and counts resulting from physical observation.
- *Payroll:* in addition to data on net amounts paid to employees, the payroll system will usually include other relevant data needed to calculate an employee's gross and net pay, including various worker classification codes, hours worked during a pay period, rates of pay, tax and withholding information, along with bank account information for the electronic transfer of funds to employees.
- *Human resources:* in most large organisations a human resources system that is separate from payroll is maintained. Included in this system is data on rates of pay and past raises, incentive payments, and other financial data about reach employee, as well as significant amounts of non-financial data, like each employee's home address. Human resource information systems may also include vital information associated with an employee's initial hiring, such as background and reference checks, verification of information provided on an employment application, etc. This information can be important if the organisation anticipates filing an insurance claim to be indemnified for losses attributable to an employee.

Availability of and legal considerations associated with each of these sources of internal data vary from one jurisdiction to another, particularly with respect to payroll and personnel information. Privacy issues must be considered before embarking on any use of such data in an investigation.

Analysis of non-financial records 22.7

Increasingly, non-financial data is being analysed as a standard element of an investigation. Non-financial data can be classified into two broad categories: structured and unstructured.

Structured data is the type of data that generally conforms to a database format. It is often numeric (e.g., units in inventory, hours worked by an employee, calendar dates), but can involve alpha data as well (e.g., codes associated with types of customer or employee, certain elements of an address).

Structured non-financial data is found in many systems, including those that include financial data mentioned above. Other systems, however, are entirely non-financial, but provide data that can be important to an investigation. Examples of non-financial systems commonly used for investigative purposes include:

- *Security:* many organisations now use tools that leave an electronic trail of the exact times and dates when specific employees entered or left the building. Records of visits by vendors and other visitors may be included in this system or may be kept separately. Security information can be very useful in establishing timelines or the whereabouts of specific individuals.
- *Network data:* much like accessing a building, networks maintain electronic records each time an authorised user logs on or off the system, and may retain a record of various aspects of the user's network activity, such as which folders were accessed, which data was downloaded, which systems were used, etc.
- *Customer service:* as the earlier example illustrates, data collected in the customer service system can have numerous applications in an investigative setting. Customer complaints about items missing from their orders may indicate theft in the warehouse.

Unstructured data refers to data that does not readily conform to a database or spreadsheet format. Text associated with messages in emails, explanations for journal entries and other communications are the most common. Unstructured data also includes photographic images, video and audio files.

Emails and text messages of interest to an investigator may involve messages within the organisation, between employees and communications between organisation employees and vendors, customers, or other third parties.

Similar to other electronic data, when a user 'deletes' this information, a back-up or archive version is often left behind and is available to an investigator. Understanding an organisation's back-up, archiving and storage practices is crucial to this part of an investigation.

Careful reviewing of email, instant messaging or text message chains is vital to most investigations and can provide an investigator with vital clues, such as:

- the timeline of events;
- the level of knowledge of events that specific individuals may have had;
- the extent of collusion among individuals;
- whether a subject or witness deleted email evidence; and
- whether there are indications of intent.

Establishing a timeline can be one of the most important requirements of an investigation. A complete timeline of events can often be established by integrating the separate timelines learned from a review of:

- systems and facilities access records;
- electronic transaction information (e.g., entries, approvals);
- documentation (e.g., invoices, shipping records); and
- electronic communications, including metadata (e.g., emails).

Email review is of particular importance in establishing intent. Intent, particularly to a civil standard, may be inferred from communications that indicate an awareness that planned transactions or activities are in conflict with established policies and procedures or treatment of similar transactions. Sentiment analysis can also be performed in connection with email, instant messaging or text message communications. This type of analysis can identify pressures or rationalisations associated with fraudulent or corrupt behaviour. For example, an employee stating in these communications that he feels unfairly treated or resentment towards management might be expressing a rationalisation for stealing from an organisation.

One example of the use of both financial and non-financial data is in the investigation of alleged financial reporting fraud. When an allegation is made that a company's financial statements have been intentionally manipulated, any of a large number of schemes come to mind. The most common fraudulent financial reporting schemes involve improper recognition of revenue, inflating turnover/sales through fictitious transactions or accelerating the recognition of legitimate transactions. So, a revenue inflation scheme will serve as our example.

To establish that the financial statements improperly reflect sales, electronic data from the sales and accounts receivable systems will need to be analysed in conjunction with physical or electronic records associated with customer orders, inventory, shipping and delivery, among others. By analysing these records, the investigator may establish that sales recognised by the company failed to conform to applicable accounting standards (e.g., International Financial Reporting Standards).

But accounting mistakes are common. For this scheme to be fraudulent, the subjects' dishonest intent to violate the accounting rules must be established. This is where analysis of emails and other electronic communications may be valuable. Perhaps email exchanges can be located documenting discussions of revenue shortfalls and methods of meeting budgeted figures. In this case, analysis of unstructured non-financial data may be one of the keys, along with interviews of subjects, to proving that the company intentionally violated their own policies and pertinent accounting principles.

Analysis of both financial and non-financial data is an important step in preparing to interview witnesses and subjects. Reading email and other communication chains before conducting the interview allows an investigator to plan the order and structure of questions to put the interviewer in the best position to identify conflicting statements and to obtain a confession.

Other investigation scenarios in which analysis of unstructured data association with communications between individuals include:

- collusion between multiple employees involved in the theft of cash or other tangible or intangible assets;
- bribery schemes in which the organisation has paid bribes, directly or indirectly, to obtain or retain business; and
- kickback schemes in which a vendor has paid a procurement official of the organisation to steer business to the vendor.

Use of external data in an investigation 22.8

Most data and documentation used in an investigation is internally generated – it comes from within the organisation or (in the case of invoices from a vendor) is otherwise readily available within the organisation. Occasionally, however, data or documentation that is only available from external sources becomes essential. External sources of data fall into two broad categories, public and non-public.

Public data and documents are those that are usually available to the general public either by visiting a website or facility or on request from the holder of the records. In most cases, public records are maintained by government agencies. Examples of public records vary significantly from one jurisdiction to another. But some examples of public records that may be useful to investigators are:

- licences and permits issued by government agencies to individuals or businesses;
- records of ownership or transfers of ownership of property (e.g., sales of land and buildings);
- criminal convictions of individuals and organisations, and certain other court records; and
- business registrations and certain filings made by organisations.

Availability and the extent of these records can differ markedly as an investigator seeks information from different parts of the world.

Increasingly, public records may also include information that an individual voluntarily makes publicly available. For example, when an individual posts photos or makes statements on social media, this information might be readily available to any and all viewers. Once again, investigators should always use caution when accessing this information, especially if the information is only available to 'friends' or other contacts that the individual has granted special access to. But when social media information is made fully available to the general public, it can provide a treasure trove of information about a subject, such as:

- places the subject has visited;
- individual contacts;
- business relationships;

- assets owned; and
- past and present employers.

Another public source of information involves websites that do not require special password or other access privileges. For example, a company's website or that of a trade association or other membership group that a subject might be involved with could provide clues about the subject's relationships, travels and past.

Even information that is no longer on a website might still be available to an investigator. The Wayback Machine at www.archive.org is an archive of almost 500 billion past pages on the internet. Simply typing the URL of a website into the Wayback Machine will produce an index by date of prior versions of that website which have been archived and are available for viewing. Accordingly, an investigator may be able to find useful information from past editions of websites long after the information has been deleted.

Non-public records are private and confidential. Holders of these records are under no obligation to produce these records unless they have provided their consent or they are compelled to do so as a result of a legal process, such as a court order or subpoena. Records such as personal bank statements of individuals who may be the subject of an investigation fall into this category. Investigators normally do not have ready access to these records.

When assisting counsel with preparing a request for a subpoena or other court-ordered production of private records, an investigator should be as detailed and specific as possible. Overly broad requests are normally either denied or result in potentially lengthy delays. For example, if records associated with a bank account are requested, rather than requesting 'all records associated with the account', it is normally better to itemise a list of those records, such as by requesting copies of:

- bank statements for the relevant period;
- images of cleared checks;
- supporting documents for other debits from the account;
- signature cards; and
- application or other forms prepared to open the account.

A vendor's internal records would normally be non-public and the vendor may be under no obligation to provide them to an investigator. However, a properly worded right to audit or access to records provision included in the contract between the organisation and the vendor may provide access to some of the most important records an investigator might need if fraud or corruption involving a vendor is suspected. A well-crafted access-to-records clause can enable an investigator to request and view a wide variety of records, including:

- supporting documentation for invoices sent to the organisation by the vendor;
- accounting and payroll records;
- time records supporting employees' work efforts; and
- communications relevant to the vendor's relationship with the organisation.

If a vendor is suspected of inflating their billings to the organisation in any manner, or there are indications of collusion between an organisation employee and a vendor, one of the first steps an investigator should perform is to carefully review the terms of the contract to assess the organisation's rights to access these records.

Review of supporting documents and records 22.9

Studying the processes and internal controls involved in the transaction cycle in the investigation and the results from data analytics and email review will result in a population of documents and electronic records that are relevant. For example, in a corruption investigation, several paper documents or records may need to be reviewed:

- budgets;
- agent, distributor, supplier and customer contracts;
- bidding documents;
- margin data;
- price lists;
- market data;
- vendor set-up documents;
- sales by region, agent, territory and product;
- background checks;
- purchase order or purchase request;
- bill of lading or other confirmation of delivery of goods;
- signed confirmation for services provided;
- invoice from a vendor or supplier;
- cheque or disbursement request form; and
- banking records.

These records might be reviewed for many different reasons. Among the most common:

- establishing a timeline of events;
- testing their clerical accuracy;
- reviewing for inconsistencies, anomalies and trends;
- reviewing for agreement with accounting records;
- reviewing for compliance with internal controls; and
- determining authenticity of the document, the vendor and the services rendered.

Testing for authenticity of the record itself or of individual signatures on documents normally involves a highly specialised skill, unless an anomaly is obvious. Accordingly, if an investigator suspects that a document on file is fraudulent or has been physically altered, or that a signature is not authentic, the document should be protected until someone with the specialised skills necessary to assess authenticity is called on. Examples of obvious deficiencies in documentation include:

- inconsistencies in addresses;
- lack of letterhead or other characteristics normally expected of a legitimate vendor;

- misspellings or other typographical errors;
- document at variance to vendor master file;
- inconsistencies in dates; and
- inconsistencies in vendor invoice numbers and sequencing.

In a corruption investigation, the authenticity or business purpose of an intermediary may be in question. The investigator should determine:

- the purpose of the intermediary;
- the principals behind the intermediary;
- the value, if any, of services rendered by the intermediary, to rule out use of the intermediary to create a slush fund or otherwise bribe a customer or influencer;
- life before or after the intermediary; and
- if the company documentation in connection with the intermediary is consistent with other intermediaries, policies and best practices.

22.10 Tracing assets and other methods of recovery

If the subject has misappropriated cash (via intercepting incoming funds intended for the organisation, stealing cash on hand, or fraudulently transferring funds from the organisation in connection with a disbursement fraud) one of the goals of most investigations is to secure the return of the funds. To do so, the investigation team must determine what the subject did with the money. Other sources of recovery may include culpable outside parties, including but not limited to collusive vendors, customers and agents. Coverage for employee dishonesty losses under insurance policies and fidelity bonds may also be possible.

If the subject misappropriates other assets, a similar question must be addressed – where are they? Often, when assets are stolen, the subject's goal is a conversion to cash by selling the stolen assets. In other cases, the stolen asset itself may be of use to the subject.

Depending on how assets were stolen, varying degrees of a trail might be left by the perpetrator, enabling the investigation team to forensically determine the flow of money after it has left the organisation. The trail may begin with the company's books and records. However, it is usually intentionally made opaque by fraudsters through money laundering techniques such as layering, transfers to shell companies, nominee shareholders and the use of clandestine communication techniques, cryptocurrencies, and tax havens where criminal law enforcement assistance may be less effective. Many of the records necessary to fully trace assets are non-public. But investigators are sometimes surprised to learn that a subject has left a public trail of valuable clues regarding the disposition or location of illegally obtained funds or assets that can be identified through indirect techniques, such as social media and internet due diligence, interviews of people in the know, establishing connections to the fraudster's other assets in more vulnerable venues and through multinational co-operation of law enforcement agencies.

Emerging issues 22.11

Increasingly, investigations cross borders. Additionally, the schemes are becoming more complex, often in response to improved internal controls that many organisations have implemented. These two trends are especially noticeable in many bribery investigations, where an organisation may be headquartered in one country, sell products to a customer in another, use a distributor in a third country, and engage the services of an agent in a fourth. The paths of payments made between these entities may go through additional countries.

The forensic accounting implications in these conditions are numerous and complex. Some of the most critical forensic accounting considerations include:

- understanding the laws governing cross-border data transfer;
- identifying which documents and records exist in each jurisdiction;
- determining what rights the investigator or organisation has to access documents and records in each jurisdiction;
- understanding the legal processes for requesting assistance from the courts in other jurisdictions;
- determining whether any special language skills will be necessary to read and interpret records obtained in other jurisdictions;
- understanding the legal issues associated with visiting and performing investigative procedures in other countries; and
- identifying whether relevant information is available from public sources in each country.

Navigating these issues is just one of many areas in which forensic accounting has changed in recent years.

Conclusion 22.12

The rapid conversion of accounting and other records from paper-based systems to electronic systems, coupled with the explosion in the quantity and types of electronic data, has resulted in many changes in the field of forensic accounting and the requirements for investigations. Expertise in the evaluation and handling of electronic evidence is just one way in which forensic accounting has evolved. Focused and efficient use of data analytics as well as the ability to mine a universe of publicly available yet critical information regarding subjects, companies and their relationships are two additional ways in which forensic accounting has matured. On the other hand, operating within a web of global data privacy and other complex regulatory constraints can complicate the job of the forensic accountant. All in all, today's forensic accountants are significantly more successful in identifying, investigating and mitigating fraud than their counterparts from the past.

23

Negotiating Global Settlements: The UK Perspective

Rod Fletcher and Nicholas Purnell QC[1]

23.1 Introduction

This chapter discusses the three main options that corporates typically consider when they are seeking to settle criminal and related proceedings in England and Wales – negotiated plea agreements, civil recovery orders (CROs) and, as of 24 February 2014, deferred prosecution agreements (DPAs).

Central to any consideration of criminal settlements in England and Wales is the identification principle under the common law, which defines the scope of corporate criminal liability. The principle states that the 'acts and state of mind' of only those who represent the 'directing mind and will' of the corporate will be imputed to it.[2] The application of this principle is generally restricted to the actions of the board of directors, the managing director and other senior officers carrying out managerial functions and acting and speaking as the corporate.[3] Historically, the identification principle has made it very difficult for authorities in the United Kingdom to convict corporates of any significant size. The English courts have, in certain situations, applied this rule of attribution to persons outside the board level, but this will depend on the construction of the particular offence in question.[4] This relatively narrow position should be contrasted with that in the United States, where corporates may be vicariously liable for the acts of their employees. This difference in the probability of a successful prosecution

1 Rod Fletcher is a partner at Herbert Smith Freehills LLP and Nicholas Purnell QC is head of Cloth Fair Chambers.

2 *Lennards Carrying Co and Asiatic Petroleum* [1915] AC 705*, Bolton Engineering Co v. Graham* [1957] 1 QB 159 (*per* Denning LJ) and *R v. Andrews Weatherfoil* [1972] 56 Cr App R 31 CA.

3 *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153.

4 *Meridian Global Funds Management Asia Ltd v. Securities Commission* [1995] 2 AC 500 PC.

explains, in part, why settlement agreements are far more prevalent in the United States than in the United Kingdom.

The statutory landscape in the United Kingdom is changing to make the prosecution of corporates easier for authorities. Section 7 of the Bribery Act 2010 created criminal liability for corporates who fail to prevent 'associated persons' (potentially including agents, subsidiaries, and other third parties as well as employees) from committing bribery. The UK legislature has recently passed the Criminal Finances Act 2017, which includes a similar offence of failure to prevent the facilitation of tax evasion; under this offence (which came into force on 30 September 2017) prosecutors will need to prove that tax evasion has occurred, that a person facilitated this evasion and that the facilitator was a person associated with the accused corporate. This type of offence of 'failure to prevent' may become increasingly common; the current Director of the SFO has called on a number of occasions for the failure to prevent offence to apply to all financial and economic crimes and in early 2017 the Ministry of Justice called for evidence in relation to the introduction of such an offence; at the time of writing it is considering the case for reform of the law on corporate liability for economic crime. The heightened threat of a successful prosecution may lead to an increase in the prevalence of settlements of criminal proceedings in England and Wales.

Each option for settlement available to a corporate has its own particular advantages and disadvantages, but a common feature is that they are all jurisdictionally limited in their effect to the United Kingdom. Where there are multiple investigating authorities, settlement negotiations in the United Kingdom will typically be approached as part of a larger, overarching strategy to settle current and prospective proceedings globally.

UK authorities are increasingly participating in global settlements, particularly with their US counterparts. It may yet be too early to identify any trends, although one distinct feature has emerged: the central role of the UK judiciary. The *Innospec* settlement was criticised by the senior judge who heard the case, Thomas LJ, for being presented as a 'done deal',[5] and the DPA model introduced in the United Kingdom departs significantly from its US counterpart by being conditional on substantial judicial review and approval.[6]

Until the recent cases of *SFO v. XYZ Limited* and *SFO v. Rolls-Royce PLC and Rolls-Royce Energy Systems Inc*[7] a further feature of settlements concluded by the UK authorities appeared to be that they were more likely to be successful if the criminal conduct had been contained to an isolated incident. For example, the Balfour Beatty plc settlement (which resulted in the first CRO against a corporate in the United Kingdom) related to one particular contract.[8] The first DPA in the United Kingdom, involving Standard Bank plc (now ICBC Standard Bank plc

5 *R v. Innospec Ltd*, Crown Court (Southwark), 26 March 2010, at paras. 26-29 (*Innospec*).

6 Section 45 and Paragraph 7, Schedule 17, Crime and Courts Act 2013 (UK).

7 *SFO v. XYZ Limited,* Crown Court (Southwark), 11 July 2016 (*XYZ Ltd)*; *SFO v. Rolls-Royce PLC and Rolls-Royce Energy Systems Inc*, Crown Court (Southwark), 17 January 2017 (Rolls-Royce).

8 'Balfour Beatty plc', press release dated 6 October 2008, SFO.

'Standard Bank'), concerned a particular debt transaction.[9] XYZ Ltd involved an SME that generated the majority of its revenue via sales to Asian markets, through the systematic offer and payment of bribes to secure contracts in a number of foreign jurisdictions over the course of roughly eight years.[10] This conduct could not be said to be contained, involving as it did at least 28 separate contracts, although the misconduct was alleged to have been carried out by a small number of employees. *Rolls-Royce* involved corruption across multiple business lines in seven jurisdictions over the course of 24 years with the involvement of senior management, described in the judgment as 'egregious criminality' involving 'truly vast corrupt payments'.[11] Whether *Rolls-Royce* is the high-watermark of criminality in corporate settlements remains to be seen, but the trend in these cases suggests that isolated or contained criminality may no longer be a prerequisite for securing a settlement with UK authorities.

Corporates facing proceedings in more than one jurisdiction could seek to settle each set of proceedings individually, but the idea behind a global settlement is to coordinate these negotiations. In theory, a global settlement should be a 'win-win' scenario for both the corporate and the investigating authorities. By acting in concert, the investigating authorities are able to exert more pressure on the corporate to settle than they each are likely to have been able to do in isolation. For the corporate, a global settlement is potentially a fairer outcome as the penalty will be assessed holistically. A global settlement also achieves more finality than a domestic prosecution, which confers only limited double jeopardy protection (in those jurisdictions where such protection is granted). As in *Standard Bank*, in *Rolls-Royce*, the corporate was required under the terms of the DPA to assist law enforcement agencies, regulators and multilateral development banks including those overseas at the reasonable request of the SFO. It was also recognised in the judgment that there remained a risk that Rolls-Royce would face liability in jurisdictions not covered by the global settlement involving the UK, the US and Brazil.[12]

In practice, global settlements can involve significant risks. As recently demonstrated by the pending Greek prosecution of former Johnson & Johnson employees, which includes the prosecution of one individual, Robert Dougall, notwithstanding his 2010 prosecution by the SFO and conviction and sentence,[13] no settlement can confer an absolute guarantee against further proceedings in any jurisdiction – particularly not in jurisdictions where there is no limitation period for criminal offences (as in the United Kingdom, other than for summary offences). Dougall's fate must be contrasted with the outcome of the SFO's investigation of Johnson & Johnson's UK subsidiary, DePuy International Limited

9 *SFO v. Standard Bank plc (now ICBC Standard Bank Plc),* Crown Court (Southwark), 30 November 2015 (*Standard Bank plc)*.

10 *SFO v. XYZ Limited*, Crown Court (Southwark), 8 July 2016, at paras. 6-7.

11 *Rolls-Royce*, Crown Court (Southwark), 17 January 2017 at para. 60.

12 Ibid. at para. 68.

13 *R v. Dougall* [2010] EWCA Crim 1048 (*Dougall*).

(DePuy), which was investigated by the SFO following a referral from the United States Department of Justice (DOJ); which, along with other domestic and foreign authorities, had been investigating Johnson & Johnson in relation to payments made by DePuy to intermediaries for the purpose of making corrupt payments to Greek medical professionals working in the Greek public health system.[14] The DOJ concluded a DPA with Johnson & Johnson in the United States as part of a global settlement over the unlawful conduct in Greece.

The SFO sought a CRO against DePuy rather than pursuing any criminal prosecution on the basis that such prosecution was prevented in the United Kingdom by the principle of double jeopardy. The Director of the SFO took the view that the underlying purpose of the rule against double jeopardy is to stop a defendant from being prosecuted twice for the same offence in different jurisdictions: Johnson & Johnson's DPA with the DOJ had the legal character of a formally concluded prosecution and punished the same conduct in Greece that had been investigated by the SFO. That double jeopardy will be a bar to prosecution where a defendant has been convicted or acquitted by a foreign court on the same facts is uncontroversial,[15] but whether the conclusion of a DPA in the United States is equivalent to a formally concluded prosecution has not been tested in the courts. The SFO gave no detailed argument as to why it concluded that DePuy's prosecution in the United Kingdom was barred, and the application of the principles of double jeopardy in global settlements remains unclear.[16] The SFO's reasoning in relation to DePuy will also be problematic where as part of a global settlement it is seeking to agree its own DPA in the United Kingdom following their introduction in 2014. If the SFO considers itself prevented by the rules of double jeopardy from pursuing criminal prosecution against a corporate that has agreed a DPA or other settlement with foreign authorities, then it may be prevented from agreeing a DPA under the statutory regime in the United Kingdom as prosecution may always follow a DPA if its terms are breached.[17]

Furthermore, no settlement can prevent private civil litigation, which could potentially be assisted or even encouraged by material generated in connection with the settled proceedings. However, settlement could make civil action less likely (or at least less likely to be successful), than were a contested criminal trial to take place, by reducing the volume of material entering into the public domain as compared to a full trial of the facts.

Whether a global settlement is worth pursuing is therefore likely to depend very much on the circumstances of each case. A key consideration will be the

14 'DePuy International Limited ordered to pay £4.829 million in Civil Recovery Order', press release dated 8 April 2011, SFO.

15 *Treacy v. DPP* [1971] AC 537 *per* Lord Diplock; see also the Decision of the Grand Chamber of the European Court of Justice in *Kossowski* (C-486/14, 29 June 2016), setting out the court's views on double jeopardy and its operation across EU Member States.

16 See the issue discussed in more detail in 'Deterring and Punishing Corporate Bribery: An evaluation of UK corporate plea agreements and civil recovery in overseas bribery cases', Transparency International UK policy paper published in May 2012, at paras. 353-361.

17 Paragraph 9, Schedule 17, Crime and Courts Act 2013 (UK).

jurisdictions and agencies involved, and the particular form or forms of settlement contemplated.

23.2 Initial considerations

This chapter assumes that the corporate has already decided that a settlement is desirable in principle. This is not a straightforward exercise and will involve many of the considerations discussed in the other chapters in this book. This is likely to include a comparison of the cost involved of agreeing a settlement (and any agreed financial penalty) as against the cost involved of defending criminal proceedings and the probability of a conviction (and any penalty imposed). It will also include the reputational damage that contested criminal proceedings may have on a corporate. Corporates should also consider that a criminal conviction for certain economic and financial crimes may exclude them from competing for certain public contracts.[18]

Of course a corporate may also successfully argue that the authority should not institute any proceedings against it: prosecutors must be satisfied of the evidential basis of the prosecution as well as the public interest in prosecuting.[19] Many investigations in the United Kingdom result in no further action being taken against the subject of the investigation.

The attractiveness of a settlement is likely to vary considerably depending on the conduct under investigation and the investigating authorities involved. It is also likely to depend on the form of settlement available – for example, the advantages to a corporate of agreeing to a DPA in the United Kingdom are likely to be very far removed from the advantages of agreeing to a DPA in the United States. In some circumstances a settlement in the United Kingdom might not be an attractive prospect when considered in isolation, but the ability to secure a linked settlement with investigating authorities in another jurisdiction could tip the balance in favour of seeking a UK settlement as part of a global resolution.

Given that a settlement may not always be an obvious choice, the reasons for seeking to settle and the reasons for choosing a particular form of settlement should be clear before negotiations commence. The initial assessment of the corporate's eligibility for the kind of settlement sought must be realistic, based on the best available information about the conduct and a thorough understanding of the attitude and approach adopted by the relevant authorities. The corporate will also need to be clear about the risks that settlement negotiations entail. In the event that the negotiations break down, the corporate might find itself in a worse position than it would have been in had it not entered into the negotiations in the first place. Finally, to demonstrate compliance with fiduciary obligations it will also be important to ensure that any decision-makers have no personal interest in the outcome of settlement negotiations, as they would have if they were exposed to individual liability in connection with the conduct under investigation. This may

18 Public Contracts Regulations 2015 (UK); Public Contracts Directive, 2014/24/EU.

19 Crown Prosecution Service Guidance on Corporate Prosecutions, http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/, accessed 6 July 2016.

be particularly complex in relation to small corporates where any decision-makers face individual liability for criminal conduct while simultaneously attracting liability to the corporate by acting as the directing mind and will.

Options for seeking a settlement 23.2.1

Civil recovery orders 23.2.1.1

A corporate could seek to persuade an investigating authority to dispose of an investigation by initiating civil recovery proceedings rather than a prosecution. This decision is not subject to judicial approval, as the decision on whether to prosecute rests solely with the prosecutor.

Civil recovery proceedings can be brought in the High Court by a number of UK enforcement agencies against property of a value in excess of £10,000 believed to have been obtained through unlawful conduct.[20] As a form of settling criminal proceedings a CRO has many features that could be helpful when a UK settlement is sought as one aspect of a global settlement. No prior UK conviction is required. The standard of proof is the civil one of the balance of probabilities. Judicial approval does not need to be sought before a claim can be brought, and the High Court's jurisdiction to make the order extends over assets located overseas; although it may in practice be tempered by the local law position on enforcement of non-conviction based orders.

A CRO was for many years regarded as the best possible settlement outcome for corporates facing potential criminal proceedings in the United Kingdom, and an outcome that could plausibly be expected in a corporate self-reporting case. Two developments have impacted on this view.

First, under its current policy, the SFO will be less ready than it historically has been to dispose of an investigation by way of a CRO.[21] In part, this is a response to the OECD's criticisms of the UK's lack of commitment to combating bribery of foreign public officials.[22] In the event that the SFO were to agree to a CRO, its terms will now be published in full, which removes some of the historically perceived benefit of this form of settlement.[23]

---

20 Part V, Proceeds of Crime Act 2002 (UK) (POCA). Section 316 of POCA defines 'enforcement authority' in England and Wales as the National Crime Agency, the Director of Public Prosecutions or the Director of the SFO. The financial threshold of £10,000 is set in section 287, POCA and the Proceeds of Crime Act 2002 (Financial Threshold for Civil Recovery) Order 2003 (UK).

21 Guidance on Corporate self-reporting, issued by the SFO, revised in October 2012. Note also the position in Scotland where the Crown Office and Procurator Fiscal Service issued guidance in June 2017 stating that prosecutors may consider civil settlement for corporates that self-report offences under the Bribery Act 2010.

22 'Report on the Application of the Convention on Combating of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions', approved and adopted by the OECD Working Group on Bribery in International Business Transactions on 16 October 2008.

23 Statement of David Green QC, Director of the SFO, 17 April 2013. See, e.g., 'Oxford Publishing Ltd to pay almost £1.9 million as settlement after admitting unlawful conduct in its East African

Secondly, the SFO has demonstrated that civil recovery proceedings and criminal proceedings are not necessarily mutually exclusive provided that the conduct can be divided. In conjunction with the conviction of Bruce Hall in 2012 and the making of a confiscation order and compensation order against him, the SFO brought civil recovery proceedings in respect of conduct falling outside the scope of the indictment because UK jurisdiction did not arise.[24] This has to be considered, however, against the background of the criticism by Thomas LJ in Innospec of the use of a CRO in addition to trial on indictment; Thomas LJ concluded that where the facts and public interest determined that a prosecution was appropriate, the use of the civil jurisdiction was consequently inappropriate. In particular, the judge deprecated the possibility of matters arising in the same case coming within the jurisdiction of two separate judges from two separate courts. In contrast, the use of a CRO for DePuy was less problematic as the corporate was not the subject of an indictment.

See Section 23.1

23.2.1.2 Deferred prosecution agreements

A DPA may be regarded as the half-way house between a negotiated plea agreement and a CRO. It remains to be seen whether it will be a popular form of settlement or whether it will be confined to isolated instances. First, a DPA is only available in limited circumstances. Secondly, the power to apply to the courts for a DPA rests solely with the prosecutor,[25] and the DPA provisions reserve to the prosecutor (currently only the SFO or the Crown Prosecution Service) the right to extend any invitation to enter into DPA negotiations. Thirdly, as has been identified by the Director of the SFO,[26] the high threshold for corporate criminal liability under English law reduces the incentive for corporates to enter into a DPA at all. To date, three of the four DPAs secured in the United Kingdom have not faced any difficult application of corporate criminal liability: *Standard Bank plc* related to the strict liability offence of failing to prevent bribery under section 7 of the Bribery Act 2010; *XYZ Ltd* applied to a small company in which the directing mind and will was easily identified; *Rolls-Royce* related to the strict liability offence of failing to prevent bribery as well as substantive offences of bribery and corruption involving, on the facts as admitted by Rolls-Royce for the purposes of the DPA, controlling minds of the company. As at the time of writing the details of the UK's fourth concluded DPA, agreed between the SFO and Tesco Stores Limited, remain unknown as the case is subject to reporting restrictions pending the prosecution of three former Tesco executives.[27] Experience will demonstrate

operations', press release dated 3 July 2012, SFO.

24 'Bruce Hall sentenced to 16 months in prison', press release dated 22 July 2014, SFO.

25 See Paragraph 8, Schedule 17, Crime and Courts Act 2013 (UK).

26 David Green QC, speech given at Pinsent Masons and Legal Week Regulatory Reform and Enforcement Conference, 24 October 2013.

27 'SFO agrees Deferred Prosecution Agreement with Tesco', press release dated 10 April 2017, SFO.

to what extent a corporate entity can introduce the possibility of a DPA into any discussions it may hold with the SFO.[28]

In theory, a DPA should be an attractive form of settlement as the corporate is never actually prosecuted, avoiding some of the stigma and adverse publicity necessarily associated with a criminal trial and a conviction. A corporate will have the opportunity to make representations on and to influence the terms of the settlement that is made public, and there will be no mandatory debarment from public contracts. Importantly, a DPA may be part of a global resolution that may be in the overall commercial interests of the corporate.

The corporate is nevertheless the subject of criminal proceedings that are suspended. The offences alleged to have been committed are particularised in an indictment, and further detailed in the statement of facts accompanying the DPA. The terms of the DPA will include not only a penalty intended to reflect the penalty that would have been imposed on a guilty plea but also disgorgement of profits and potentially compensation payments.

The terms of the DPA may require the corporate to disgorge the gross profit made as a result of the criminal conduct.[29] The DPA may also impose a financial penalty, [30] which must be broadly comparable to the fine that a court would have imposed on conviction and is accordingly assessed by reference to the relevant Sentencing Guideline for fraud, bribery and money laundering offences (Sentencing Guideline).[31] Where the corporate has limited means and ability to meet these financial obligations, the court may nevertheless approve a penalty that would render the corporate insolvent where it would be in the interests of justice to do so.[32] Among other things, the court will consider the impact of any financial penalty on the corporate's staff, service users, customers and the local economy. In *XYZ Ltd*, the corporate's parent agreed to provide financial support to XYZ Ltd by returning almost £2 million from dividends received for XYZ Ltd to pay towards disgorgement.[33] The court made clear that the innocent parent was under no contractual or legal obligation to contribute towards the financial penalty imposed on its subsidiary for the criminal conduct.[34] However, the court did point out that the parent had received £6 million in dividend payments since acquiring XYZ Ltd. Unlike a criminal sentence, a DPA may extend to requiring the corporate to submit to a compliance monitor for a specified period.[35]

In *Rolls-Royce*, the total financial orders (including those imposed in the USA and Brazil) amounted to over £650 million even after a 50 per cent reduction to

28 Deferred Prosecution Agreement Code of Practice, issued by the Director of Public Prosecutions and Director of the SFO (DPA Code of Practice), at para. 2.1.

29 Paragraph 5(3)(d), Schedule 17, Crime and Courts Act 2013 (UK).

30 Paragraph 5(3)(a), Schedule 17, Crime and Courts Act 2013 (UK).

31 Fraud, bribery and money laundering offences: Definitive guideline, issued by the Sentencing Council, in force from 1 October 2014.

32 *XYZ Ltd* Crown Court (Southwark), 11 July 2016 at paras. 23-24.

33 *XYZ Ltd* Crown Court (Southwark), 11 July 2016 at para. 22.

34 *XYZ Ltd* Crown Court (Southwark), 11 July 2016 at para. 21.

35 See Schedule 17, Crime and Courts Act 2013 (UK).

the UK element of the financial penalty in recognition of Rolls-Royce's extraordinary co-operation.[36] The Court was satisfied that this figure was sufficient to bring home to both management and shareholders the need to operate within the law without being so high as to put Rolls-Royce out of business, which would have been inappropriate in the circumstances.[37]

The process of negotiating a DPA could itself deter a corporate from seeking this sort of settlement. It is lengthy and uncertain, as any agreement reached with the relevant prosecuting authority is ultimately conditional on judicial approval. It is accompanied by potentially as great a degree of public scrutiny as may be attracted by contested criminal proceedings. The provision of false, misleading or incomplete information to the relevant prosecuting authority could amount to an offence,[38] and it can be extremely challenging for a corporate, and the relevant individual within the management structure, to certify that the material provided to the investigating agency is complete.

The DPA may become a more attractive option for corporates if there is more flexibility in the terms imposed; the Director of the SFO has recently noted that the US Department of Justice Pilot Program, under which a 50 per cent discount on penalty is available to corporates voluntarily self-disclosing FCPA violations, was of obvious interest to the SFO.[39] In the DPA reached with XYZ Ltd, the court stated that a discount of 50 per cent to the financial penalty that would have been imposed[40] could be appropriate given that the corporate had self-reported and admitted the criminal conduct far in advance of the earliest possible opportunity, that would have applied after a criminal charge.[41] This sizeable reduction was not based on an application of the Sentencing Guideline or the DPA statutory provisions themselves.

Even more surprising (at first glance) was the application of a 50 per cent discount to the financial penalty in *Rolls-Royce*, where the corporate did not make the initial self-report.[42] The initial report of suspicions of criminality in the corporate's civil business in Asia came from public internet postings and precipitated the SFO's investigation; however, this led to an immediate and extensive investigation by the corporate during which it made a number of voluntary reports to

36 *Rolls-Royce,* Crown Court (Southwark), 17 January 2017 at para. 128.

37 Ibid. at para. 127.

38 For example, for attempting to pervert the course of justice, contrary to the common law. Prosecution of the offence that is the subject of the DPA can also follow if the organisation provided information to the SFO that it knew or ought to have known was inaccurate, misleading or incomplete, see *XYZ Ltd* and Rolls-Royce.

39 David Green QC, speech given at Herbert Smith Freehills LLP's Corporate Crime and Investigations Conference, 22 June 2016.

40 In fact, as the judge made clear, the question of penalty was 'academic because, given the amount disgorged, whatever multiplier is chosen and however substantial the discounts, the result is a figure which XYZ simply cannot pay and which would result in its insolvency.' at para. 55.

41 *SFO v. XYZ Limited*, Crown Court (Southwark), 8 July 2016, at paras. 55-57.

42 *Rolls-Royce*, Crown Court (Southwark), 17 January 2017 at para. 123.

the SFO in respect of other business lines in multiple jurisdictions.[43] Rolls-Royce's co-operation with the SFO and other authorities was said to be 'extraordinary'.[44] Rolls-Royce took a number of steps in addition to the extensive investigation and voluntary reports to authorities: it reviewed relationships with intermediaries, agents, advisers and consultants; provided over 30 million documents in electronic and hard copy form (Rolls-Royce agreed to the use of digital methods to identify privilege issues in the material and the use of independent counsel in relation to the privilege review); allowed the SFO to interview witnesses first and waived privilege over its own internal interview memoranda; provided material to the SFO voluntarily (without need for recourse to compulsory powers); consulted with the SFO in respect of media coverage; provided all financial data sought by the SFO and co-operated with financial assessments undertaken; and sought the SFO's permission before winding up companies that may have been implicated in the SFO's investigation.

The SFO submitted that in the particular circumstances of the case, the Court should not distinguish between the corporate's assistance and that of those who have self-reported from the outset. This was accepted on the basis that what Rolls-Royce reported was far more extensive and of a different order than might have been exposed without its co-operation.[45] The Court was satisfied that, from the moment of the initial question from the SFO prompted by the public postings on the internet, Rolls-Royce could not have done more to expose its own misconduct. Self-reporting was said in the judgment to be a core purpose of DPAs, and the weight this attracts depends on the totality of the information provided; it seems that the measures that Rolls-Royce took to unearth and report the extent of the criminality made up for the absence of an initial self-report.[46]

There is a clear view among practitioners that the incentives to enter into a DPA, in particular the apparent maximum discount on penalty, embedded within the statutory scheme,[47] of one-third (the same as for an early guilty plea) is insufficient and fails to recognise the positive factors in the conduct of the corporate that will have led to the offer of a DPA in the first place. It may be that both the SFO and the judiciary have recognised this in the light of reference to a 50 per cent discount to the financial penalty that could have been imposed in *XYZ Ltd* and the reduction that was applied in *Rolls-Royce*.

Negotiated plea agreements 23.2.1.3

A plea agreement can be negotiated with the prosecutor at any stage after indictment, up to the conclusion of the trial. It may be preceded by advance representations on charge, which a prosecutor is under no obligation to consider but may do so at his or her discretion. Both advance representations and plea agreements

43 Ibid. at para. 17.

44 Ibid. at paras. 16-20 and 121.

45 Ibid. at para. 22.

46 Ibid. at para. 38.

47 Schedule 17 Paragraph 5(4), Crown and Courts Act 2013 (UK).

could potentially reduce the scope of the conduct charged, or even determine the nature of the offence charged; as seen in *BAE Systems*,[48] where the corporate had been investigated for overseas corruption but pleaded guilty to knowingly procuring the failure of its subsidiary, British Aerospace Defence Systems Ltd (BADS), to comply with the provisions of section 221 of the Companies Act 1985, and thereby aiding and abetting, counselling and procuring the commission of the offence contrary to section 225 of the Companies Act, by the officers of BADS.[49] In *BAE Systems*, Mr Justice Bean was critical of the restriction on the scope of the conduct in the settlement reached between the corporate and the SFO, and in light of these criticisms prosecuting authorities may in future be less willing to minimise the conduct in negotiated plea agreements.[50] Mr Justice Bean made clear that in cases involving negotiated plea agreements the judge will not be bound by the agreement between the prosecution and the defence, and the prosecution's view on the proposed basis of the plea is deemed to be conditional on the judge's acceptance of the basis of the plea.[51] The judge made clear that the involvement of the criminal courts precludes the passing of a sentence on an artificial basis. While Mr Justice Bean accepted the basis of the sentence in *BAE Systems*, this may not always be the case.[52]

The judge also expressed surprise that the SFO had committed to a blanket indemnity against investigations or prosecutions of any member of the BAE Systems group for past conduct whether disclosed or otherwise.[53]

However, even if the charges remain unchanged, a guilty plea at the earliest possible stage makes the corporate eligible for a reduction of up to one-third off the sentence that would otherwise have been imposed on conviction.[54]

UK prosecutors will always be open to negotiations on plea. The prosecution and the defence are in all cases required to resolve issues and agree evidence wherever possible prior to trial.[55] The prosecutor must however have regard to any applicable restraints on the exercise of discretion, including the Witness Charter and the Code of Practice for Victims of Crime.[56] In accordance with the Code for Crown Prosecutors, prosecutors will also need to ensure that the plea reflects

48 *R v. BAE Systems plc* [2010] EW Misc 16 (CC) (*BAE Systems*).

49 *Corruption and Misuse of Public Office* (2nd Ed.), Collin Nichols QC, Timothy Daniel, Alan Bacarese and John Hatchard, at p. 39.

50 *BAE Systems* at para. 13.

51 *R v. Underwood* [2004] EWCA Crim 2256; *BAE Systems* at para. 13.

52 The principles underlying this reasoning are also reflected in the statutory regime for DPAs, which must be approved by a judge as being in the interests of justice; see further Section 23.2.1.2.

53 *BAE Systems* at para. 5.

54 Reduction in Sentence for a Guilty Plea: Definitive guideline, Sentencing Council, 23 July 2007, at para. 4.2 (for cases where the first hearing was before 1 June 2017);Reduction in Sentence for a Guilty Plea: Definitive Guideline, Sentencing Council, 7 March 2017, para. D1 (for cases where the first hearing was after 1 June 2017).

55 Rule 3.3, Criminal Procedure Rules 2015 (UK).

56 The Witness Charter, issued by the Ministry of Justice, December 2013; Code of Practice for Victims of Crime, issued by the Ministry of Justice, October 2015.

the seriousness and extent of the offending.[57] The Attorney General's Guidelines to the legal profession state that prosecutors must not agree to a basis of plea that is misleading, untrue or illogical or insupportable.[58] Where a case involves multiple defendants, the bases of plea must be factually consistent. Trial judges may ultimately, of their own motion, disregard the agreement and direct a 'Newton' hearing to establish the relevant facts.[59]

Just as the decision on whether to accept a proposed basis of plea is ultimately one for the trial court, it is similarly for the sentencing court to impose the sentence on conviction. In cases of serious and complex fraud the Attorney General's Guidelines permit the prosecution and defence to present a joint written submission to the court on sentence but this is not binding on the court. In *Dougall,* the court declined to impose the SFO's suggested suspended sentence on an assisting offender, although the custodial sentence that the court did impose was overturned on appeal. The Court of Appeal criticised the SFO for adopting a role that was more akin to that of the defence. The courts in *BAE Systems* and in *Innospec* felt compelled to accept the suggested sentences because they formed part of a global settlement that the corporate entity had been invited to accept (and because of the corporate's limited financial resources in *Innospec*), but Thomas LJ in *Innospec* warned that this approach would not be repeated in the future.

The attractiveness of a plea agreement to a corporate will depend largely on the weight of the prosecution evidence, including the existence of any co-operating co-offenders under the 'offender assistance' provisions set out in sections 71-75 of the Serious Organised Crime and Police Act 2005. In particular, the corporate's willingness to plead is likely to reflect an assessment that the prosecutor would be able to establish corporate criminal liability. As mentioned in the introduction to this chapter, guilty pleas by corporates are more likely to be forthcoming for offences where the identification principle does not apply or liability is strict, or both, or where the corporate is small and lines of responsibility are clear; by contrast, the prosecution might in other cases struggle to identify culpable senior management.

The size of the likely penalty will also be a factor when the corporate is considering whether to plead. There is an established procedure in place by which a defendant in Crown Court proceedings can seek a binding indication from the trial judge of what sentence would be imposed on a guilty plea (*Goodyear* indication).[60] That new Guideline may have similarly increased the attractiveness of plea agreements for corporates, not only by making the likely sentence more predictable at an even earlier (pretrial) stage but also by increasing the risk of

57 The Code for Crown Prosecutors, January 2013, at para. 9.

58 See 'Plea discussions in cases of serious or complex fraud', 29 November 2012; and 'The acceptance of pleas and the prosecutor's role in the sentencing exercise', 30 November 2012, Attorney General's Office.

59 Consolidated Criminal Practice Direction, at para. IV.45.10.

60 In accordance with *R v. Goodyear* [2005] EWCA Crim 888 and by reference to the Sentencing Guideline.

higher penalties being imposed than has historically been the case and thereby incentivising an early, negotiated settlement.

The downsides of a plea agreement include the inability to contest the charges in a public forum, and loss of the opportunity of an acquittal. The advantages of a plea agreement also decline rapidly with time once a trial is under way.

There are also risks arising from plea negotiations. The Attorney General's Guidelines state that the prosecutor may not rely on the defendant's participation in plea negotiations or on any information disclosed during those negotiations as evidence against the defendant in the event that the negotiations fail but a signed plea agreement can be relied on as confession evidence against the defendant. A prosecutor would normally be free to rely on any evidence gathered as a result of enquiries made on the back of information disclosed in the course of the negotiations, and information provided by the defendant in connection with the negotiations could normally be relied on both in related prosecutions of other defendants and in a prosecution of the defendant for another offence. In addition, the prosecutor might be obliged to disclose material relevant to the negotiations to a co-defendant.

23.2.2 Strategic considerations when seeking a settlement in the United Kingdom

Once a corporate has decided in principle to seek to settle criminal proceedings in the United Kingdom, the objective will be to achieve the desired form of settlement as effectively as possible, avoiding or minimising, to the extent possible, adverse consequences. This section will discuss common strategic considerations that are likely to arise at the outset and during the early stages of settlement negotiations.

23.2.2.1 Timing of settlement

A preliminary strategic consideration will be the point at which to approach the relevant authority. On the one hand, a successful outcome is more likely the earlier an approach is made. The financial and reputational costs to a corporate of being a subject of a criminal investigation and prosecution will increase incrementally and early self-reporting is an important factor in determining whether a DPA will be offered. Clearly, however, the corporate needs to have sufficient knowledge about the conduct it proposes to report.

A corporate may self-report the conduct in question or otherwise bring it to the attention of relevant authorities, for example, pursuant to money laundering reporting obligations or, for listed corporations, obligations to disclose information to the market. The SFO's most recent guidance on self-reporting was published in 2012.[61]

In all other cases the determining factor is likely to be the type of settlement sought. Where the favoured outcome is a CRO, the driver will be to reach

61 Guidance on Corporate self-reporting, issued by the SFO, revised in October 2012. See also the Guidance on corporate prosecutions issued by the Director of Public Prosecutions, the Director of the SFO and the Director of the Revenue and Customs Prosecutions Office, issued in 2009/2010.

agreement on this form of alternative disposal before any steps are taken to initiate criminal proceedings. If the preferred form of settlement is a DPA, the timing of the settlement will be dictated by the DPA Code of Practice, but again will involve negotiations with the authority before the commencement of criminal proceedings. A settlement could be reached at any of the following points in time.

See Section 23.2.1.2

Before major production of documents

A corporate must balance the need to understand any potential criminal liability it faces with the benefit of making an early report to an authority. As stated above, corporates should establish sufficient knowledge of the circumstances before deciding to seek a settlement. Once that decision has been made, it is unlikely that an agency in the United Kingdom will be prepared to reach a settlement agreement without receiving all relevant documentation and undertaking some form of investigation. Once in the hands of the authorities, any material provided could be used against the corporate and individuals. In addition, such material can be provided to other domestic and international agencies and may ultimately be disclosed in any related civil proceedings. It has to be assumed that documents provided to investigating agencies may ultimately end up in the public domain.

Before witness testimony

To the extent that corporates record any interviews they conduct, UK authorities are likely to want access to these first accounts, which may raise issues of legal professional privilege (although two recent first instance decisions of the English High Court have increased the doubt as to whether records of such accounts are currently protected by privilege at all).[62] A corporate could choose to rely on documentary evidence to gain an understanding of any potential liability and so avoid the time, expense and privilege difficulties associated with conducting lengthy interviews. However, in many circumstances it may be necessary to conduct interviews in order to obtain an understanding of the facts. Ordinarily, in the United Kingdom the SFO will conduct interviews as part of its investigations following a self-report, including where there have already been interviews by the corporate.

See Chapter 35 on privilege

Before indictment

In most cases, corporates will be seeking to settle before indictment. As discussed above, settlement negotiations may provide an opportunity to influence the content and timing of the indictment.

Before trial

A settlement at the early stages of criminal proceedings may help to mitigate reputational damage by reducing the amount of material made available to the

62 *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch); *Director of the SFO v. ENRC* [2017] EWHC 1017 (QB).

authorities and, through them, potentially becoming available in the public domain or to other overseas agencies.

There may yet be benefits of settling after the commencement of trial. Although disclosure obligations will have been complied with and material may have been referred to in open court (thereby becoming accessible to the public), by avoiding witness testimony the corporate may minimise the risk of further reputational and other costs as a result of adverse prosecution testimony or unpredictable defence witnesses. Settling before conviction could potentially also serve a public relations objective in presenting the corporate publicly as being somewhat co-operative (despite initially contesting the proceedings).

23.2.2.2 Ability to secure a global settlement

An early settlement of UK criminal proceedings may also increase the prospects of concluding a global settlement. In the global settlement scenario, timing is likely to be primarily driven by the authority 'leading' the settlement negotiations. As press reports suggested in relation to the LIBOR investigation, there can be a 'race' among investigating authorities to charge defendants as a means of securing jurisdiction.[63]

Where a number of authorities may be investigating or have an interest in investigating the conduct, the potential for conflicts of jurisdiction to arise should be addressed by communications between prosecutors pursuant to multilateral and bilateral agreements such as the Eurojust guidelines for deciding which jurisdiction should prosecute and the Agreement for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States of America.[64] Prosecutors engaged in plea negotiations in serious and complex fraud cases are directed by the Attorney General's Guidelines to liaise with any counterparts known to have an interest in the defendant, in accordance with the Prosecutors' Convention and any other relevant agreement or guidance.[65] However, these arrangements would not be enforceable by corporates who find themselves adversely affected by any departures from their terms; in any event, such agreements do not tend to address settlements.

In practice, constructive global settlement discussions require a high level of communication between the investigating agencies involved and also between the lawyers acting for the corporate and those investigating agencies. By way of example, in *Standard Bank plc* there was clearly a high level of communication between the SFO and the US DOJ (as well as between the bank's lawyers and both the SFO and the DOJ), which ultimately resulted in the DOJ confirming in writing

63 See, e.g., 'US DoJ issues arrest warrant for Briton in Libor probe', Caroline Binham, 6 February 2015, Financial Times.

64 Annex A – Eurojust Guidelines – 'Which Jurisdiction Should Prosecute?', Annual Report 2003, issued by Eurojust (revised in 2016); Agreement for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States of America, January 2007.

65 Prosecutors' Convention 2009, agreed by a number of UK prosecuting authorities including, *inter alia*, the SFO, the FCA, the Crown Prosecution Service and the Attorney General's Office.

in advance of the UK settlement that in view of the terms of the proposed settlement it did not propose to continue its own investigation.

The SEC, on the other hand, decided to continue with its own investigation into the civil (as opposed to criminal) consequences of the alleged conduct, which resulted in a separate settlement with the bank. Although the SEC's investigation related to separate issues, the bank completed its settlement with the SEC very shortly before the final DPA hearing in the United Kingdom and the settlement was announced on the same day. Coordinating the timing of the settlement so that it was announced at the same time was clearly in the bank's interests, as it ensured that the UK and US investigations into the conduct were resolved simultaneously with the bank able then to draw a line under the events and focus on the future.

Similarly, in *Rolls-Royce* it was clear that substantial discussions had taken place between the SFO, the US DOJ and the Brazilian public prosecutor to ensure a coordinated global resolution of the relevant conduct; indeed, its DPA with the US DOJ was fully disclosed in the UK DPA proceedings,[66] and the DPA hearing in the UK was brought forward for reasons linked to the change in administration in the United States in January 2017.[67] Rolls-Royce announced settlements with those authorities in parallel with its DPA with the SFO. The corporate was apparently able to coordinate between prosecuting authorities such that it was prosecuted for different conduct in different jurisdictions;[68] it was also given US$25 million credit by the DOJ for fines paid in Brazil in relation to conduct that was overlapping between its DPA in the US and its leniency agreement in Brazil.[69]

It is important to keep in mind when negotiating simultaneous settlements with multiple authorities and regulators (both at home and abroad) that the subject ensures that the published findings in each investigation concluded by a negotiated settlement are consistent, as authorities may have an incomplete understanding, or different interpretation, of the facts.

Written submissions to UK prosecuting authorities 23.2.3

One important risk that settlement negotiations pose for corporates is that the material generated will be relied on in the event that the negotiations break down; whether by the recipient authority or by third parties. Even if settlement negotiations will attract confidentiality to varying degrees, there will always be a number of avenues through which material provided to the authorities may be made available to other authorities and to third parties.

The extent to which settlement negotiations will generate material, and the extent to which such material may be protected from onwards disclosure, will

66 *Rolls-Royce*, Crown Court (Southwark), 17 January 2017 at para. 5.

67 Ibid. at paras. 10 and 12.

68 Ibid. 17 January 2017 at para. 5.

69 'Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case', press release dated 17 January 2017, United States Department of Justice.

depend on the form of settlement in question. Written submissions made to a prosecutor in the course of negotiating a plea agreement are confidential and will only be made available to third parties where it can be shown that the prosecutor's obligation to preserve confidentiality is outweighed by a countervailing interest.[70] In DPA negotiations, both the form and content of documents are governed by statute and are not negotiable. These documents will include the draft statement of facts and the terms of the proposed DPA, as well as the preliminary application to the court.[71] The prosecutor will require these documents to be agreed before the application to the court can proceed. They will also include any submissions contained in related correspondence with the prosecutor, as well as minutes of any meetings between the corporate and the prosecuting authority.

23.2.4 Oral presentations to UK prosecuting authorities

Presenting information orally, as an alternative to written submissions, could in theory reduce the risk that settlement negotiations pose for corporates by limiting the amount of incriminating documentary material generated in the course of settlement negotiations or otherwise provided to the authorities. As a strategy it is obviously conditional on securing the agreement of the prosecuting authority, and is not as frequently encountered in the United Kingdom as in the United States; but the SFO is known to have acceded to requests of this nature on occasion. Notably, this approach was employed in relation to both the first and second DPAs entered into in the United Kingdom. However, it is not clear to what extent oral presentations will ultimately put the corporate in a better position than it otherwise would have been in had it made written submissions instead. Oral summaries of privileged information and material could still be considered by the prosecuting authority as a limited (or indeed full) waiver of privilege, as there is no settled case law in the United Kingdom on this point, which could create a risk of collateral waiver of privilege in other jurisdictions or over other material. If the underlying interviews were not privileged, a prosecutor's notes from the presentation could potentially be disclosed to third parties, without the corporate having an opportunity to confirm whether the impressions recorded are correct.

See Section 23.2.2.1

An indication of the possible approach of courts in the United Kingdom can be gleaned from a ruling in proceedings against Dennis Kerrison and Miltiades Papachristos (employees of Innospec) (13 May 2013 unreported) in which His Honour Judge Goymer considered whether a PowerPoint presentation to the SFO/DOJ that referred to the notes of interviews conducted by the corporate with a prosecution witness amounted to a waiver of legal professional privilege in those interviews. The judge decided that there was not sufficient deployment of the interview notes in the PowerPoint presentation such as would amount to a collateral waiver of legal professional privilege in respect of those notes. It was

70 Guidance to accompany the Attorney General's Guidelines on Plea Discussions in cases of Serious or Complex Fraud, issued by the Director of Public Prosecutions, the Director of the SFO and the Director of the Revenue and Customs Prosecutions Office, 24 May 2012.

71 Paragraph 5, Schedule 17, Crime and Courts Act 2013 (UK).

conceded in argument that the PowerPoint presentation was subject to privilege, and as such there was no detailed discussion of the application of the principles of litigation privilege in this case. This is not always so in the investigations context, following *Three Rivers District Council and Others v. The Governor and Company of the Bank of England* [2003] EWCA Civ 474 (*Three Rivers No. 5*). The Court of Appeal has considered more recently the ambit of litigation privilege in one of the many cases relating to the SFO's investigation into the Tchenguiz brothers, stressing the importance of the 'dominant purpose' test.[72]

The recent first-instance decisions of the English High Court of *The RBS Rights Issue Litigation*[73] and the *Director of the SFO v. ENRC* (*ENRC*)[74] cast doubt on whether notes of witness interviews prepared by a corporate's external lawyers will be subject to privilege at all. The decision on litigation privilege in ENRC is particularly relevant for corporates investigating possible wrongdoing to determine whether to self-report or otherwise engage with authorities in settlement negotiations. That case concerned documents created during the course of an investigation conducted by ENRC's lawyers that was initially prompted by a whistleblower report. In rejecting ENRC's claim of privilege, the judge held that litigation was not in reasonable contemplation, although the documents were created in the context of an anticipated criminal investigation by the SFO. The judge found that for the purpose of a claim to litigation privilege where criminal proceedings are said to have been contemplated, the party claiming privilege must have uncovered evidence of wrongdoing (so as to reasonably contemplate prosecution, rather than an investigation) before proceedings could be said to be in reasonable contemplation. This decision is the subject of an appeal, but until it is resolved it places corporates in a difficult position in relation to privilege, and might support a more aggressive approach to privilege claims by the SFO.

See Chapter 35 on privilege, Section 35.4.2

See Chapter 35 on privilege

Legal considerations 23.3

Settlement negotiations should only be undertaken with a thorough understanding of the legal framework that governs the particular form of settlement pursued, and any relevant policies that govern the approach adopted by the relevant prosecuting authority. A number of relevant legal principles will also need to be borne in mind as crucial background context, regardless of the form of settlement pursued.

Legal professional privilege (LPP) 23.3.1

Prosecuting authorities are increasingly requesting or encouraging corporates to waive privilege as a sign of their co-operation, or even as a precondition to concluding a settlement. The extent to which the prosecuting authority and a corporate may diverge in their interpretations or application of LPP is dealt with in

72 *Tchenguiz v. Director of the Serious Fraud Office (Non-Party Disclosure)*, also known as *Rawlinson and Hunter Trustees SA v. Akers* [2014] EWCA Civ 136 at para. 15.

73 [2016] EWHC 3161 (Ch).

74 [2017] EWHC 1017 (QB).

Chapter 35 but the appropriateness of putting pressure on a corporate to waive LPP is far from clear; particularly in the context of a multi-jurisdictional investigation where a number of different legal systems may be in play, all with varying degrees of protection for lawyer–client communications. The collateral damage to the corporate's interests in other jurisdictions if LPP were to be waived could potentially be substantial, and would need to be carefully considered before the corporate agreed to a global settlement involving a waiver on this basis. Attempts to resolve these difficulties by offering limited waiver may work but in practice are certainly not without risk (including, in particular, in relation to collateral waiver risks in jurisdictions that do not recognise limited waiver).

23.3.2 Admissions

Unlike a plea agreement, the settlement of criminal proceedings by way of a CRO or DPA does not require the corporate to make formal admissions of guilt. However, the effect in practice of agreeing to a CRO or a DPA may be equivalent to an admission. An application for a CRO will be accompanied by a detailed statement of claim,[75] and by agreeing to the CRO the defendant may be taken as confirming its agreement to the contents. Similarly, whereas an admission is not a prerequisite for a DPA, once the DPA is approved the statement of facts on which it is based becomes admissible in subsequent proceedings in England and Wales (not limited to related criminal proceedings) as if it were the corporate's admission of its contents.

Indirect admissions of this kind entail risk for both the corporate and any other persons concerned in the conduct. They could potentially be relied on by third parties in support of civil or criminal proceedings brought against the corporate, both in the United Kingdom and overseas. They are also likely to prejudice the position of any other persons concerned in the conduct, not limited to the corporate's officers. This exposure increases the more extensive the indirect admissions are. In negotiating the first UK DPA the SFO considered it necessary for the statement of facts to be lengthy (in this instance, 55 pages) to put the judge in a position to approve the agreement on the most complete basis available. The approved statement of facts in *Rolls-Royce* was similarly long and detailed.

A corporate could seek to avoid or at least mitigate some of these adverse consequences by concluding a settlement under which a subsidiary accepts liability and makes any necessary admissions, as in the MW Kellogg Limited CRO in 2011.[76] Note, however, that a corporate will not be able to hide behind a subsidiary that has been set up as a vehicle through which a corrupt payment may be made so that the subsidiary can be abandoned if the corrupt payment comes to light.[77] Alternatively, a corporate could seek to negotiate a settlement under which an individual officer accepts liability instead of the corporate. However, if there is

75 Practice Direction – Civil Recovery Orders, at paras. 4.1-4.5.

76 'MW Kellogg Limited to pay £7 million in SFO High Court action', press release dated 16 February 2011, SFO.

77 *XYZ Ltd* Crown Court (Southwark), 11 July 2016 at para. 28.

a prospect of a successful prosecution of the corporate entity, this may be unlikely to succeed. As a general matter, risk mitigation strategies of this kind are likely to be highly context-specific, and subject to the willingness of the relevant prosecuting authorities to recognise the interests at stake.

Practical issues arising from the negotiation of the first UK DPA 23.4

DPAs have to date been made available only for a limited range of corporate economic offences prosecuted by either the CPS or the SFO. Statute governs eligibility for a DPA, its contents and the manner in which it is to be negotiated and approved, with limited discretion left to either the corporate or the prosecuting authority. This departure from the much more flexible US model complicates any predictions as to how frequently DPAs will be relied on in practice in the United Kingdom, but this section will consider practical issues arising from the negotiation of the first UK DPA as part of a global settlement.

The legislation requires the judge hearing the application to be satisfied that a DPA is in the interests of justice (as opposed to prosecution of the corporate). The four DPAs agreed as at the time of writing, *Standard Bank plc, XYZ Ltd, Rolls-Royce* and *Tesco Stores Limited* were all heard by Sir Brian Leveson, President of the Queen's Bench Division, who (as is clear from the judgments in relation to the first three DPAs) went to considerable lengths to satisfy himself that the proposed DPAs were in the interests of justice and that the terms were fair, reasonable and proportionate. Notably in *Rolls-Royce* he said that the involvement of prosecutors in different countries (in this case, the US and Brazil) should not preclude a DPA in the UK, but the extension of criminality to these countries is relevant to the balancing exercise of whether the DPA is in the interests of justice.[78]

In the *Standard Bank* decision, Leveson P noted that the first consideration must be the seriousness of the conduct and in this regard emphasised that the potential criminality faced by the bank was the failure to prevent intended bribery committed by senior officers of a sister company. He also noted the SFO's conclusion that there was insufficient evidence to suggest that any of Standard Bank's employees had committed an offence.

Leveson P also attached considerable weight to the early report made by Standard Bank to the authorities, noted that the bank had made significant enhancements to its compliance policies and procedures since 2011 and that the bank in its form as at November 2015 was effectively a different entity from that which had been involved in the events the subject of the DPA. Notably, these two factors were also determinative in the DPAs agreed between the SFO and XYZ Ltd and the SFO and Rolls-Royce.[79]

DPA negotiations are held under strict confidentiality restrictions imposed by the SFO pursuant to the DPA Code of Practice. The Code of Practice requires the

78 *Rolls-Royce*, Crown Court (Southwark), 17 January 2017 at para. 42.

79 *XYZ Ltd* Crown Court (Southwark), 11 July 2016 at paras. 15-18; *Rolls-Royce*, Crown Court (Southwark), 17 January 2017 at paras. 48-51, 60 and 63.

corporate entering into DPA negotiations to provide an undertaking in respect of the confidentiality of the fact the DPA negotiations are taking place.

What this means in practice is that third parties with whom the corporate needs to share the fact of the negotiations or any information relating to the DPA negotiations must sign a confidentiality undertaking. Any potential disclosure to the market has to be carefully considered and discussed with the SFO at an early stage (i.e., prior to the relevant obligation arising), and with the judge once an application to the court has been made.[80] Rule 5.8 Criminal Procedure Rules 2015 stipulates that details of a court hearing must appear on the court list at most 48 hours before the court hearing, and the listing must include the names of the parties. This in itself may give rise to press and market speculation on the subject matter of the DPA and the size of the financial penalty. If an announcement is required, an application should be made to the nominated judge.

The legislation does not address anonymity of individuals in the statement of facts. There are protections afforded in US DPAs and in the course of FCA investigations by the third-party rights provisions, and by the 'Maxwellisation' process in public inquiries. In *Standard Bank plc*, the conclusion reached was that those named on the draft indictment would be named, as would be the bank's senior deal team member, but that the remaining individuals whose conduct was relevant to the factual narrative would remain anonymous. The potential consequences of the naming of individuals following the DPA's publication can be seen in the fact that Ms Shose Sinare, one of the Tanzanian individuals allegedly responsible for the underlying offence in *Standard Bank plc*, has brought a civil claim against Standard Bank in the Tanzanian courts alleging, among other things, that she had a right to see and respond to the allegations in the statement of facts.

XYZ Ltd was anonymised on the basis that there were ongoing criminal proceedings arising out of the same facts; to avoid the risk of prejudice in those proceedings, the court ordered that the judgment providing full details of the parties involved only be made public following the conclusion of those proceedings.[81] The statement of facts has not yet been published in this case for the same reason. XYZ Ltd was a small company and was charged with both substantive offences, requiring the application of the identification principle through the involvement of very senior former employees, and for the offence of failing to prevent bribery under the Bribery Act, which may have related to both agents and employees. The *XYZ Ltd* case, once published in full, may shed further light on how individuals will be treated when a global settlement with a corporate is being negotiated.

See Section 23.1

Rolls-Royce did not include the identities of the individuals involved in the criminal conduct for the same reason of avoiding prejudice to potential criminal proceedings.[82] In addition to this, the Court did not name the recipients of corrupt payments or bribes in certain countries on the basis that that this could lead to action or the imposition of penalties which would be regarded in the

80 *Rolls-Royce*, Crown Court (Southwark), 17 January 2017 at para. 14.

81 *XYZ Ltd* Crown Court (Southwark), 11 July 2016 at para. 3.

82 *Rolls-Royce* Crown Court (Southwark), 17 January 2017 at para. 32.

UK as contravening Article 3 of the European Convention on Human Rights.[83] The Rolls-Royce DPA itself says in terms that it does not provide any protection against prosecution of any present or former officer, director, employee or agent of Rolls-Royce, and further, Rolls-Royce is required to co-operate with the investigation and prosecution of the individuals involved in the relevant conduct.[84]

The DPA agreed between Tesco Stores Limited and the SFO, when published following the criminal trial of the three former Tesco executives, may identify or clarify the problems that are in inherent in the process for individuals who are prosecuted in relation to conduct which is also the subject of a DPA.

The negotiation process in *Standard Bank plc* did not move as quickly as originally anticipated. It became apparent that an adversarial stance would not be appropriate in seeking to negotiate an agreement, and over time communications became more focused and more effective. It is also clear from the facts available that *XYZ Ltd* and *Rolls-Royce* took considerable periods to resolve; so, while the process towards a DPA is likely to be shorter than a contested trial, it will probably still take a considerable period to agree and be approved.

Before the preliminary application is filed at court by the SFO, the corporate is required to provide a declaration regarding the information supplied to the SFO, as well as the declaration of the individual through whom the corporate made its declaration. The declarations are required to be made pursuant to the Criminal Procedure Rules 2015.[85]

To provide comfort to the corporate and the individual it may be necessary to follow a similar process to that used when individuals sign regulatory attestations – including understanding the documentation provided and questioning those involved in the data collection process. This is something to consider as early as possible in the DPA negotiations.

It is also clearly important to seek to ensure that the scope of any compliance review or monitorship is limited to the matters that are relevant to the circumstances of the case, as these can be intrusive, lengthy and costly exercises.

In global investigations and settlement discussions it is essential to keep in close contact with other investigating agencies, where necessary providing detailed explanations of the DPA process and the basis on which the statement of facts and DPA terms have been agreed.

Resolving parallel investigations 23.5

In the UK, historically civil proceedings were generally stayed pending the outcome of any parallel criminal proceedings. However courts consider this approach case by case and the emphasis has increasingly moved away from the presumption of a stay. Specifically in the context of contemplated CROs, the current policy

83 Ibid. at para. 32,

84 Ibid. at paras. 71-72.

85 Rule 11.2(3)(c) Criminal Procedure Rules 2015 No.1490(L.18).

(set out in the Attorney General's Guidelines on asset recovery)[86] should prevent civil recovery proceedings from being pursued in parallel with criminal proceedings; although the Bruce Hall example discussed above demonstrates there is no bar against such proceedings being pursued in tandem with criminal proceedings provided the conduct that is the subject of the respective proceedings can be appropriately distinguished.[87]

23.5.1 Other domestic authorities

We have already identified some of the difficulties of negotiating a truly 'global' settlement and their inherent limitations; many of which are equally relevant where there are multiple domestic authorities investigating the same conduct and both civil and criminal proceedings are in contemplation. Corporates seeking to reach a settlement with other domestic authorities are likely to be assisted by agreements and MOUs already in place between the main authorities, including, for example, the memorandum of understanding between the Competition and Markets Authority and the SFO,[88] and the FCA's Enforcement Guide.[89] The DPA agreed between the SFO and Tesco Stores Limited was coordinated with an agreement with the FCA that Tesco Stores Limited and its parent company, Tesco plc, had committed market abuse.[90] At the time of writing, the DPA remains subject to a reporting restriction, and as such the details of the relationship between the commission of market abuse and the criminal conduct which was the subject of the DPA remain unclear, but it appears that this case will provide some insight into the approach taken by the SFO and FCA in engaging in settlements relating to corporates' criminal and regulatory liability.

23.5.2 Foreign authorities

The interplay of agencies becomes even more complex where foreign agencies are involved. The participation of UK authorities in global settlements has to date typically been driven by the US authorities, reflecting the relative ease with which US prosecutors can establish corporate criminal liability. One potential issue arises from divergent and sometimes conflicting requests from authorities, typically in connection with communications, disclosure of materials and confidentiality. The aim of any settlement negotiations should be to encourage one authority to take the lead, in accordance with any applicable guidelines or agreements concluded by the relevant authorities for this purpose.

86 Guidance for prosecutors and investigators on their asset recovery powers under Section 2A of the Proceeds of Crime Act 2002, 29 November 2012, Attorney General's Office.

87 cf. Thomas LJ in *Innospec.*

88 Memorandum of understanding between the Competition and Markets Authority and the Serious Fraud Office, 29 April 2014.

89 FCA Handbook, Enforcement Guide, E.G. 12 and E.G. Appendices 2 and 3.

90 'Tesco to pay redress for market abuse', press release, 28 March 2017, FCA.

24

Negotiating Global Settlements: The US Perspective

Nicolas Bourtin, Stephanie Heglund and Ryan Galisewski[1]

Introduction 24.1

Strong incentives exist for corporations – particularly those in highly regulated industries that are vulnerable to potentially debilitating collateral consequences – to avoid litigating a case brought by the government. Among other considerations, protracted and unpredictable litigation can create risks of (1) financial and reputational harm to the company, (2) weakening relationships with regulators, (3) significant legal expense, and (4) severe legal and regulatory consequences associated with an unfavourable litigation outcome. As a result, when threatened with enforcement action, corporations often seek to enter into settlement negotiations with investigating authorities. Nevertheless, a corporation entering into such negotiations must carefully weigh the various attendant burdens and collateral consequences of such agreements.

Strategic considerations 24.2

As a preliminary matter, it is important to consider the impact of all interactions with US authorities on the company's ability to reach a settlement on favourable terms. Even early in an investigation, a corporation can develop a co-operative working relationship with an enforcement agency through prompt and complete disclosure and assistance with requests and inquiries. While co-operation is not the right strategic approach in all cases – companies may choose to take a more adversarial approach, even early in an investigation – establishing a record of proactive and complete co-operation can have a substantial effect on the final terms of any resolution, as US government authorities typically consider the nature and

1 Nicolas Bourtin is a partner, and Stephanie Heglund and Ryan Galisewski are associates, at Sullivan & Cromwell LLP.

extent of a corporation's co-operation with the investigation in contemplating whether to settle a matter and on what terms. Indeed, both the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC, or the Commission) have explicitly included voluntary disclosure and co-operation in their enforcement policies. As outlined in the United States Attorneys' Manual, in determining whether and to what extent to award a company co-operation credit, the DOJ considers, among other things, 'the timeliness of the co-operation, the diligence, thoroughness and speed of the internal investigation, and the proactive nature of the co-operation.'[2] Similarly, the SEC Enforcement Manual provides that a company's co-operation is evaluated by considering self-policing, self-reporting of misconduct, remediation and co-operation with the investigation.[3] As a result, by conducting an internal investigation and self-reporting potential misconduct to the authorities, a corporation may increase its chances of receiving co-operation credit and, in turn, more favourable settlement terms.[4]

At the close of the government's investigation, when beginning to negotiate the terms of a potential settlement agreement, a corporation must be particularly attuned to both the timing and the breadth of such an agreement. Regarding timing, certain stages of litigation can be particularly costly for a corporation; securing settlements early may be advantageous for a corporation. For example, in some cases – particularly where the key facts are known early and there is public pressure on the government to act quickly – a speedy settlement may be struck before a lengthy and expensive investigation is conducted. Such circumstances are rare, however, and the government will normally be reluctant to reach a settlement before a full investigation has been completed.

Another pivotal point to consider is whether settlement can be achieved before indictment or the filing of a complaint, as such public actions carry the risk of significant legal, financial and reputational consequences. And in fact most negotiated corporate resolutions are reached before charges are filed, as companies are eager to avoid the uncertain public and shareholder reaction to a contested litigation. A recent economic study showed that a company's share price generally decreases more dramatically as a result of the announcement of a government investigation

2 U.S. Attorneys' Manual § 9-28.700, Principles of Federal Prosecution of Business Organizations, The Value of Cooperation (rev. November 2015); see also DOJ, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (5 April 2016), at pp. 4-7.

3 SEC, Office of Chief Counsel, Enforcement Manual, Framework for Evaluating Cooperation by Companies § 6.1.2 (4 July 2015); see also SEC Release No. 44969, Report of Investigation Pursuant to Section 21(a), Exchange Act Release No. 44,969, 76 SEC Docket 220 of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (23 October 2001); SEC Release No. 34-61340, Policy Statement Concerning Cooperation by Individuals, in its Investigations and Related Enforcement Actions Exchange Act Release No. 34-61340, 75 Fed. Reg. 3122-02 (13 January 2010), www.sec.gov/rules/policy/2010/34-61340.pdf (last accessed 22 May 2016).

4 See, e.g., Report of Investigation Pursuant to Section 21(a), Exchange Act Release No. 44,969, 76 SEC Docket 220 (23 October 2001) (declining to take action against the parent company given the company's response to the apparent misconduct and setting forth criteria the SEC considers in determining whether, and how much, to credit self-reporting).

if there is no concurrent resolution.[5] The extent of share price declines can, among other effects, have great significance in follow-on civil litigation.

In terms of the breadth of a potential settlement agreement, a corporation must consider the scope of the conduct being investigated and the scope of the potential release from liability. At the conclusion of the government's investigation, to the extent that it opts to pursue charges related to certain alleged misconduct, it can be advantageous for those charges to be reflected in a single settlement agreement or in distinct agreements announced simultaneously, so as to mitigate the risk of legal, financial and reputational harm associated with multiple days of negative press, carry-over investigations and future litigation. In the event that the government determines not to pursue charges against the company or its employees,[6] it can be advantageous to diplomatically encourage a declination – a formal notice that the government has declined to pursue the case further,[7] to provide the company valuable closure.

Owing to the government's increased focus on the prosecution of individuals, however, it is increasingly unlikely that the government will release from liability company employees who engaged in potential wrongdoing as part of

5 See Declaration of Stephen Choi, Ph.D., *In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 1:10-cv-03461-PAC, 2015 WL 5613150 (S.D.N.Y. 6 April 2015), ECF No. 145 (finding that the average impact of an investigation announcement was -3.8 per cent when there was no concurrent resolution, compared to 0.22 per cent when there was a concurrent resolution). In one particularly striking example, Goldman Sachs settled a case for US$550 million in 2010 to avoid the difficulty and notoriety of litigation; after news of the settlement hit the market, Goldman's shares increased 5 per cent, resulting in a market value increase greater than the cost of the settlement. Sewell Chan & Louise Story, Goldman Pays $550 Million to Settle Fraud Case, N.Y. Times (15 July 2010), www.nytimes.com/2010/07/16/business/16goldman.html.

6 The United States Attorneys' Manual lists ten factors that prosecutors should weigh in determining whether to charge a corporation, including (1) the nature and seriousness of the offence; (2) the pervasiveness of wrongdoing within the corporation; (3) the corporation's history of similar misconduct; (4) the corporation's willingness to co-operate in the investigation; (5) the existence and effectiveness of the corporation's pre-existing compliance programme; (6) the corporation's timely and voluntary disclosure of wrongdoing; (7) the corporation's remedial actions; (8) collateral consequences; (9) the adequacy of other remedies; and (10) the adequacy of the prosecution of individuals responsible for the corporation's malfeasance. U.S. Attorneys' Manual § 9-28.700, Principles of Federal Prosecution of Business Organizations, Factors to Be Considered (rev. November 2015). The SEC considers its own factors in determining whether to close an investigation, including (1) the seriousness of the conduct and potential violations; (2) the staff resources available to pursue the investigation; (3) the sufficiency and strength of the evidence; (4) the extent of potential investor harm if an action is not commenced; and (5) the age of the conduct underlying the potential violations. SEC, Office of Chief Counsel, Enforcement Manual § 2.6.1, Policies and Procedures.

7 Precise practices may differ. The policy of the SEC, for example, is to send 'termination letters' to 'notify individuals and entities at the earliest opportunity when the staff has determined not to recommend an enforcement action against them to the Commission.' SEC, Office of Chief Counsel, Enforcement Manual § 2.6.2, Termination Notices. These SEC termination letters provide somewhat less assurance than a formal declination, because '[a]ll that such a communication means is that the staff has completed its investigation and that at that time no enforcement action has been recommended.' Id.

a settlement with a company.[8] The DOJ formalised its increased focus on the prosecution of individuals with the publication of the 'Yates Memorandum.' On 9 September 2015, the DOJ issued this new policy memorandum, signed by then Deputy Attorney General Sally Quillian Yates, regarding individual accountability for corporate wrongdoing.[9] The Yates Memorandum memorialised certain government sentiments demonstrating an inclination toward the prosecution of individuals in corporate fraud cases.[10] The Yates Memorandum outlined that individual accountability is important for several reasons, including (1) deterring future illegal activity; (2) incentivising changes in corporate behaviour; (3) ensuring the proper parties are held accountable for their actions; and (4) promoting the public's confidence in the justice system.[11] The Yates Memorandum provided six 'key steps' to strengthen the government's pursuit of individual wrongdoing, including, among others, by specifying that 'absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation.'[12] Even after the change in administration in 2017, it appears that the DOJ's focus on individual accountability will continue.[13]

---

8 One exception is found in settlements with the DOJ's Antitrust Division. Historically, antitrust settlements regularly contained non-prosecution provisions that protected a company's employees from criminal liability related to the antitrust activity at issue. Antitrust settlements may 'carve out' certain individuals from this protection based on their level of culpability. See Sally Quillian Yates, Memorandum from the U.S. Dep't of Justice on Individual Accountability for Corporate Wrongdoing (9 September 2015), https://www.justice.gov/dag/file/769036/download.

9 Id.

10 See, e.g., Marshall Miller, Principal Deputy Assistant Attorney General for the Criminal Division, Remarks at the Global Investigations Review conference (17 September 2014), https://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller (explaining that 'when [corporations] come in to discuss the results of an internal investigation to the Criminal Division . . . expect that a primary focus will be on what evidence you uncovered as to culpable individuals, what steps you took to see if individual culpability crept up the corporate ladder, how tireless your efforts were to find the people responsible'); Sung-Hee Suh, Deputy Assistant Attorney General, Remarks at the PLI's 14th Annual Institute on Securities Regulation in Europe: Implications for U.S. Law on EU Practice (20 January 2015), https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-sung-hee-suh-speaks-pli-s-14th-annual-institute-securities (explaining that 'corporations do not act criminally, but for the actions of individuals . . . the Criminal Division intends to prosecute those individuals, whether they are sitting on a sales desk or in a corporate suite'); Leslie Caldwell, Assistant Attorney General for the Criminal Division, Remarks at New York University Law School's Program on Corporate Compliance and Enforcement (17 April 2015), https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law (explaining that '[t]rue cooperation . . . requires identifying the individuals actually responsible for the misconduct – be they executives or others – and the provision of all available facts relating to that misconduct').

11 Sally Quillian Yates, Memorandum from the U.S. Dep't of Justice on Individual Accountability for Corporate Wrongdoing at p. 2 (9 September 2015), https://www.justice.gov/dag/file/769036/download.

12 Id.

13 See DOJ, Attorney General Jeff Sessions Delivers Remarks at Ethics and Compliance Initiative Annual Conference (Remarks as prepared for delivery) (24 April 2017), https://www.justice.gov/

Similarly, in the securities enforcement context, the SEC recently expressed an increased focus on charging individuals responsible for wrongdoing.[14] In particular, Mary Jo White, the former Chair of the SEC, has highlighted that one new approach to charging individuals is to use Section 20(b) of the Exchange Act[15] to target those who have 'engaged in unlawful activity but attempted to insulate themselves from liability by avoiding direct communication with the defrauded investors.'[16]

Legal considerations 24.3

Privilege considerations 24.3.1

At times during the investigative process, legal considerations may be in tension with strategic ones – a corporation should be cognisant of the potential for such tensions to navigate toward an agreeable settlement without unnecessarily waiving any valuable rights. In particular, a company may need to weigh the value of additional co-operation credit for disclosing relevant privileged documents to the government against the value of protecting privileged documents from future discovery in follow-on civil litigation.

On the one hand, the government may consider the disclosure of privileged documents in determining the corporation's level of co-operation. Under current DOJ policy, for example, 'cooperation credit is not predicated upon the waiver of attorney–client privilege or work-product protection,' although co-operation – particularly under the Yates Memorandum – still requires the timely disclosure of 'relevant facts',[17] which may require the disclosure of some privileged materials, such as memoranda of witness interviews prepared during an internal

opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual ('The Department of Justice will continue to emphasize the importance of holding individuals accountable for corporate misconduct.').

14 Joshua Gallu and David Michaels, SEC to Shift Enforcement Focus to Individuals, White Says, Bloomberg News (26 September 2013), www.bloomberg.com/news/articles/2013-09-26/sec-to-shift-enforcement-focus-to-individuals-white-says-1-; Mary Jo White, SEC Chair, Speech at the New York City Bar Association's Third Annual White Collar Crime Institute: Three Key Pressure Points in the Current Enforcement Environment (19 May 2014), https://www.sec.gov/news/speech/2014-spch051914mjw.html (noting that '[a]n internal, back-of-the[-]envelope, analysis the staff did recently indicates that since the beginning of the 2011 fiscal year, we charged individuals in 83% of our actions . . . , [a]nd we look for ways to innovate in order to further strengthen our ability to charge individuals').

15 Section 20(b) of the Securities Act of 1933 allows the Commission to bring enforcement actions against 'any person' who does 'any act or thing which it would be unlawful for such person to do under the provisions of this chapter or any rule or regulation thereunder through or by means of any other person.' See 15 U.S.C. § 78t(b) (2011).

16 Id.

17 Mem. from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, Principles of Federal Prosecution of Business Organizations (28 August 2008), at pp. 9-11, https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

investigation.[18] On the other hand, disclosure to the government of documents prepared during the course of an investigation may waive any relevant protections during follow-on civil litigation.[19] In such instances, a company may consider entering into a limited waiver agreement with the government as a middle ground, but it must keep in mind that courts may be sceptical of a limited waiver agreement, even when paired with a confidentiality agreement.[20] Recent amendments

18 Id. at pp. 8-9. This reflects a steady retreat in the DOJ's position. In 1999, then-Deputy Attorney General Eric Holder noted in a memorandum that the DOJ would consider the waiver of corporate attorney–client and work-product privileges as, although not an 'absolute requirement', at least 'one factor in evaluating the corporation's cooperation.' Memorandum from the Dep't of Justice on Bringing Criminal Charges Against Corporations §§ II.A.4, VI.A-B (16 June 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.pdf. After some Congressional interest in corporate attorney–client privilege, the DOJ issued another memorandum in 2006 stating that, although '[w]aiver of attorney–client and work product protections is not a prerequisite to a finding that a company has cooperated,' prosecutors could request carefully limited waivers only in limited circumstances 'when there is a legitimate need for the privileged information to fulfil their law enforcement obligations.' Mem. from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, Principles of Federal Prosecution of Business Organizations (12 December 2006), at pp. 8-9, https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.

19 A court in the Southern District of New York recently held that briefs, written memos, white papers and presentations shown to the CFTC were discoverable in a subsequent civil action. See *Alaska Electrical Pension Fund v. Bank of America Corp.*, 2017 WL 280816, at *2-3 (S.D.N.Y. 20 January 2017). The court's decision, however, noted the lack of confidentiality agreements between the government and the defendants, and the court did not claim to apply a categorical rule about confidentiality agreements and waiver of work-product privilege. See id. at *2 ('[T]he Court need not decide categorically whether confidentiality agreements can ever protect work product that is shared voluntarily with a government agency because, at most, they are just one of several factors to be considered, and they are not enough to carry the day here.') (internal quotation marks and citations omitted).

20 Most federal courts of appeal have declined to allow a selective disclosure to regulators during an investigation of documents protected by the attorney–client privilege or work-product doctrine without a resultant waiver of the privilege or protection with respect to third-party civil litigants. See *In re Pac. Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012), at pp. 1127-28 (U.S. Attorney investigation); *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179 (10th Cir. 2006) (SEC and DOJ investigations); SEC, Office of Chief Counsel, Enforcement Manual § 4.3.1, Confidentiality Agreements (28 October 2016) ('While obtaining materials that are otherwise potentially subject to privilege or the protections of the attorney work-product doctrine can be of substantial assistance in conducting an investigation, the staff should exercise judgment when deciding whether to enter into a confidentiality agreement with a company under investigation. Considerations include [that] . . . [s]ome courts have held that companies that produce otherwise privileged materials to the SEC or the U.S. Department of Justice, even pursuant to a confidentiality agreement, waived privilege in doing so.'). But see *In re Steinhardt Partners, L.P.*, 9 F.3d. 230 (2d Cir. 1993), at p. 236 ('[W]e decline to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection. . . . Establishing a rigid rule would fail to anticipate . . . situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.'); see also *In re Natural Gas Commodity Litigation*, 2005 WL 1457666, at *8 (S.D.N.Y. 21 June 2005) (discussing how an explicit confidentiality agreements combined with a non-waiver agreement went a 'long way' toward establishing non-waiver).

to the SEC Enforcement Manual indicate that advocacy materials presented to the SEC may be discoverable and admissible in evidence, notwithstanding the protections of Federal Rules of Evidence 408 and 410.[21]

As part of its investigative process, the government may also engage the company in discussions as to whether charges are warranted. Government authorities may convey this information to the company orally, through reverse proffers,[22] or in writing, through a document such as the SEC's Wells notice.[23] Upon receipt of such information, the company then generally may respond with its arguments as to why the government should not bring an enforcement action. While providing a response is usually advisable and carries the prospect of success, in certain circumstances, a corporation may determine that it is not in the company's best interest. Among other considerations, a Wells submission is not privileged or confidential, and therefore can be used later against the corporation in civil litigation or made publicly available. In the alternative, the corporation may opt to initiate a meeting with the authorities to discuss the proposed charges, to prevent the creation of discoverable material and foster a dialogue between the company and the government.

During settlement negotiations, a corporation must also be careful in sharing drafts of settlement documents because materials shared with the government may become discoverable in civil litigation. Although Federal Rule of Evidence 408 generally protects documents related to settlement negotiations,[24] the

21 See SEC, Office of Chief Counsel, Enforcement Manual § 3.2.3.2, White Papers and Other Materials (excluding Wells submissions) (28 October 2016).

22 See Andrew Ceresney, Director, SEC Division of Enforcement, Remarks at University of Texas School of Law's Government Enforcement Institute: The SEC's Cooperation Program: Reflections on Five Years of Experience (13 March 2015), https://www.sec.gov/news/speech/sec-cooperation-program.html ('One thing we are doing more of is using reverse proffers at key points in our investigations. When appropriate, we will invite counsel in for a meeting in which we share key documents and expected testimony that will implicate the defendant. This is another practice that is well established among criminal prosecutors and FBI agents but historically has been used less frequently at the SEC. Sometimes we might do a reverse proffer at a more advanced stage of an investigation in order to attempt to bring the investigation swiftly to a close on settlement terms that we deem favourable and appropriate. But we also might do it much earlier in an investigation, in order to demonstrate to a witness why cooperation is worthwhile.').

23 A Wells notice is a letter that a securities or commodities regulator, such as the SEC, the Commodity Futures Trading Commission (CFTC), or the Financial Industry Regulatory Authority (FINRA), sends to a corporation or individual when it intends to bring a civil action against them. See, e.g., *Richman v. Goldman Sachs Grp.*, Inc., 868 F. Supp. 2d 261 (S.D.N.Y. 2012), at p. 272 ("The SEC provides a target of an investigation with a Wells Notice "whenever the Enforcement Division staff decides, even preliminarily, to recommend charges."') (citation omitted).

24 See Fed. R. Evid. 408 advisory committee's note ('[S]tatements made during compromise negotiations of other disputed claims are not admissible in subsequent criminal litigation, when offered to prove liability for, invalidity of, or amount of those claims.').

documents may nonetheless ultimately be deemed discoverable,[25] or even admissible as evidence.[26]

24.3.2 Limitations and tolling agreements

In the course of a government investigation, statutes of limitation will often come into play.[27] At the outset of an investigation, particularly if the investigation commences toward the end of a particular statutory period, the government may ask the company to sign a tolling agreement, an agreement to waive a right to claim that litigation should be dismissed owing to the expiration of a statute of limitations for a particular period. It may be in the best interest of the company to sign it, as a form of co-operation and to avoid a precipitous filing of charges by the government. If a tolling agreement has not been signed at an earlier stage in the investigation, the government may ask a corporation to sign one during the settlement negotiation process, especially if a potential limitations period is about to close. In this context, tolling agreements serve to relieve the government of the pressure of taking formal action before the relevant limitations period runs, and allow for time for additional sharing of information in the hope of facilitating a settlement agreement.[28]

---

25 For example, courts in the Southern District of New York consistently hold that 'Rule 408 does not apply to discovery.' E.g., *Small v. Nobel Biocare USA, LLC,* 808 F. Supp. 2d 584 (S.D.N.Y. 2011), at p. 586; accord *Conopco, Inc. v. Wein*, 2007 WL 1040676, at *5 (S.D.N.Y. 4 April 2007); *ABF Capital Mgmt. v. Askin Capital*, 2000 WL 191698, at *1 (S.D.N.Y. 10 February 2000). Rather, courts apply the discovery standard of Federal Rule of Civil Procedure 26(b)(1) to determine the discoverability of settlement negotiations. E.g., *Small*, 808 F. Supp. 2d at pp. 586–87; *ABF Capital Mgmt.*, 2000 WL 191698, at *2. Some courts require a 'particularized showing' of the need for the discovery. See *Bottaro v. Hatton Assocs.*, 96 F.R.D. 158 (E.D.N.Y. 1982), at p. 160; see also *Tribune Co. v. Purcigliotti*, 1996 WL 337277, at *2 (S.D.N.Y. 19 June 1996) ('slightly heightened showing of relevance'); *SEC v. Thrasher,* 1996 WL 94533, at *2 (S.D.N.Y. 27 February 1996) ('modest presumption against disclosure').

26 E.g., *In re Gen. Motors LLC Ignition Switch Litig.*, 2015 WL 7769524, at *2 (S.D.N.Y. 30 November 2015) (admitting consent decree as evidence 'not . . . to prove that New GM violated the Safety Act . . . but for other purposes that are plainly relevant').

27 Unless otherwise provided by statute, an enforcement action by a federal regulator that seeks a civil fine or penalty is generally subject to the standard five-year limitations period for proceedings. 28 U.S.C. § 2462.

28 See SEC, Office of Chief Counsel, Enforcement Manual § 3.1.2, Statutes of Limitations and Tolling Agreements (28 October 2016) ('If the assigned staff investigating potential violations of the federal securities laws believes that any of the relevant conduct arguably may be outside the five-year limitations period before the SEC would be able to file or institute an enforcement action, the staff may ask the potential defendant or respondent to sign a "tolling agreement." Such requests are occasionally made in the course of settlement negotiations to allow time for sharing of information in furtherance of reaching a settlement.').
A tolling agreement signed by the corporation will not toll the statute of limitations against individuals. Rather, to toll the time to bring charges against an individual, the government will have to secure a separate tolling agreement with that person. See Sally Quillian Yates, Memorandum from the U.S. Dep't of Justice on Individual Accountability for Corporate Wrongdoing at p. 6 (9 September 2015) ('[W]here it is anticipated that a tolling agreement is . . . unavoidable and necessary, all efforts should be made either to resolve the matter against culpable

Forms of resolution 24.4

Prosecutorial settlements: DPAs, NPAs and guilty pleas 24.4.1

In past years, most corporate criminal investigations initiated by US prosecutors were resolved by deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs).[29] DPAs and NPAs are generally thought of as a middle ground between declining prosecution and obtaining a conviction.[30] Although in recent years there have been some high-profile corporate guilty pleas, there is no

individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations period by agreement or court order.'), https://www.justice.gov/dag/file/769036/download.

29 For examples of DPAs and NPAs in recent years, see *In re Las Vegas Sands Corp.* (17 January 2017), https://www.justice.gov/opa/press-release/file/929836/download (NPA, FCPA claims); *In re Gen. Cable Corp.* (Dep't of Justice 22 December 2016), https://www.justice.gov/criminal-fraud/file/921801/download (NPA, FCPA claims); *In re JPMorgan Securities (Asia Pacific)* (Dep't of Justice 17 November 2016), https://www.justice.gov/criminal-fraud/file/921801/download (NPA, FCPA claims); *In re IAP Worldwide Servs. Inc.* (Dep't of Justice 16 June 2015), https://www.justice.gov/opa/file/478281/download (NPA, FCPA claims); *In re Dallas Airmotive, Inc.* (Dep't of Justice 10 December 2014), https://www.justice.gov/file/181831/download (DPA, FCPA claims); *In re HSBC Holdings plc (*10 December 2012), https://www.justice.gov/sites/default/files/opa/legacy/2012/12/11/dpa-executed.pdf (DPA, IEEPA & TWEA claims); *In re ING Bank N.V.* (8 June 2012), https://www.sec.gov/Archives/edgar/data/1039765/000119312513120728/d501093dex45.htm (DPA, IEEPA & TWEA claims); *In re Wells Fargo Bank, N.A.* (Dep't of Justice 8 December 2011), https://www.justice.gov/sites/default/files/atr/legacy/2011/12/08/278076a.pdf (NPA, anti-competitive conduct claims); *In re Tenaris S.A.* (Dep't of Justice 17 May 2011), https://www.sec.gov/news/press/2011/2011-112-dpa.pdf (DPA, FCPA claims); *In re Barclays Bank PLC* (Dep't of Justice 16 August 2010), www.federalreserve.gov/newsevents/press/enforcement/enf20100818b1.pdf (DPA, IEEPA & TWEA claims); *In re ABN AMRO Bank N.V.* (Dep't of Justice 9 May 2010), http://lib.law.virginia.edu/Garrett/prosecution_agreements/sites/default/files/pdf/ABN_AMRO.pdf (DPA, IEEPA & TWEA claims); *In re Wachovia Bank, N.A.* (Dep't of Justice 16 March 2010), https://www.sec.gov/litigation/complaints/2011/comp22183.pdf (DPA, money laundering claims).

30 See U.S. Attorneys' Manual § 9-28.1100, Principles of Federal Prosecution of Business Organizations, Collateral Consequences (rev. November 2015) ('[W]here the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designated, among other things, to promote compliance with applicable law and prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other.'); see also Mary Jo White, SEC Chair, Speech at the New York City Bar Association's Third Annual White Collar Crime Institute: Three Key Pressure Points in the Current Enforcement Environment (19 May 2014), https://www.sec.gov/news/speech/2014-spch051914mjw.html ('[S]ome have questioned whether it is appropriate for prosecutors to consider the consequences – direct and collateral – when they make a decision whether to indict a company. Of course they should; we want their decision to be thoughtful and in the public interest. And the DOJ's Principles of Federal Prosecutions of Business Organizations indeed require them to weigh the collateral consequences of a corporate indictment among a number of other factors.').

indication yet that these guilty pleas will overtake NPAs and DPAs as prosecutors' primary settlement mechanism.[31]

In a deferred prosecution, the government brings criminal charges against the company, which it agrees to dismiss at the end of a specified period if the company complies with the DPA's terms. Because a DPA is filed with the court, it becomes a public document.

A non-prosecution differs in that no criminal charges are filed against the company. As a result, an NPA need not be made public unless prosecutors seek to publicise the results of the investigation or the company is itself required to disclose the agreement. The DOJ commonly uses both forms of agreement to resolve investigations concerning, among other things, fraud, the Foreign Corrupt Practices Act,[32] the False Claims Act,[33] the Bank Secrecy Act[34] and antitrust laws. In previous years, DPAs and NPAs were the exclusive domain of the DOJ, but the SEC and state prosecutors have also recently adopted their use, using the agreements to resolve certain securities law violations.[35]

Unlike an NPA, over which the government has full discretion to adopt terms and conditions, a DPA may be subject to some level of judicial review pursuant to the Speedy Trial Act. Because a DPA involves the filing of an information or indictment, the Speedy Trial Act requires trial to start within 70 days.[36] However, the Speedy Trial Act allows this 70-day period to be tolled with the 'approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.'[37] Although this provision suggests that courts have a role in overseeing DPAs, judges have historically been relatively deferential to the government in approving them.

---

31 Although there is no standard form or precedent for these agreements, most prosecutorial settlement agreements include some or all of the following provisions: (1) a statement of facts describing illegal acts and/or an admission of wrongdoing; (2) an agreement that the company, its employees and its agents will not publicly contradict the statement of facts; (3) co-operation with the government for the duration of the agreement, including the provision of documents and efforts to secure employee testimony; (4) some form of remedial action, including terminating or disciplining culpable employees, implementing revised internal controls and procedures, and/or, in some cases, appointing an independent compliance monitor; (5) fines and penalties; (6) obligations to report future violations of law; and (7) an acknowledgement that the government has the sole discretion to determine whether the agreement has been breached. For both an NPA and a DPA, because the company has generally admitted to the conduct at issue, if a company is indicted upon breach of the agreement, conviction is almost certain.

32 15 U.S.C. §§ 78dd-1, et seq.

33 31 U.S.C. §§ 3729-3733.

34 31 U.S.C. §§ 5311–5330.

35 Andrew Ceresney, Director, SEC Division of Enforcement, Remarks at University of Texas School of Law's Government Enforcement Institute: The SEC's Cooperation Program: Reflections on Five Years of Experience (13 March 2015), https://www.sec.gov/news/speech/sec-cooperation-program.html; Enforcement Cooperation Program, SEC (16 February 2016), https://www.sec.gov/spotlight/enfcoopinitiative.shtml.

36 See 18 U.S.C. § 3161(c)(1); see also U.S. Attorneys' Manual: Criminal Resource Manual § 628, Speedy Trial Act of 1974 (rev. November 2015).

37 18 U.S.C. § 3161(h)(2).

Two recent decisions from the Courts of Appeals for the DC and Second Circuits confirm that the longstanding practice of limited judicial oversight over consensual enforcement settlements is the favoured approach. In each case, the district court refused to approve a settlement that the court deemed too lenient, and was reversed by the Court of Appeals on the grounds that the trial court's discretion in such circumstances is quite limited. In April 2016, in *United States v. Fokker Services BV*,[38] the DC Circuit Court of Appeals issued a writ of *mandamus* and vacated a decision by District Judge Richard Leon rejecting as too lenient a proposed DPA between the DOJ and Fokker Services. The Court of Appeals reasoned that 'the court's withholding of approval would amount to a substantial and unwarranted intrusion on the Executive Branch's fundamental prerogatives.'[39] Similarly, in June 2014, the Second Circuit issued a decision in *SEC v. Citigroup Global Markets*,[40] calling into question the appropriateness of judicial scrutiny of consensual settlements with the SEC. In a decision that reversed a notable opinion written by Judge Jed Rakoff criticising an SEC settlement with Citigroup as insufficient, the Second Circuit made clear that courts must afford the SEC's policy judgements 'significant deference' including whether, when and how to resolve enforcement proceedings. Under *Citigroup*, a district court's review of a settlement agreement is narrow and limited.[41] Subsequent cases have added glosses to the Citigroup holding, with some district courts exerting discretion over certain aspects of settlement agreements,[42] including the selection of an independent monitor.[43]

Despite the reversals, the district courts' criticisms are broadly consistent with those expressed in recent years by a number of federal judges who have hesitated before ultimately approving DPAs and other similar government settlements. In those other instances, the courts' criticisms commonly have included assertions that those settlements lacked: (1) a large enough penalty amount[44] (relatedly, there is concern that companies will begin to view monetary penalties merely as 'a cost

38 818 F.3d 733 (D.C. Cir. 2016), at p. 747, vacating 79 F. Supp. 3d 160 (D.D.C. 2015).

39 Id. at p. 744.

40 752 F.3d 285 (2d Cir. 2014).

41 Id. at p. 294 (quoting *eBay, Inc. v. MercExchange*, 547 U.S. 388 (2006), at p. 391).

42 See, e.g., *U.S. Securities and Exchange Commission v. Aronson*, 665 F. App'x 78 (2d Cir. 2016), at p. 80 (holding that the district court did not abuse its discretion in ordering briefing on an issue before a related criminal case was completed, even though the consent decree provided that the parties would propose a briefing schedule after the completion of the criminal case).

43 See *U.S. Commodity Futures Trading Commission v. Deutsche Bank AG*, 2016 WL 6135664, at *1-3 (S.D.N.Y. 20 October 2016) (holding that it was proper for the court to select an independent monitor, when the parties' proposed monitors were inadequate).

44 See *U.S. v. Saena Tech Corp.*, 140 F. Supp. 3d 11 (D.D.C. 2015), at p. 31 ('An agreement that contained neither punitive measures (such as fines) nor requirements designed to deter future criminality (such as compliance programs and independent monitors) could not be said to be designed to secure a defendant's reformation and should be rejected. Even an agreement that contained some of these elements could be ineffective if the obligations were found to be so vague or minimal as to render them a sham.').

of doing business'[45]); (2) admissions of wrongdoing by the company;[46] (3) charges against the individuals who were responsible for the offence;[47] (4) sufficient factual detail for the judge to evaluate the agreement;[48] (5) sufficient remedial obligations for the company;[49] and (6) sufficient reporting to the court about the company's compliance with the agreement.[50]

In recent years, perhaps as a result of political and public pressure,[51] including such public criticism of DPAs from the federal courts, there has been a marked uptick in guilty pleas to resolve criminal actions.[52] The major difference between a guilty plea and an NPA or DPA is that a guilty plea results in a conviction, which generally comes with harsher collateral regulatory consequences and more significant reputational harm. Such risks for a corporation are significant, especially in a heavily regulated industry – the ramifications can be wide-ranging and unclear.

See Section 24.5.3

45 See, e.g., Brett Wolf, U.S. Warns Banks It May Revoke Some Money-Laundering Settlements, Reuters (15 March 2015), http://www.reuters.com/article/us-banks-moneylaundering-idUSKBN0MC1ZE20150316 (quoting Assistant Attorney General Caldwell as saying 'We don't want DPAs and NPAs to be perceived as a cost of doing business'); Peter J. Henning, Guilty Pleas and Heavy Fines Seem to Be Cost of Business for Wall St., N.Y. Times (20 May 2015), https://www.nytimes.com/2015/05/21/business/dealbook/guilty-pleas-and-heavy-fines-seem-to-be-cost-of-business-for-wall-st.html?_r=0 ('Banks appear willing to plead guilty as long as the collateral costs are not too heavy. Thus, the potency of a criminal conviction as a deterrent seems to have been dissipated, perhaps to the point that it is just another business expense.').

46 See, e.g. *S.E.C. v. CR Intrinsic Investors, LLC*, 939 F. Supp. 2d 431 (S.D.N.Y. 2013), at pp. 436-39 (discussing concerns about allowing 'neither admit nor deny' provisions in a consent judgment).

47 See *Saena Tech Corp.*, 140 F. Supp 3d at 35-36 (discussing potential concerns with a DPA that effectively immunised an individual).

48 cf. *U.S. Securities and Exchange Commission v. Mulvaney*, 2012 WL 12930425, at *1 (E.D. Wis. 20 November 2012) (granting consent decree only after ordering further briefing on its factual basis).

49 See *Saena Tech Corp.*, 140 F. Supp. 3d at p. 31 (discussing the necessity of sufficient deterrent effects).

50 cf. *U.S. v. HSBC Bank USA, N.A.*, 2013 WL 3306161, at *11 (E.D.N.Y. 1 July 2013) (ordering the parties to file quarterly reports and stating that it will 'notify the parties if, in its view, hearings or other appearances are necessary or appropriate').

51 See, e.g., Danielle Douglas, Holder Concerned Megabanks Too Big to Jail, Wash. Post (6 March 2013), https://www.washingtonpost.com/business/economy/holder-concerned-megabanks-too-big-to-jail/2013/03/06/6fa2b07a-869e-11e2-999e-5f8e0410cb9d_story.html.

52 See Caldwell Says Look for More Corporate Guilty Pleas and Declinations, Corp. Crime Reporter (21 April 2015), www.corporatecrimereporter.com/news/200/caldwell-says-look-for-more-corporate-guilty-pleas-and-declinations/ ('You will probably be seeing more guilty pleas in the corporate space.'). Notably, in May 2015 Citicorp, JPMorgan Chase & Co., Barclays PLC, Royal Bank of Scotland and UBS all pleaded guilty in May 2015 to felony charges for conspiring to manipulate foreign exchange benchmark rates. Five Major Banks Agree to Parent-Level Guilty Pleas, press release, Dep't of Justice (20 May 2015), https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas; see also DB Group Servs. Plea Agreement, 3:15CR62 (D. Conn. 23 April 2015), https://www.justice.gov/file/628871/download; BNP Paribas S.A. Order to Cease and Desist (Fed. Reserve Sys. 30 June 2014), https://www.federalreserve.gov/newsevents/press/enforcement/enf20140630a1.pdf; Credit Suisse AG Plea Agreement, 1:14-cr-00188 (E.D. Va. 19 May 2014), https://www.justice.gov/iso/opa/resources/686201451919151694802 2.pdf; Marubeni Corporation (March 2014).

Regulatory settlements: consent orders and civil NPAs and DPAs 24.4.2

Companies under investigation by federal and state regulators whose enforcement mechanisms are administrative or civil may resolve an investigation by voluntarily entering into a consent order where an institution typically consents to the issuance of a cease-and-desist order or the assessment of a civil monetary penalty, or both. A consent order, like a cease-and-desist order or a civil monetary penalty assessment, is a formal enforcement action; it is a public document and, although it may not always be filed, its terms are enforceable in court. Consent orders often vary in the level of detail they provide concerning the wrongdoing, although they are often less detailed than a criminal settlement. A consent cease-and-desist order may oblige the company to undertake remedial measures to correct the misconduct and ensure future compliance. The term of the order is usually indefinite. A consent civil monetary penalty assessment merely obliges the institution to pay a penalty, and the order's terms are fully satisfied by the payment.

Some regulators have adopted NPAs and DPAs that are similar to their criminal counterparts'. For example, the SEC, which is responsible for civil enforcement and administrative actions to enforce the securities laws,[53] has begun to use NPAs and DPAs to resolve cases 'where an entity or person has engaged in misconduct and where the co-operation is extraordinary, but the circumstances call for a measure of accountability.'[54] Although available as an option, NPAs and DPAs remain relatively uncommon for civil enforcement actions by the SEC.[55]

Key settlement terms 24.5

Whether negotiating a settlement agreement in the criminal or regulatory context, many common principles come into play. To facilitate a successful negotiation, a company must have a comprehensive understanding of (1) benchmark terms for historical settlements regarding similar misconduct, (2) those terms that are most significant to the company and (3) any distinguishing factors in the matter at issue that encourage terms less severe than the benchmarks.

53 See SEC, How Investigations Work (rev. 15 July 2013), https://www.sec.gov/News/Article/Detail/Article/1356125787012; Mary Jo White, SEC Chair, Speech, All-Encompassing Enforcement: The Robust Use of Civil and Criminal Markets to Police the Markets (31 March 2014), https://www.sec.gov/News/Speech/Detail/Speech/1370541342996.

54 Andrew Ceresney, Director, SEC Division of Enforcement, Remarks at University of Texas School of Law's Government Enforcement Institute, The SEC's Cooperation Program: Reflections on Five Years of Experience (13 March 2015), https://www.sec.gov/news/speech/sec-cooperation-program.html.

55 See id. ('[T]hey have been a relatively limited part of our practice. I think this is appropriate and should continue to be the case.'); see also SEC, Office of Chief Counsel, Enforcement Manual § 6.2.3, Non-Prosecution Agreements (28 October 2016) ('A non-prosecution agreement is a written agreement . . . entered in limited and appropriate circumstances.').

24.5.1 Monetary penalties

Nearly all corporate settlements with US authorities include some form of monetary penalty. The form largely depends on the regulator and its practices.[56] Typically, monetary penalties in regulatory settlements consist of a civil monetary penalty. Disgorgement of profits or restitution to harmed parties may also be required.[57]

The SEC considers two principal factors in determining monetary penalties: the presence or absence of a direct and material benefit to the corporation itself as a result of the violation and the degree to which the penalty will recompense or further harm the injured shareholders.[58] The SEC will also consider factors such as: deterring the conduct, the extent of the injury, any complicity on the part of the corporation, the intent of the individuals committing the wrong, the difficulty in detecting that particular type of wrongdoing, any remedial steps taken by the corporation and the extent of its co-operation.[59] Generally, the factors that US authorities consider in determining monetary penalties mirror those used to determine whether to bring charges against the corporation in the first place, including the nature of the offence, the company's timely and voluntary disclosure of wrongdoing, and the company's remedial actions.

It is important, however, to keep in mind that, in recent years, settlement values generally have been increasing and continue to do so. In the 2015 fiscal year, the DOJ collected more than US$23 billion in civil and criminal penalties, including US$5 billion in penalties from Bank of America under the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA).[60] In the 2016 fiscal year, the DOJ collected more than US$15.3 billion in civil and

56 See, e.g., Cornerstone Research, SEC Enforcement Activity Against Public Company Defendants: Fiscal Years 2010-2015, www.law.nyu.edu/sites/default/files/SEC-Enforcement-Activity-FY2010-FY2015.pdf. The SEC's monetary fines generally fall into three categories: (1) monetary penalties, (2) disgorgement with prejudgment interest, and (3) monetary relief for harmed investors. See id.

57 Forfeiture, the seizure of assets that comprised the proceeds of the wrongdoing, or were used to facilitate it, is rarely used in regulatory actions against business entities even when available, because the government is generally reluctant to seize property related to an ongoing business. See U.S. Attorneys' Manual § 9-111.124 (Business Seizures ('Due to the complexities of seizing an ongoing business and the potential for substantial losses from such a seizure, a United States Attorney's Office must consult with the Asset Forfeiture and Money Laundering Section prior to initiating a forfeiture action against, or seeking the seizure of, or moving to restrain an ongoing business.')). Restitution, the compensation of individuals harmed by illegal conduct, is also rarely a part of any settlement. In particularly complex cases involving many different classes of individuals that may have been harmed, calculation of restitution may be especially difficult, and a corporation may find the government amenable to not seeking restitution in its settlement, with the understanding that compensation of harmed individuals is more efficiently and accurately handled through related civil litigation.

58 SEC Release No. 2006-4 (4 January 2016), Statement of the Securities and Exchange Commission Concerning Financial Penalties, https://www.sec.gov/news/press/2006-4.htm.

59 Id.

60 DOJ, Press Release, Justice Department Collects More than $23 Billion in Civil and Criminal Cases in Fiscal Year 2015 (3 December 2015), https://www.justice.gov/opa/pr/justice-department-collects-more-23-billion-civil-and-criminal-cases-fiscal-year-2015.

criminal penalties, including residential mortgage lending-related settlements from Goldman Sachs Group, Morgan Stanley & Company and Wells Fargo Bank, NA, amounting to US$2.96 billion, US$2.6 billion and US$1.2 billion, respectively.[61] And from 2005 to 2015, the total criminal fines and penalties assessed by the DOJ's Antitrust Division increased an entire order of magnitude, from US$338 million in 2005 to US$3.6 billion in 2015.[62] (In the 2016 fiscal year, the total decreased to US$399 million, but this appears to have been just a lull in an overall upward trend.[63] In the first month of 2017, the Justice Department announced a US$5.28 billion settlement with Credit Suisse.[64])

Many of those settlements called for payments by the settling companies to third-party community organisations that were not directly harmed by the alleged fraud. In a policy change announced in June 2017, Attorney General Jeff Sessions issued a memorandum prohibiting DOJ attorneys from making settlements conditional on payments to non-governmental organisations not directly harmed by a company's alleged misconduct.[65]

The SEC has also dramatically increased its use of 'aggressive' monetary penalties.[66] Whereas a record-setting penalty in 2002 reached a mere US$10 million, the mean payment for certain cases between 2010 and 2013 was over US$50 million.[67] Three of the top 10 monetary settlements imposed in public company-related actions were imposed in 2016.[68] These include a US$415 million action against Merrill Lynch and a US$267 million action against JP Morgan wealth management subsidiaries. As of October 2016, SEC enforcement settlements related to misconduct leading to or arising from the financial crisis exceeded US$3.76 billion for the 204 entities and individuals charged.[69] An important recent decision

61 DOJ, Press Release, Justice Department Collects More than $15.3 Billion in Civil and Criminal Cases in Fiscal Year 2016 (14 December 2016), https://www.justice.gov/opa/pr/justice-department-collects-more-153-billion-civil-and-criminal-cases-fiscal-year-2016.

62 DOJ, Criminal Enforcement: Trends Charts Through Fiscal Year 2015 (11 December 2015), https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

63 DOJ, Criminal Enforcement: Trends Charts Through Fiscal Year 2016 (30 January 2017), https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

64 DOJ, Press Release, Credit Suisse Agrees to Pay $5.28 Billion in Connection with its Sale of Residential Mortgage-Backed Securities (18 January 2017), https://www.justice.gov/opa/pr/credit-suisse-agrees-pay-528-billion-connection-its-sale-residential-mortgage-backed.

65 Memorandum, Att'y Gen. Jeff Sessions, *Prohibition on Settlement Payments to Third Parties* (5 June 2017), https://www.justice.gov/opa/press-release/file/971826/download.

66 SEC Enforcement Activity Against Public Companies and Their Subsidiaries, Cornerstone Research (2016), https://www.cornerstone.com/GetAttachment/1a6f93a7-3859-4e7e-841f-65241c49c123/SEC-Enforcement-Activity-against-Public-Companies.pdf.

67 Sonia A. Steinway, Comment, SEC 'Monetary Penalties Speak Very Loudly,' But What Do They Say? A Critical Analysis of the SEC's New Enforcement Approach, 124 Yale L.J. 209 (October 2014) (analysing SEC trends in monetary penalties).

68 SEC Enforcement Activity Against Public Companies and Their Subsidiaries: Fiscal Year 2016 Update, Cornerstone Research (2016), https://www.cornerstone.com/Publications/Reports/SEC-Enforcement-Activity-Against-Public-Company-Defendants-2016.

69 SEC, SEC Enforcement Actions: Addressing Misconduct That Led To or Arose From the Financial Crisis, key statistics (22 February 2017), www.sec.gov/spotlight/enf-actions-fc.shtml

that may diminish the SEC's leverage in settlement negotiations is *Kokesh v. SEC*,[70] in which the Supreme Court held that a five-year statute of limitations applies to SEC enforcement actions seeking disgorgement.[71] The decision also raises the question of whether the Court would, in fact, recognise disgorgement as an available remedy in SEC enforcement proceedings.[72]

24.5.2 Continuing obligations

In addition to monetary penalties, settlement agreements will often include other continuing obligations. In particular, settlement agreements almost always contain language stating that the company will commit to undertake remedial efforts, such as the enhancement of its compliance programmes or an obligation to report potential violations of law in the future. To ensure ongoing compliance and satisfactory remedial efforts, in recent years, government agencies have increasingly required the use of corporate monitors to keep corporations accountable.

See Chapter 32 on monitorships

One common obligation in corporate settlements is the imposition of a monitor to oversee the company's compliance with the settlement agreement and report back to the government on the company's progress. Monitorships, which may last for a number of years, are a financial and functional burden on a company. Monitorships can be draining in terms of the cost of retaining the monitor itself, the costs required to implement recommended reforms, the cost of staffing and maintaining an internal team to work closely with the monitor and the disruption to the company's business and management. Another important consideration when contemplating a monitorship as a term of settlement is that monitors are generally given broad access to the corporation's files, outside the protection of an attorney–client relationship. This lack of attorney–client relationship can pose a risk of further legal exposure for the company. Given that a monitor is tasked with reviewing the corporation's practices, and reporting the findings of the review to

(summarising all settlements resulting from the financial crisis). Other regulatory agencies have followed suit, with the CFTC enforcing a record US$3.144 billion in civil monetary penalties and US$59 million in restitution and disgorgement in 2015. Between 2010 and 2014, the New York Department of Financial Services (NYDFS) issued monetary penalties totalling near US$6 billion. Completed mainly through consent orders, NYDFS's most notable settlements include a US$600 million penalty against Deutsche Bank and a US$2.243 billion penalty against BNP Paribas, which eventually pleaded guilty to criminal charges and paid a total of US$8.9 billion to resolve the numerous investigations.

70 137 S. Ct. 1635 (2017).

71 See id. at 1645. Prior to this ruling, the SEC relied disproportionately on engorgement penalties: in 2015, the SEC obtained US$3 billion in disgorgement payments and US$1.2 billion in other civil monetary penalties. See SEC, Select SEC & Market Data: Fiscal 2015 (2016), https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2015.pdf.

72 See id. at 1642, n. 3 ('Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context. The sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462's limitations period.'). See also Transcript of Oral Argument at 7-9, *Kokesh*, 137 S. Ct. 1635 (No. 16-529).

relevant authorities, it is possible that the monitor will identify and be obliged to disclose additional violations of law to relevant authorities. In addition, once a monitor's reports are submitted to the relevant authorities, those reports and any documents contained in them can be subject to FOIA requests, which may create additional exposure in follow-on civil litigation.

Given the substantial expense and disruption caused by a monitorship, it is in a corporation's interest to try and avoid the imposition of a monitor – especially in instances where corporate culpability is relatively low and the company has already undertaken substantial remedial efforts. The most effective means for a company of avoiding the imposition of a monitor continue to be to voluntarily report its misconduct, to co-operate fully with the government's resulting investigation and to demonstrate to the government that the company has already undertaken a comprehensive remediation plan. Where a monitor is imposed, a corporation can mitigate the disruption by negotiating the monitor's duration of assignment, scope of responsibility, decision-making capacity and accessibility to corporate files.

Collateral consequences 24.5.3

A criminal or regulatory settlement can also trigger a number of collateral consequences, which can vary depending on the types of violations the settlement covers and the industry of the affected entity. For example, a guilty plea for a bank could mean the loss of its financial holding company status and federal deposit insurance, the appointment of a receiver or conservator, and, for foreign banks, the potential termination of offices in the United States. A guilty plea for a broker-dealer could mean automatic loss of broker-dealer registration, a bar from acting as a registered investment adviser, and revocation of its status as a well-known seasoned issuer. A guilty plea for a corporation could also result in, among other things, disqualification from membership of certain self-regulatory organisations, a temporary or permanent bar from participation in federal procurement contracts (debarment), or loss of state licences. Compounding these difficulties, many of the collateral consequences that arise upon conviction travel within a corporation's legal structure, so that even regulated businesses that were not involved in the offence can be subject to licence revocations, loss of securities law safe harbours and other consequences.

Corporations may need to seek waivers or exemptions from multiple regulators, including the SEC, the CFTC, the Federal Reserve, the Department of Labor and FINRA, to allow them to continue engaging in the affected business activities, a process that should be planned well in advance of settlement. Each regulator may have more than one relevant exemption.[73] The company will therefore need to assess the relevant regulations for each authority that oversees the

73 The SEC has many, including (1) status as a well-known seasoned issuer (WKSI); (2) status under Section 9(a) of the 1940 Act as an investment adviser, depositor or principal underwriter of registered investment companies; and (3) exemptions from certain capital-raising restrictions, under Regulations A and D. See also generally Richard A. Rosen & David S. Huntington, Waivers

company's activities. The permutations of collateral consequences are many and depend on the form of the settlement (e.g., DPA, NPA, guilty plea, conviction or consent order)[74] or even the nature of the offence.[75] In addition to automatic disqualifications, there is a wide array of discretionary actions available to regulators for which waivers or exemptions could be sought.[76]

The method of receiving a waiver or exemption from these collateral consequences depends on the agency. For the SEC, a corporation requests an exemption from the SEC Staff, which can either make a recommendation to the Commission or act directly on the application with delegated authority from the Commission. The SEC generally grants a waiver under a finding of 'good cause'.[77] In contrast, the Department of Labor, in granting exemptions for qualified professional asset manager status, engages in a formal rule-making process, including a public notice and comment period.[78] The Federal Reserve, which can take a range of discretionary actions, generally engages in a more informal regulatory-relations dialogue when considering the collateral consequences of a significant settlement.

Timing is critical for the waiver process, because a company will need to ensure that there is no gap in its licences and statuses. Complicating matters, regulators often take different views as to when statutory disqualifications based on convictions or settlements commence. The SEC views 'conviction' as entry into a guilty plea, so any relevant SEC waivers need to be lined up before then. In contrast, the Department of Labor says that conviction is at sentencing, which can take place well after the entry of the guilty plea. For this reason, sentencing after the entry of

---

from the Automatic Disqualification Provisions of the Federal Securities Laws, 29 Insights: The Corp. & Sec. Law Advisor at p. 2 (August 2015) (cataloguing various SEC waivers).

74 Naturally, criminal convictions have much more severe consequences than a DPA, NPA or administrative consent order. For instance, Section 9(a) of the Investment Company Act of 1940 automatically bars an entity from acting as investment adviser or providing certain other services to registered investment companies if that entity or an affiliated entity has been convicted within the past ten years of any felony or misdemeanour arising out of the conduct of the business of a bank. 15 U.S.C. § 80a-9(a)(1).

75 For example, under the Commodities Exchange Act, an entity may be disqualified from registration under the Act if the entity has been found to have committed some kind of fraud by a settlement agreement with any federal or state agency. 7 U.S.C. § 12a(2)-(3); see also No Action and Interpretation, Letter No. 12-70 (CFTC31 December 2012), www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/12-70.pdf. The SEC has a policy of not enforcing the disqualifications under Section 206(4) of the Investment Advisers Act for administrative (but not civil) orders. See No-Action Letter, Dougherty & Co., 2003 WL 22204509 (SEC 3 July 2003).

76 For example, under Section 15(b)(4) of the Securities Exchange Act, the SEC has the discretion after a conviction to suspend or revoke the registration of a broker-dealer if it finds, after notice and comment, that it is in the public interest. See 15 U.S.C. § 78o(b)(4)(B).

77 17 C.F.R. § 230.405, Ineligible Issuer § 2 ('An issuer shall not be an ineligible issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer.'); see also SEC, Div. of Corp. Fin., Revised Statement on Well-Known Seasoned Issuer Waivers (24 April 2014), www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp-031214.htm.

78 29 C.F.R. pt. 2570, subpt. B.

a guilty plea can be delayed for the purpose of obtaining the necessary exemption from the Department of Labor.[79]

In recent years, the granting of waivers in connection with corporate settlements has drawn criticism by some in the government and the media that enforcement agencies have been too lenient in releasing companies from the consequences of their settlements, particularly in the case of companies that have been the subject of multiple enforcement actions.[80] There is every reason to believe that going forward the relevant agencies will require increasingly high showings by companies before agreeing to grant the necessary waivers.

Admissions and follow-on civil litigation 24.5.4

With increasing frequency, as a condition of settlement, government authorities are requiring corporations to make factual or legal admissions, or both. For example, prior to 2013, the SEC had a long-standing policy of settling cases without requiring admissions from defendants.[81] In June 2013, however, following public criticism, including in the wake of Judge Rakoff's denial of approval of the SEC's settlement with Citigroup, the Commission changed its policy 'by requiring admissions of misconduct in certain cases where heightened accountability and acceptance of responsibility by a defendant are appropriate and in the public interest.'[82] The SEC has defined these types of cases as including instances (1) where the violation of the securities laws involved particularly egregious conduct; (2) where large numbers of investors were harmed; (3) where the markets or investors were placed at significant risk; (4) where the conduct obstructs the Commission's investigation; (5) where an admission can send an important message to the markets; or (6) where the wrongdoer poses a particular future threat to

79 For example, in the set of plea agreements associated with manipulating foreign exchange benchmark rates, there was a term that the United States would support any motion or request to delay sentencing until the Department of Labor had issued a ruling on the request for exemption. E.g., Barclays Plea Agreement, Case No. 3:15CR00077 (D. Conn. 20 May 2015), at para. 12(e), https://www.justice.gov/file/440481/download; UBS Plea Agreement, Case No. 3:15CR00076 (D. Conn. 20 May 2015), at para. 28, https://www.justice.gov/file/440521/download.

80 See, e.g., Letter from Office of Sen. Elizabeth Warren, Rigged Justice: 2016: How Weak Enforcement Lets Corporate Offenders Off Easy (January 2016), https://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf (describing major criminal and civil cases from 2015 in which report authors found government enforcement 'feeble' and insufficient to deter corporate crime); Kara M. Stein, SEC Commissioner, Dissenting Statement in the Matter of the Royal Bank of Scotland Group, plc, Regarding Order Under Rule 405 of the Securities Act of 1933, Granting a Waiver from Being an Ineligible Issuer (28 April 2014), www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541670244 ('I fear that the Commission's action to waive our own automatic disqualification provisions arising from RBS's criminal misconduct may have enshrined a new policy – that some firms are just too big to bar.').

81 See SEC Release No. 33-337, Consent Decree in Judicial of Administrative Proceedings, 1972 WL 125351 (28 November 1972) (formally permitting respondent to avoid admitting or denying the allegations).

82 Andrew Ceresney, Director, SEC Division of Enforcement, Testimony on Oversight of the SEC's Division of Enforcement (19 March 2015), https://www.sec.gov/news/testimony/031915-test.html.

investors or the markets.[83] Nevertheless, the SEC has also acknowledged that 'for reasons of efficiency and other benefits', including getting significant relief, eliminating litigation risk, returning money to victims expeditiously and conserving enforcement resources for other matters, 'most cases will continue to be resolved on a "neither admit not deny" basis.'[84] Indeed, even under the new policy, admissions still appear to be infrequent.[85]

In addition to the reputational impact and collateral consequences that such admissions can impose on a corporation, admissions can expose a company to significant liability in follow-on civil litigation. Plaintiffs may be able to rely on factual or legal admissions in settlement agreements to support a complaint,[86] and may attempt to introduce them as evidence later.[87] A corporation will have a strong argument that an administrative consent order does not represent an adjudication and cannot be relied on in a complaint;[88] DPAs and NPAs have been used in follow-on litigation with mixed results.

---

83 Id.; see also Mary Jo White, SEC Chair, Speech for the Council of Institutional Investors fall conference in Chicago, IL, Deploying the Full Enforcement Arsenal (26 September 2013), https://www.sec.gov/News/Speech/Detail/Speech/1370539841202.

84 Id.

85 As of October 2015, according to one count, the SEC had only required admissions of fact in 18 settlements. See Marc S. Raspanti et al., The SEC's New Admissions Policy Means Sometimes Having to Say You're Sorry, The Champion 16 (September/October 2015), at p. 17.

86 The following decisions allowed plaintiffs to rely on admissions made in a prior government settlement agreement: *Davis v. Beazer Homes, U.S.A. Inc.*, 2009 WL 3855935, at *7 (M.D.N.C. 17 November 2009) (finding company's statement in DPA was a significant factor contributing to the validity of plaintiff's claim); *Somerville v. Stryker Orthopedics*, 2009 WL 2901591, at *3 (N.D. Cal. 4 September 2009) (determining defendant's prior NPA contributed to the sufficiency of plaintiff's claim).

87 E.g., *In re Gen. Motors LLC Ignition Switch Litig.*, 2015 WL 7769524, at *2 (S.D.N.Y. 30 November 2015) (admitting consent decree as evidence 'not . . . to prove that New GM violated the Safety Act . . . but for other purposes that are plainly relevant').

88 For example, the Second Circuit has held that 'a consent judgment between a federal agency and a private corporation which is not the result of an actual adjudication of any of the issues . . . can not be used as evidence in subsequent litigation between that corporation and another party.' *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887 (2d Cir. 1976), at p. 893; see also *Waterford Tp. Police & Fire Ret. Sys. v. Smithtown Bancorp, Inc.*, 2014 WL 3569338 (E.D.N.Y. 18 July 2014) (striking from complaint references to consent agreements with the Federal Deposit Insurance Corporation (FDIC) and the New York Banking Department); *In re Platinum & Palladium Commodities Litig.*, 828 F. Supp. 2d 588 (S.D.N.Y. 13 September 2011) (striking from complaint references to CFTC's findings of fact contained in an administrative consent order). But see *In re Bear Stearns Mortg. Pass-Through Certificates Litig.*, 851 F. Supp. 2d 746 (S.D.N.Y. 2012), at p. 768 n.24 ('[S]ome courts in this district have stretched the holding in *Lipsky* to mean that any portion of a pleading that relies on unadjudicated allegations in another complaint is immaterial under Rule 12(f). Neither Circuit precedent nor logic supports such an absolute rule.') (citation omitted); *Tobia v. United Grp. of Cos., Inc.*, 2016 WL 5417824, at *3 (N.D.N.Y. 22 September 2016) (holding that while the SEC complaint and consent order are inadmissible to prove liability under *Lipsky*, the allegations and findings enumerated in the SEC complaint are not made inadmissible merely by virtue of their inclusion therein).

A corporation entering into a settlement agreement ideally should, to the extent possible, try and neither admit nor deny the charges, in which case the findings of the order are less likely to be able to be used against it.[89] In the event that a corporation is unable to do so, a company should strategically negotiate for narrowly tailored factual statements and flexible language to enable it to defend itself in follow-on civil litigation. In particular, admitting to a generalised violation of law may be less likely to have future adverse consequences than admission of a specific legal violation that shares elements of claims that could be brought in follow-on civil litigation. For example, a corporation could admit to various controls-based violations in a settlement with the SEC rather than admitting to securities fraud. Or, a corporation could admit to a violation that does not contain a *scienter* element or does not concede that anyone was harmed as a result – necessary elements for many private causes of action.

Furthermore, a corporation should be aware that settlement agreements that dictate that the corporation cannot contradict the findings of facts can restrict the corporation's positions in follow-on civil litigation.[90] Because any statement that could be viewed by the government as contradictory to the facts of the agreement may then be seen as a breach – thereby reviving a prosecutorial or regulatory action – it is important that such agreements, at a minimum, contain exceptions that allow a company to take good-faith positions in follow-on civil litigation.[91]

89 See, e.g., *J.P. Morgan Securities Inc. v. Vigilant Ins. Co.*, 126 A.D.3d 76 (N.Y. App. Div. 1st Dep't 2015) (holding the insurer could not rely on the 'Dishonest Acts Exclusion' of policies to avoid indemnification of US$160 million disgorgement and US$90 million civil penalties required by an SEC cease-and-desist order).

90 See, e.g., *In re IAP Worldwide Services Inc.*, NPA, FCPA claims (Dep't Of Justice June 2015), https://www.justice.gov/opa/file/478281/download ('The Company admits, accepts, and acknowledges that it is responsible under United States law for the acts of its officers, directors, employees, and agents as set forth in the Statement of Facts . . . and that the facts described . . . are true and accurate.'); c.f. SEC Release No. 9453, Order Instituting Cease-and-Desist Proceedings, *In the Matter of TD Bank, N.A.* (23 September 2013), https://www.sec.gov/litigation/admin/2013/33-9453.pdf (clarifying that '[t]he findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding').

91 See, e.g., *In the Matter of Citibank, N.A.*, CFTC Docket No. 16-16 (25 May 2016), at p. 26, www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcitibankisdaorder052516.pdf ('Respondent agrees that neither it nor any of its successors and assigns, agents, or employees under its authority of control shall take any action or make any public statement denying directly or indirectly, any findings or conclusions in this Order or creating, or tending to create, the impression that this Order is without a factual basis; provided, however, that nothing in this provision shall affect Respondent's (i) testimonial obligations, or (ii) right to take positions in other proceedings to which the Commission is not a party.').

24.6 Resolving parallel investigations

24.6.1 Other domestic authorities

Most large-scale investigations of corporations involve a number of government agencies from federal and state governments, both prosecutorial and regulatory. The degree of coordination among these agencies varies case by case, and coordinating with multiple agencies can be challenging. However, there can be benefits to coordinated settlements, including closure for the company, enhanced legal certainty and the avoidance of unnecessary duplication,[92] or undue burdens of disclosure.[93] In addition, because the settlement announcements can occur on a single day, a company may be better able to control the release of information concerning the settlements and thereby limit the effect of any harmful disclosures on the market.[94] There is a distinct trend toward more and more multi-agency settlements, as agencies increase collaboration, even across borders.[95]

92 Section 391 of the revised version of the Financial CHOICE Act of 2017 (CHOICE Act 2.0) outlines policies to minimise duplication of enforcement efforts. In particular, the CHOICE Act 2.0 requires that, within 90-days of of enactment, each agency, including the Board of Governors of the Federal Reserve System, the Consumer Law Enforcement Agency, the Commodity Futures Trading Commission, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, the Office of the Comptroller of the Currency, the National Credit Union Administration, and the Securities and Exchange Commission, implement policies and procedures '(1) to minimize duplication of efforts with other Federal or State authorities when bringing an administrative or judicial action against an individual or entity; (2) to establish when joint investigations, administrative actions, or judicial actions or the coordination of law enforcement activities are necessary and appropriate and in the public interest; and (3) to, in the course of a joint investigation, administrative action, or judicial action, establish a lead agency to avoid duplication of efforts and unnecessary burdens to ensure consistent enforcement, as necessary and appropriate and in the public interest.' H.R. 10, 115thCong. § 391 (2017), 2017 CONG US HR 10 (Westlaw). Although, on 8 June 2017, the US House of Representatives passed the Choice Act 2.0 by a vote of 283-186, the future of the act remains uncertain as it appears unlikely to gain the votes it needs to pass in the Senate. See Mike Konczal, The G.O.P. Plan to Unleash Wall Street, N.Y. Times, 9 June 2017, https://www.nytimes.com/2017/06/09/opinion/the-gop-plan-to-unleash-wall-street.html?_r=0.

93 SEC, Press Release, SEC, CFTC Sign Agreement to Enhance Coordination, Facilitate Review of New Derivative Products, (11 March 2008), https://www.sec.gov/news/press/2008/2008-40.htm.

94 See, e.g., SEC, Press Release, JPMorgan Chase Agrees to Pay $200 Million and Admits Wrongdoing to Settle SEC Charges (19 September 2013), https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539819965 ('As part of a coordinated global settlement, three other agencies also announced settlements with JPMorgan today: the U.K. Financial Conduct Authority, the Federal Reserve, and the Office of the Comptroller of the Currency.'); SEC, Press Release, Standard Bank to Pay $4.2 Million to Settle SEC Charges (20 November 2015), https://www.sec.gov/news/pressrelease/2015-268.html; SEC, Press Release, VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations (18 February 2016), https://www.sec.gov/news/pressrelease/2016-34.html ('"This closely coordinated settlement is a product of the extraordinary efforts of the SEC, Department of Justice, and law enforcement partners around the globe to jointly pursue those who break the law to win business," said Kara N. Brockmeyer, Chief of the SEC Enforcement Division's FCPA Unit.').

95 Recent examples of multi-agency settlements include *In Re: Volkswagen 'Clean Diesel' Marketing, Sales Practices, and Products Liability Litigation*, 3:15-mc-02672-CRB (N.D. Cal. 17 May 2017),

Foreign authorities 24.6.2

Owing at least in part to the internationalisation of enforcement, the global nature of modern-day securities frauds, increased regulatory activity on the state level and the increased complexity of the markets,[96] regulatory investigations today tend to involve a variety of authorities.[97] Thus a corporation must carefully evaluate whether a settlement with certain authorities should be postponed until a global

https://www.ftc.gov/system/files/documents/cases/170517_volkwagen_ftc_final_order_.pdf (consent decree with the DOJ, on behalf of the EPA and stipulated order for permanent injunction and monetary judgment for the FTC); *SEC v. Teva Pharmaceutical Industries, Ltd.*, 1:16-cv-25298 (S.D. Fla. 22 December 2016), https://www.sec.gov/litigation/litreleases/2016/lr23708.htm (DPA with the DOJ and interest and disgorgement payments to the SEC in connection with civil and criminal violations of the Foreign Corrupt Practices Act); SEC Release No. 78989, Order Instituting Administrative and Cease-and-Desist Proceedings (29 September 2016) (Och-Ziff DPA with the DOJ and interest and disgorgement payments to the SEC to resolve criminal charges arising out of bribes paid to public officials in the Democratic Republic of Congo and Libya), https://www.sec.gov/litigation/admin/2016/34-78989.pdf; Commerzbank AG Plea Agreement (D.D.C. 12 March 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/12/commerzbank_deferred_prosecution_agreement_1.pdf (DPAs with the DOJ and DANY and consent orders with OCC and FinCEN); JPMorgan Chase Bank, N.A. Deferred Prosecution Agreement (S.D.N.Y. 6 January 2014), https://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/JPMC%20DPA%20Packet%20(Fully%20Executed%20w%20Exhibits (DPA with the DOJ and consent orders with the Federal Reserve, OFAC and NYDFS); SEC Release No. 9453, Order Instituting Cease-and-Desist Proceedings, In the Matter of TD Bank, N.A. (23 September 2013), https://www.sec.gov/litigation/admin/2013/33-9453.pdf (consent orders with the OCC and FinCEN and cease-and-desist order with SEC).

96 Mary Jo White, SEC Chair, Speech at the New York Bar Association's Third Annual White Collar Crime Institute, Three Key Pressure Points in the Current Enforcement Environment (19 May 2014), https://www.sec.gov/news/speech/2014-spch051914mjw.html.

97 Examples of global settlements involving regulators from multiple jurisdictions include Odebrecht S.A. and Braskem S.A. Plea Agreements, see Dep't of Justice, Press Release, Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (21 December 2016), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve (plea agreements with the DOJ, in which Odebrecht and Braskem agreed to pay a combined total penalty of at least $3.5 billion to resolve charges with authorities in the US, Brazil and Switzerland arising out of their schemes to pay hundreds of millions of dollars in bribes to government officials around the world); *SEC v. Embraer S.A.*, see SEC, Press Release, Embraer Paying $205 Million to Settle FCPA Charges (24 October 2016), https://www.sec.gov/news/pressrelease/2016-224.html (DPA with the DOJ, and interest and disgorgement payments to the SEC and Brazilian authorities to resolve criminal and civil charges arising out of bribery of government officials in the Dominican Republic, Saudi Arabia and Mozambique, and the false recording payments in India via a sham agency agreement); *SEC v. VimpelCom Ltd,* see SEC, Press Release, VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations (18 February 2016), https://www.sec.gov/news/pressrelease/2016-34.html (settlement with US and Dutch regulators, with significant assistance from Norwegian, Swedish, Swiss, and Latvian authorities); Citicorp, JPMorgan Chase & Co., Barclays PLC and The Royal Bank of Scotland plc Plea Agreements, see Dep't of Justice, Press Release, Five Major Banks Agree to Parent-Level Guilty Pleas (20 May 2015), https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas (global settlement of claims against five banks involving DOJ, the Federal Reserve, CFTC, and the New York State Department of Financial Services in the US, and the Financial Conduct Authority in the UK).

resolution can be reached. Coordinated global settlements often afford the company the opportunity to predict and prevent excessive, cumulative or unnecessary monetary penalties, continuing obligations and collateral consequences.[98]

98 For example, as part of a global settlement regarding Odebrecht, the DOJ's plea agreement provided that 'the United States will credit the amount that Odebrecht pays to Brazil and Switzerland over the full term of their respective agreements.' Dep't of Justice, Press Release, Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (21 December 2016), available at https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve. And, as part of a global settlement with Embraer to resolve alleged FCPA violations, the SEC announced that 'Embraer may receive up to a $20 million credit depending on the amount of disgorgement it will pay to Brazilian authorities in a parallel civil proceeding in Brazil.' SEC, Press Release, Embraer Paying $205 Million to Settle FCPA Charges (24 October 2016), https://www.sec.gov/news/pressrelease/2016-224.html.

25

Fines, Disgorgement, Injunctions, Disbarment: The UK Perspective

Peter Burrell and Paul Feldberg[1]

Criminal financial penalties 25.1

Companies and individuals subject to a multi-jurisdictional investigation are most likely to be investigated in the UK by the Serious Fraud Office (SFO), the authority responsible for the prosecution of serious economic crimes in England and Wales. In the event that a company or individual pleads guilty to a criminal charge or is found guilty after trial, the court will apply the Sentencing Council's Definitive Guideline for Fraud, Bribery and Money Laundering (the Guideline) in determining the financial or other penalty to be imposed. The Guideline was issued on 31 January 2014 and applies to individuals and corporates alike, and includes a specific section dedicated to the sentencing of corporate offenders.

The Guideline applies to all sentences passed on or after 1 October 2014, regardless of the date of the offence.[2] Therefore, cases still being investigated and prosecuted under legislation that pre-dates the Bribery Act 2010 (Bribery Act), which came into force in July 2011, will still fall to be sentenced by reference to the Guideline. In applying the Guideline to offences prosecuted under legislation that pre-date the Guideline, the court is entitled to reflect 'modern attitudes' to historic offences and make due allowance for any change in maximum sentence for that particular offence, to ensure that the sentence passed is in the interests of justice.[3] While in some cases that can result in an increase in penalty, in others it may mean a decrease. For example, under the Bribery Act the maximum sentence is 10 years' imprisonment whereas before it was seven years. On that basis, it could be argued a fine for a pre-Bribery Act offence calculated using the new

1 Peter Burrell is a partner and Paul Feldberg is counsel at Willkie Farr & Gallagher (UK) LLP.

2 Sentencing Council: Fraud, Bribery and Money Laundering Definitive Guideline, 1 October 2014.

3 *R v. Hall* [2011] EWCA Crim 2753; *R v. Clifford* [2014] EWCA Crim 2245.

Guideline should be discounted by up to 42 per cent to reflect the fact that where the Guideline has to be applied to both pre- and post-Bribery Act conduct, the fine should reflect that Parliament intended conduct after the Bribery Act came into force to be punished more seriously. The Guideline sets out a step-by-step guide to the sentencing process to be used by the court in assessing the sentence to be imposed on individuals and corporates. Set out below are the steps the sentencing court must follow when assessing the penalties to be imposed on a corporate defendant for offences of fraud, money laundering and bribery.

25.2 Compensation

The court must first consider whether any compensation should be paid by the company to the victim, for any injury, loss or damage resulting from the offence.[4] The amount of the order will be the amount the court considers appropriate, having regard to any evidence and to any representations made by or on behalf of the accused.[5] In respect of such claims, the SFO will need to provide evidence to the court of a request for compensation by the victim. In the case of *R v. Smith & Ouzman Ltd*,[6] Recorder Mitchell QC indicated that he would have refused the SFO's request for a compensation order as the SFO had not produced evidence of a request for compensation from the victim.

A compensation order is not mandatory, but if it is not made, the court should provide reasons as to why it has not made an order.[7] The court must have regard to the financial means of the defendant. If the defendant's means are limited, priority should be given to the payment of compensation over any other financial penalties.

25.3 Confiscation

Confiscation must be considered if either the Crown asks for it or the court thinks that it may be appropriate.[8] The aim of confiscation is to deprive defendants of the benefit that they have gained from their criminal conduct.[9] The amount confiscated will represent the total value of the advantage or benefit obtained by the defendant, although the order cannot be for a greater sum than the value of the assets the defendant has available to satisfy it. It is irrelevant whether the defendant has retained the benefit or not. The court must address the following factors before making a confiscation order: (1) whether the defendant has benefited from the criminal conduct; (2) the value of the benefit obtained; and (3) the sum that is recoverable from the defendant.[10]

4 s.130(1)(a) of the Powers of Criminal Courts (Sentencing) Act 2000.
5 s.130(4) of the Powers of Criminal Courts (Sentencing) Act 2000.
6 Unreported, Southwark Crown Court, 7 January 2015.
7 s.130(3) Powers of Criminal Courts (Sentencing) Act 2000.
8 The Guideline, p. 48.
9 s.6 Proceeds of Crime Act 2002.
10 *R v. May* [2008] 1 AC 1028.

The confiscation regime can be particularly harsh. Historically, in corruption cases a prosecutor could claim that the benefit obtained was the entire value of the contract won through the criminal conduct, and request that that amount be confiscated. However, recent case law suggests that the confiscation amount should be proportionate, and restricted to the gross profit earned by the company together with any other pecuniary advantage flowing from the corruption.[11] When calculating the gross profit, the approach is typically to 'add back' the amount of bribes paid which may have been deducted as an 'expense' before arriving at the gross profit.

An important consideration, particularly where companies participate in joint ventures or collaborate on projects, is that if a benefit is determined by the court to have been obtained jointly by co-defendants, the court may make a confiscation order against each defendant for the whole amount of the benefit obtained.[12]

Companies and individuals should also be aware that the prosecutor may ask the court to apply the criminal lifestyle provisions. If the court determines that a defendant has a criminal lifestyle (which may be the case if the defendant was convicted of two offences in the previous six years) the consequences can be serious.[13] The lifestyle provisions would also apply if a defendant pleads guilty or is convicted of two qualifying offences on the indictment. Perhaps the greatest risk is that it can be shown that the conduct in the indictment was committed over at least six months. If one thinks about an allegation of bribery, this is normally charged as both a conspiracy to bribe, as well as a substantive offence of bribery. Typically, a conspiracy charge will involve the offer of a bribe, the award of a contract and then the payments. This may well take much longer than six months, bringing the lifestyle provisions into play for even a simple one-off corrupt payment. In the case of a corporate defendant, if the conditions above are met, it will be assumed that property transferred or expenditure incurred by a company over the six years preceding the charge was obtained from general criminal conduct, and therefore liable to be confiscated; unless the company can show this assumption to be incorrect or that applying the criminal lifestyle provision would risk serious injustice.[14]

11 *R v. Waya* [2012] UKSC 51, [2012] 3 WLR 1188: courts must consider Article 1 of Protocol 1 of the ECHR when making a confiscation order, and ensure in particular that confiscation be proportionate to the legitimate aim of recovery of the proceeds of crime.]; *R v. Sale* [2013] EWCA Crim 1306.

12 *R v. Ahmad and Fields* [2015] AC 299. Any sum recovered from one defendant must be taken into account when bringing an action against another.

13 s.75 Proceeds of Crime Act 2002 sets out the three tests, the offence (1) is specified in Schedule 2 of the Proceeds of Crime Act 2002; (2) the offence constitutes conduct forming part of a course of criminal activity; or (3) was committed over a period of at least six months and the defendant has benefited from the conduct.

14 s.10 Proceeds of Crime Act 2002.

25.4 Fine

The fine figure is calculated by reference to the harm caused by the particular criminal conduct. For bribery offences, the appropriate figure is normally the gross profit obtained from the criminal conduct. For fraud offences, it is normally the actual or intended gross gain to the offender, and for money laundering offences, the amount of the money laundered.[15]

Once the relevant harm figure is determined, the court will apply a multiplier, to reflect the culpability of the defendant. The Guideline provides a non-exhaustive list of factors to be taken into account to assess the level of culpability, which will either be high, medium or low. The factors include the role played by the corporate entity in the unlawful activity, the duration of the offence, any obstruction of detection, the scale and vulnerability of the victims, and whether the offence involved the corruption of government officials.[16] The multiplier will either be 300 per cent (high), 200 per cent (medium) or 100 per cent (low). The court will then adjust the percentage within the relevant category range (from 20 per cent up to 400 per cent) depending on any aggravating or mitigating factors, a non-exhaustive list of which is set out in the Guideline.[17] The fine must represent the seriousness of the offence, as well as the financial circumstances of the defendant.

The court should then 'step back' and consider adjusting the level of the fine based on the effect of compensation, confiscation and fine taken together, which should remove the gain, provide appropriate punishment and act as a deterrent. If a defendant is being sentenced for more than one offence, the court must also consider whether the total sentence imposed on the defendant is just and proportionate based on the misconduct. It is perhaps this step-back element which increases the uncertainty as to the size of fine.

Before the Guideline was introduced, Thomas LJ stated in relation to the fine element 'I approach sentencing on the basis in this case that a fine comparable to that imposed in the US would have been the starting point.'[18] This quote was referred to in the first DPA.[19] Following that *dictum*, a judge may decide to step back and increase the fine to the level a US court would impose. Anecdotally, we are aware from recent cases that in one instance the judge did inquire of the SFO what the fine would have been if the US Sentencing Guidelines were being followed. Owing to this level of uncertainty and because the fine cannot be agreed by the prosecution and defence even as part of a plea bargain (or DPA), some corporate offenders may wish to consider asking the court for an indication of the sentence it could expect to receive should it plead guilty, often known as seeking a *Goodyear* indication.[20]

15 The Guideline, p. 49.

16 Ibid.

17 Ibid., p. 50.

18 *R v. Innospec Ltd*, Southwark Crown Court, 26 May 2010, unreported.

19 SFO and Standard Bank Plc, 30 November 2015.

20 See *R v. Goodyear* [2005] 1 WLR 2532.

The procedure governing such requests is set out in the case of *R v. Goodyear*, and the Criminal Practice Direction.[21] If the request is granted, the indication will be confined to the maximum fine the court would impose if the defendant pleaded guilty at that stage in the proceedings. It will not include ancillary matters such as confiscation. The court cannot give an indication where there is a dispute between the parties as to the factual basis for sentencing. The agreed factual basis should be reduced to writing and placed before the judge. Crucially, the judge has absolute discretion to decline to give any indication. If an indication is given and the defendant does not plead guilty having had a reasonable opportunity to consider it, then the indication will fall away. If the case proceeds to trial, the prosecution will not be able to refer to the request for a *Goodyear* indication. Finally, a *Goodyear* indication cannot be sought pre-charge and is therefore unlikely to be of assistance in DPA cases.

Guilty plea 25.5

If a guilty plea is entered by the defendant, the court must give the defendant credit.[22] The Reduction in Sentence for a Guilty Plea Definitive Guideline recommends a sliding scale of discount, which will be applied to the harm figure, dependent on the stage at which the plea is entered: one-third for a plea at the first reasonable opportunity; one-quarter once the trial date is set; and one-tenth at the start of or during trial.[23] The court should also consider applying a further discount to reflect any assistance provided by the defendant to the prosecution.[24]

Costs 25.6

The court may make an order in favour of either the prosecution or the defendant.[25] Ordinarily, in the event of a plea or a conviction, the court will make an order that the defendant pay the investigation and court costs of the prosecuting body. If a defendant is acquitted or the prosecution does not proceed to trial, the court may make an order in favour of the defendant. A defendant's costs will be met out of central funds[26] in an amount the court considers reasonably sufficient to compensate the defendant for any expenses properly incurred in the proceedings. A defendant's costs order should usually be made unless there is a positive reason for not doing so.

21 CPD VII Sentencing C: Indications of Sentence.

22 s.144 Criminal Justice Act 2003.

23 The Reduction in Sentence for a Guilty Plea Definitive Guideline, Revised July 2007, p. 5.

24 *R v. Wood* [1992] 2 Cr App R (S) 347.

25 Prosecution of Offences Act 1985; Access to Justice Act 1999; Lord Chief Justice's Practice Direction (Costs in Criminal Proceedings) 201; and Costs in Criminal Case (General) Regulations.

26 s.16 of the Prosecution of Offences Act 1985.

25.7 Director disqualifications

Under the Company Directors Disqualification Act 1986 (CDDA), any director convicted of misconduct in connection with a company (either in the UK or overseas) or considered to be unfit to be concerned with the management of a company, may be disqualified from the right to manage a company by the making of a disqualification order.[27] A disqualification order may bar a person from acting as a director of any UK company for up to 15 years, and the person will be entered on the register of disqualified directors.

It should be noted that proceedings for a disqualification order are not brought by the company itself. If a director is convicted of an indictable offence in connection with the promotion, formation or management of a company,[28] it is usually the court before which the director is convicted that will consider whether a disqualification order ought to be made and impose the order. However, in the case of an offence committed outside the United Kingdom, the Secretary of State has standing to apply to the court for a disqualification order, if it appears expedient in the public interest.

The Secretary of State also has standing to apply to court for a disqualification order against a person who is (or has been) a director or a shadow director of a company, if it appears expedient in the public interest. On an application, the court may make a disqualification order where it is satisfied that such person's conduct in relation to the company (alone or taken together with their conduct as a director or shadow director of one or more other companies or overseas companies) makes them unfit to be concerned in the management of a company.

Following recent amendments to the CDDA, a disqualification order for unfitness may be made on any information properly put before the court that demonstrates that the director or shadow director is unfit to be concerned in the management of a company.[29] As an alternative, the Secretary of State has discretion to accept a disqualification undertaking, if it is expedient to do so instead of making an application for a disqualification order.

The matters to be taken into account by the court or the Secretary of State, in considering whether a person's conduct makes them unfit to be concerned in the management of a company, whether to make a disqualification order and what the period of disqualification should be, are set out in Schedule 1 to the CDDA. Specific matters are to be taken into account where the person in question is or has been a director, including (1) any misfeasance or breach of fiduciary duty by the director in relation to a company or overseas company, (2) any material breach of any statutory or other obligation of the director which applies as a result of

27 s.2(1), s.5A(2) and s.8(2) of the CDDA.

28 In addition, any conviction in connection with the liquidation or striking off of a company, with the receivership of a company's property and/or with being an administrative receiver of a company's property may also result in a disqualification order: s.2(1) CDDA.

29 s.109 of the Small Business, Enterprise and Employment Act 2015 removed the previous reference to 'investigative material' in s.8 of the CDDA, with effect from 1 October 2015.

being a director of a company or overseas company, and (3) the frequency of any such conduct.

If a company enters formal insolvency proceedings, appointed liquidators or administrators must submit reports about directors (including shadow directors) to the Secretary of State if it appears to them the conditions for disqualification are satisfied.[30] For companies entering insolvency proceedings starting on or after 6 April 2016, this obligation to report will apply in respect of all directors and shadow directors (current and past within the previous three years), irrespective of their conduct.[31]

Civil recovery orders 25.8

Companies should also be aware of the SFO's ability to obtain a civil recovery order (CRO) to recover property it has proved, on the balance of probabilities, is or represents property obtained through unlawful conduct, pursuant to Part 5 of the Proceeds of Crime Act 2002 (POCA 2002).

The SFO is not required to obtain a conviction to obtain a CRO. The civil standard of proof, and the absence of the need for a conviction has historically made the use of CROs attractive to both the SFO and corporate entities alike. CROs have also been used by the SFO in addition to a prosecution, to target tainted assets. However, CROs, which are *in rem* actions, have rarely been used by the SFO in this way, as the SFO must show that the property it seeks to recover is in fact the property that has been created by the criminal conduct. Such difficulties associated with proving the exact nature of the property can of course be dealt with by the respondent entity admitting that the property is tainted in the way alleged by the applicant.

One notable case in which the SFO used a CRO to recover tainted assets followed a guilty plea to corruption offences and breaches of UN sanctions in 2009 by the engineering firm Mabey & Johnson Ltd. In 2012, the SFO then successfully obtained a CRO of approximately £130,000 against its parent company, Mabey Engineering (Holdings) Ltd, even though the parent company had no knowledge of the unlawful conduct. The CRO was obtained to recover a sum representing the value of the dividends received by the parent that were derived from contracts won through Mabey & Johnson Ltd's unlawful conduct.

However, the SFO's use of CROs as an alternative to prosecution in corporate matters has received considerable criticism. The criticism concerned the lack of detail surrounding the underlying criminal conduct, and the basis on which the SFO decided to pursue a CRO rather than a criminal conviction.

Perhaps in light of this criticism, on 29 November 2012 the Attorney General's Office published guidance for prosecutors and investigators on how they should use these asset recovery powers.[32] The Attorney General's guidance sets out a

30 s.7 of the CDDA 1986.

31 s.7A of the CDDA 1986.

32 Guidance for prosecutors and investigators on their asset recovery powers under section 2A of the Proceeds of Crime Act 2002, 29 November 2012.

non-exhaustive list of circumstances in which these powers might be appropriately used when it is not feasible to secure a conviction. It also sets out a non-exhaustive list of circumstances in which these powers could still be properly used when a conviction is feasible, but the use of asset recovery powers that do not require a conviction might better serve the overall public interest.

The SFO now states that it may use these powers as an alternative (or in addition) to prosecution, but states that if it does so, it will publish its reasons, the details of the illegal conduct and the details of the disposal. The last significant CRO obtained by the SFO as an alternative to prosecution was in 2012.[33] On 30 September 2017, the Criminal Finances Act 2017 came into force. Under section 20 of this Act, the FCA may recover property in cases where there has not been a conviction, but where it can be shown, on the balance of probabilities, that property has been obtained through unlawful conduct. Applications are made in the High Court.

The Criminal Finances Act 2017, Part 1, section 1-9 amends section 362 of POCA 2002 and empowers the High Court to make unexplained wealth orders (UWOs). These require persons suspected of involvement in, or association with, serious criminality to explain the origin of assets that appear to be disproportionate to their known income. A failure to provide a response will give rise to a presumption that the property is recoverable, to assist any subsequent civil recovery action. Persons may also be convicted of an offence if they make false or misleading statements in response to a UWO. Applications can be made by the SFO, NCA and FCA, among others.

See Chapter 17, Section 3.3, on individuals in cross-border investigations; and Chapter 30, Section 1.3, on individual penalties

25.9 Criminal restraint orders

The SFO and other enforcement authorities are also able to apply for a restraint order in the Crown Court. Such an order prevents a defendant from dissipating, disposing of or detrimentally dealing with its assets. The Crown Court has the power to impose a restraint order, which applies to all 'realisable property' currently in the defendant's possession, or subsequently acquired by the defendant.[34] As such, restraint orders are the criminal law equivalent of freezing injunctions.

The legislation stipulates five different scenarios in which a restraint order may be imposed.[35] The common thread is that there must normally be reasonable cause to believe that the defendant has benefited from his or her criminal conduct and is likely to dissipate the assets prior to any fine or confiscation order being imposed. If that is the case, an application for a restraint order may be made after commencement of a criminal investigation, during proceedings for an offence, or in the context of specific applications filed by the prosecution.

33 Oxford Publishing Limited: https://www.sfo.gov.uk/2012/07/03/oxford-publishing-ltd-pa y-almost-1-9-million-settlement-admitting-unlawful-conduct-east-african-operations/.

34 s.41(2), Proceeds of Crime Act 2002; this is subject to a number of exceptions, such as for legal fees and ordinary living expenses.

35 Ibid., s.40.

The court has broad discretion in defining the terms of a restraint order,[36] but must require the applicant, usually the SFO, to report to the court on the progress of the investigation at specified intervals.[37] A breach of a restraint order constitutes criminal contempt.

Serious crime prevention orders 25.10

Unlike the orders discussed above, Serious Crime Prevention Orders (SCPOs), which were first introduced in the Serious Crime Act 2007 (SCA) and which have been significantly broadened by the Serious Crime Act 2015, can be imposed prior to any finding of criminal liability. SCPOs are civil orders.[38]

SCPOs may be imposed only upon application by the Director of Public Prosecutions or the Director of the SFO[39] where the court is satisfied that the person concerned has been involved in 'serious crime' anywhere in the world, and that there are reasonable grounds to believe that an SCPO would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales.[40] The prosecution needs to prove these matters to the civil standard of proof: namely, it must be more likely than not that the defendant has been involved in serious crime, and that the order would protect the public.[41] However, there is authority from the House of Lords regarding Anti-Social Behaviour Orders (ASBOs), which are similar to SCPOs in nature and operation, to the effect that the standard of proof in proceedings where 'allegations were made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person' is the criminal standard of proof, namely beyond reasonable doubt.[42] It is unclear whether this would apply to SCPOs notwithstanding the statutory provisions, but the CPS has taken the view that the criminal standard does apply to the issue as to whether a defendant was 'involved' in serious crime.[43]

There are two types of SCPO: Crown Court orders and High Court orders. The Crown Court may impose an SCPO only upon conviction of a person for a serious crime. The High Court has jurisdiction to make an order without the need for a conviction.[44] The distinction turns on proof of 'involvement in' as opposed to 'conviction of' a serious offence. It follows that 'involvement' is broader than 'conviction', and includes conduct that may have facilitated the commission by another of a serious offence in England and Wales,[45] or that was likely to facilitate such offence, whether or not it was actually committed.[46]

36 Ibid., s.41(7).
37 Ibid., s.41(7B)(a).
38 SCA s.35(1).
39 SCA s.8. Thus SCPOs are not available in private prosecutions.
40 SCA s.1(1).
41 SCA s.35(2).
42 *R v. Manchester Crown Court ex p McCann* [2002] UKHL 39, [2003] 1 AC 787.
43 CPS Guidance, para. 13.1.
44 SCA s.1(1).
45 SCA s.2(1)(b).
46 SCA s.2(1)(c).

'Serious crime' is defined broadly, and includes any offence listed in Part 1 of Schedule 1 to the SCA, as well as any other offence 'which, in the particular circumstances of the case, the court considers to be sufficiently serious to be treated' as serious crime for the purposes of an SCPO application.[47] Schedule 1 lists an array of specific offences under 16 headings, ranging from trafficking in arms, to money laundering, fraud, tax evasion, bribery and offences in relation to breaches of sanctions.[48]

SCPOs may be imposed on individuals as well as bodies corporate, partnerships and unincorporated associations.[49] Where a corporation is in breach of an order, the court may order its dissolution where to do so would be 'just and equitable.'[50] The court has wide discretion in formulating the terms of the SCPO.[51] The overriding test for imposition of an SCPO is that the court may include such terms as it considers 'appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person concerned in serious crime in England and Wales.'[52] Section 5 of the SCA contains a non-exhaustive list of restrictions that might be imposed, such as limitations on financial, property or business dealings;[53] a person's associations or communications;[54] use of any item;[55] and travel both within and outside the jurisdiction.[56] Notably, an SCPO may also include a requirement to provide specified information or disclose documents to law enforcement.[57] While this is subject to legal professional privilege,[58] there is no provision in the SCA to protect the right against self-incrimination. However,

47 SCA s.2(2).

48 SCA Sched. 1. In particular offences under: Proceeds of Crime Act 2002, ss.327 (concealing, etc. criminal property), 328 (facilitating the acquisition, etc. of criminal property), and 329 (acquisition, use and possession of criminal property); Fraud Act 2006 ss.1 (fraud by false representation, failing to disclose information or abuse of position) and 11 (obtaining services dishonestly); Bribery Act 2010 ss.1 (offences of bribing another person), 2 (offences relating to being bribed), 6 (bribery of foreign public officials).

49 SCA s.30.

50 SCA s.27(4)(b).

51 The court may include a provision allowing a law enforcement agency to enter into a monitoring arrangement with a third-party contractor, and to have the subject of the SCPO pay some of the costs: SCA s.39(4), (5).

52 SCA s.1(3) (High Court); s.19(5) (Crown Court). Other legislation dealing with civil orders in furtherance of the criminal law, such as ABSOs, sexual offences prevention orders and terrorism prevention and investigation measures impose a requirement of 'necessity' rather than 'appropriateness'. As most applications for an SCPO will engage one or more Convention rights, however, the court will need to consider the Human Rights Act 1998, in particular the precept of proportionality, which includes necessity. See also CPS Guidance, para. 13.3 et seq.

53 SCA s.5(3)(a).

54 SCA s.5(3)(c).

55 SCA s.5(3)e).

56 SCA s.5(3)(f).

57 SCA s.5(5)(a). But a requirement to provide information orally is not permissible: SCA s.11.

58 SCA s.12.

a statement made by the defendant in compliance with a request for information may not be given in evidence against the defendant.[59]

The National Crime Agency (NCA) has published a list of all SCPOs in force. As of 17 August 2016, there are 221 SCPOs in force.[60] They have been imposed for a range of offences, ranging from drug trafficking (by far the largest category) to money laundering, illegal immigration and fraud. The conditions imposed in the orders vary in severity, but include restrictions on possessing cash and financial reporting requirements. However, this list does not include SCPOs obtained by local police authorities or HMRC that the NCA was not notified of. As of 31 March 2014, there were 136 SCPOs in place that were not obtained by the NCA.[61] The vast bulk of orders were obtained post-conviction in the Crown Court; there appears to be only one instance where an SCPO was obtained in the High Court.[62]

One possible SCPO could be a form of monitorship. To date, monitors have been appointed following a criminal plea, a CRO and a DPA. In each case the appointment of a monitor would likely have been agreed as part of the overall resolution of the case. However, SCPOs permit the courts to impose a monitor.

Regulatory financial penalties and other remedies 25.11

Companies and individuals may also face regulatory sanctions for their misconduct. The primary regulatory authority is the Financial Conduct Authority (FCA), which regulates firms and individuals performing regulated financial services activities, such as banks, credit unions and insurance firms. The FCA may bring enforcement action against these firms (as well as individuals) in connection with economic crimes to the extent that it considers there has been a regulatory breach.

On 6 March 2010, the FCA adopted a new method of calculating financial penalties and published the procedure in the Decision Procedure and Penalties Manual (DEPP). The new procedure allows the FCA to take into account the revenue generated by the relevant part of the financial institution when determining the level of the fine, which may well be in excess of any gain made through misconduct. In relation to an individual, the FCA will look at the gross amount of any benefit received by the individual in connection with the breach when assessing the fine figure.

The use of the new procedure has resulted in the FCA imposing fines on financial institutions for conduct after 6 March 2010 that are substantially higher than fines that would have been imposed under the previous penalty regime. If the

59 SCA s.15. This is similar to the provisions under the Criminal Justice Act 1987 s.2.

60 See http://www.nationalcrimeagency.gov.uk/publications/621-ancillary-orders. The list includes financial reporting orders, which preceded SCPOs and were merged within the latter category by the Serious Crime Act 2015. Any orders obtained by the NCA's predecessor, the Serious Organised Crime Agency, are equally included.

61 Home Office Fact Sheet, 'Serious Crime Act 2015: Improvements to Serious Crime Prevention Orders.' Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415969/Fact_sheet_-_SCPOs_-_Act.pdf.

62 Ibid.

relevant conduct spans the date of both the old and new penalty procedures, the FCA will apply the old procedures to the conduct preceding 6 March 2010 and the new procedures to the subsequent conduct.

25.11.1 Penalty regime before 6 March 2010

When determining the financial penalty for any failings before 6 March 2010, the FCA will take the following factors into account:[63]

- the deterrent effect of any fine;
- the nature, seriousness and impact of the breach;
- the extent to which the breach was deliberate or reckless;[64]
- the amount of benefit gained or loss avoided;
- the conduct following the breach;
- any mitigating and aggravating factors; and
- any other regulatory action taken by the FCA.

25.11.2 Penalty regime after 6 March 2010

Under the new penalty regime, the FCA uses five steps to determine the level of a financial penalty it will impose on a firm for a regulatory breach:[65]

1 disgorgement, normally the revenue made, or the loss avoided from the breach;
2 seriousness of the breach;[66]
3 any mitigating and aggravating factors;
4 adjustment for deterrence;[67] and
5 settlement discount.[68]

---

63 CA Handbook, Decision Procedure and Penalties Manual (DEPP) 6.5 (previous version applicable to breaches pre-6 March 2010).

64 For corporate entities, the FCA does not need to conclude that the actions of the institution as a whole were deliberate or reckless, but that the actions of the relevant employees within the institution were. The FCA may then find that owing to the improper actions of the employees, the financial institution was reckless in failing to ensure that its systems and controls were adequate to meet its regulatory obligations.

65 FCA Handbook, Decision Procedure and Penalties Manual (DEPP) 6.5 (current version updated 6 March 2010).

66 In relation to corporate entities this figure will be determined by reference to the 'relevant revenue' from the particular product line or business during the period of the breach. The FCA will determine what percentage of the revenue figure it considers to be an appropriate financial penalty, from a minimum of 0 per cent to a maximum of 20 per cent. The assessment is based on a number of factors including the impact and nature of the breach, and whether the breach was deliberate or reckless. A Level 5 breach is most serious at a 20 per cent penalty, reducing in 5 per cent increments, such that a Level 1 breach is 0 per cent. The figure to be imposed under this section is in addition to the disgorgement amount.

67 If the FCA considers the figure arrived at after Step 3 is insufficient to deter the firm that committed the breach, or others, from committing further or similar breaches, the FCA may increase the financial penalty.

68 If the financial institution settles at the earliest stage, it will receive a 30 per cent reduction on the financial penalty. However, this will not apply to any disgorgement sum due.

Since the introduction of the new regime, the FCA has an increased flexibility in determining the level of financial penalty to be imposed on a financial institution. For any misconduct after 6 March 2010, the new penalty regime gives the FCA wide discretion in determining the 'relevant revenue' forming the basis for the penalty, and this can now include the underlying revenue of the relevant part of the financial institution. Since the introduction of the revised DEPP, there has been a steady increase in the level of fines imposed by the FCA (or its predecessor) from a total of just over £66 million in 2011 to nearly £1.5 billion in 2014.[69]

On 1 March 2017, the FCA introduced a new enforcement procedure for disciplinary cases. Previously, a firm or individual was eligible for: a 30 per cent discount in penalty if they settled with the FCA at an early stage in proceedings (Stage 1); a 20 per cent discount if they settled prior to the expiry of the period for making written representations (Stage 2); or a 10 per cent discount if they settled up to the decision notice being issued (Stage 3).

Under the new procedure, there are now three additional options available to parties looking to resolve partly contested cases at Stage 1. The penalty discounts of 20 per cent and 10 per cent for settling cases at Stage 2 and Stage 3 are, however, no longer available. The new options allow the party to do one of the following:

- obtain a 30 per cent discount if the firm or individual agrees with the FCA all the relevant facts and accepts that they amount to regulatory breaches, but disputes the penalty to be imposed;
- obtain a 15–30 per cent discount if the firm or individual agrees with the FCA all the relevant facts but disputes that they amount to regulatory breaches and disputes the penalty. The percentage of the discount made available to the firm or individual is at the discretion of the Regulatory Decisions Committee (RDC), the decision-making board responsible for deciding if enforcement action is appropriate); or
- obtain a 0–30 per cent discount in penalty if the firm or individual partly agrees with the FCA some of the facts, liability and penalty, but disputes a number of other issues. Again, the percentage of the discount made available to the firm or individual is at the discretion of the RDC.[70]

As a result, settlement discounts will now be available in a wider range of circumstances allowing regulated firms to challenge aspects of the FCA's enforcement team's findings before the RDC.

Withdrawing a firm's authorisation 25.12

In addition to imposing financial penalties on authorised firms and individuals, the FCA has a number of other powers at its disposal to it meet its strategic and operational objectives, in particular ensuring that financial markets function well, protecting consumers and ensuring integrity and competition in the markets.[71]

69 http://www.fca.org.uk/firms/being-regulated/enforcement/fines.

70 https://www.fca.org.uk/publication/corporate/enforcement-information-guide.pdf.

71 FSMA s.1B(1)-(3).

Perhaps the most draconian measure the FCA can impose on a firm is the withdrawal of its authorisation to engage in regulated activities.

The Financial Services and Markets Act 2000 (FSMA), as substantially revised by the Financial Services Act 2012, imposes a general prohibition on a person or entity engaging in 'regulated activities', which are defined in Schedule 2 to FSMA, but include most financial advisory and transactional work.[72] The general prohibition applies unless a person, legal or natural, is exempt or has been 'authorised' to engage in such activity under FSMA.[73] A common form of such authorisation is permission given by the FCA to a firm under Part 4A of FSMA. In granting permission, the FCA must ensure that the authorised person is satisfying certain 'threshold conditions', and will continue to do so. One key threshold condition is suitability: an authorised person must be 'a fit and proper person having regard to all the circumstances.'[74] The FCA's powers include a right to cancel this permission if it appears to the FCA that the authorised person is failing or is likely to fail to fulfil the threshold conditions.[75]

The withdrawal power is exercisable where the FCA believes that it is 'desirable to exercise the power in order to advance . . . one or more of its operational objectives.'[76] While the power is broadly worded, the FCA's Enforcement Guidelines state that the cancellation power will be exercised mainly where the FCA has 'very serious concerns' about a firm, or the way its business is or has been conducted.[77] More specifically, this will be the case where the firm in question has repeatedly failed to comply with FCA rules and requirements, or has failed to co-operate with the FCA in its supervisory capacity.[78] Withdrawal of permission means that the authorised person ceases to be authorised and cannot engage in any regulated activities.[79] As an alternative to withdrawing permission, the FCA has broad powers to vary a Part 4A permission, or to impose specific conditions on its exercise instead.[80]

25.13 Approved persons

FSMA distinguishes between regulated activity and controlled functions. 'Controlled functions' are defined in the FCA Handbook,[81] and include functions such as director, chief executive or partner. In essence, senior positions within an entity that is an 'authorised person' under FSMA must be held by persons

72 FSMA Sched. 2.

73 FSMA s.19.

74 FSMA Sched. 6, para. 2E.

75 FSMA s.55J(b). Other threshold conditions relate to matters such as office location, effective supervision, resources, and business model. The FCA may also cancel permission if the authorised person has not engaged in regulated activity in the previous 12 months: s.55J(b).

76 FSMA s.55J(c).

77 FCA EG 8.5.1.

78 FCA EG 8.5.2(7), (8); see also FSMA s.55L(2).

79 FSMA ss.19, 31(1)(a).

80 FSMA ss.55J, 55L.

81 See FSMA s.56(3); FCA Handbook, SUB 10C.4 and SUB 10A.4.4.

who are specifically approved by the FCA for that purpose. This requires a formal application to the FCA,[82] which will need to be satisfied that the person is 'fit and proper',[83] taking into account such matters as qualifications, training, competence and other personal characteristics.[84] The FCA Handbook contains a mandatory reporting and disclosure requirement in relation to approved persons. An authorised person must inform the FCA 'if it becomes aware of information which would reasonably be material to the assessment of an FCA-approved person's . . . fitness and propriety.'[85] The FCA has a broad power to withdraw approval, and this is not predicated on a report from an authorised person.[86] The FCA will however first consider whether its objectives can be adequately achieved by imposing less draconian measures, such as public censures, financial penalties and private warnings.[87]

Restitution orders 25.14

The FCA is also empowered to seek restitution where it seeks to remedy any profit made, or loss caused, by a breach of certain FSMA rules to those adversely affected by that breach. Under Part XXV of FSMA, a restitution order may be imposed where the High Court is 'satisfied that a person has contravened a relevant requirement, or been knowingly concerned in the contravention of such a requirement.'[88] Further, the person against whom the order is sought must either have profited from the contravention, or must have caused loss or otherwise an adverse effect to another.[89]

The FCA will take the following considerations into account in determining whether to seek restitution, in the light of 'all the circumstances of the case':[90] whether the profits or losses are quantifiable; the number of persons affected; costs to the FCA; alternative redress, such as compensation schemes or another regulator; whether victims can be expected to bring proceedings in their own right; the firm's solvency; alternative powers available to the FCA; and the conduct of persons having suffered loss, for example whether they have contributed to their loss.[91] This list is not exhaustive. If it finds that these requirements are met, the court may order restitution of a sum it considers 'just' having regard to the profits made or loss caused, as the case may be.[92] If the court orders restitution, the money will be paid to the FCA rather than to the person who has suffered loss or at whose

82 FSMA s.60.
83 FSMA s.60(1).
84 FSMA s.60(2).
85 FCA Handbook, SUB 10A.14.17.
86 FSMA s.63.
87 FCA EG 9.3.1.
88 FSMA s.382(1), (6). The meaning of 'relevant requirement' is somewhat narrower than under the injunction provisions, but is substantially the same; see s.382(9).
89 Ibid.
90 FCA EG 11.2.1.
91 Ibid.
92 FSMA s.382(2).

expense a profit has been made (FSMA refers to these as 'qualifying persons').[93] However, the FCA must then disburse the money among the qualifying persons according to the terms of the court order.[94] The payment of restitution does not bar an ancillary civil claim for damages to be brought by qualifying persons.[95]

The FCA also has powers to order compensation. On 28 March 2017, the FCA used its powers[96] for the first time to require a listed company to pay compensation for market abuse. Tesco agreed that it committed market abuse in relation to a trading update it published on 29 August 2014, which gave a false or misleading impression regarding the value of publicly traded Tesco shares and bonds. Tesco agreed to pay compensation to investors who purchased Tesco securities on or after 29 August 2014 and who still held those securities when the statement was corrected on 22 September 2014. Under the compensation scheme, Tesco must pay each investor an amount equal to the inflated price of each security. The FCA estimated that the total compensation payable under the scheme is likely to be in the region of £85 million, plus interest.

25.15 Debarment

In addition to financial penalties, companies will need to be mindful of the impact that any conviction, or misconduct not resulting in a conviction, may have on their ability to tender for public contracts. A conviction or certain misconduct may result in debarment from tendering for public procurement contracts. The rules governing debarment are contained in the Public Contracts Regulations 2015 (the Regulations), which came into force in the UK on 26 February 2015, and implemented the EU Procurement Directive (the Directive).[97]

Debarment can be mandatory or discretionary. Debarment is mandatory if the economic operator (i.e., the tendering company) has been convicted of a specific category of offence, including economic crimes such as bribery, corruption, money laundering, and fraud or conspiracy to defraud affecting the EU's financial interests. Debarment will also be mandatory if an individual who is a member of the relevant company's administrative, management or supervisory body, or has powers of representation, decision or control in the company, is convicted of one or more of these offences.[98]

In comparison with the previous legislation, which imposed an automatic, indefinite debarment for companies convicted of these types of offence, mandatory debarment now only applies for a maximum of five years.

Discretionary debarment applies to a different range of conduct, including insolvency, the distortion of competition, and where a contracting authority

93 FSMA s.382(2).
94 FSMA s.382(3).
95 FSMA s.382(7).
96 FSMA s.384
97 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.
98 Regulation 57(1).

is able to demonstrate by appropriate means that a company is guilty of grave professional misconduct rendering its integrity questionable. An authority may exclude a company from participation in procurement procedures[99] for three years following such conduct.[100]

While the Regulations do not define 'grave professional misconduct', the European Court of Justice has interpreted this term as covering 'all wrongful conduct which has an impact on the professional credibility of the operator'.[101] Reference to a conviction for an economic crime outside the remit of mandatory debarment could form the basis for demonstrating such misconduct.

The most significant change in respect of debarment in the UK is the introduction of self-cleaning, which applies to both mandatory and discretionary debarment. The Regulations set out a number of conditions which, if a company meets them, can demonstrate that company's suitability for access to public procurement tenders, despite the existence of prior grounds for mandatory or discretionary exclusion. The conditions include the payment of compensation, co-operation with investigative authorities and taking concrete measures to prevent further criminal offences or misconduct. If a contracting authority considers evidence of self-cleaning provided to it by a company to be sufficient, it will not debar the company.[102] The gravity and circumstances of the misconduct are relevant factors when evaluating whether a company has self-cleaned such that, the graver the offence, the more comprehensive these steps will need to be.[103]

Outcomes under a DPA 25.16

Even when a company in the UK enters into a deferred prosecution agreement (DPA), it will still be subject to the range of financial penalties applicable to a plea or a conviction. The legislation and DPA Code[104] state that the level of financial penalty imposed should be broadly comparable to a fine that a court would have imposed following a guilty plea,[105] which would ordinarily be a reduction of one-third. However, in recent DPAs[106] approved by the court, Sir Brian Leveson, President of the Queen's Bench Division, has applied 50 per cent reductions to the financial penalty imposed. In the *XYZ* DPA, Leveson P considered that a 50 per cent reduction was appropriate as the company had self-reported in a timely way

99 Regulation 57(8)(c).

100 Regulation 57(12).

101 Case C-465/11 *Forposta v. Poczta Polska*; para. 27. This was in light of Article 45(2) of the previous Public Procurement Directive, Directive 2004/18/EC, though it remains persuasive to the new Public Procurement Directive.

102 Regulation 57(13).

103 Regulation 57(16).

104 Deferred Prosecution Agreements Code of Practice, Crime and Courts Act 2013.

105 Crime and Courts Act 2013, Schedule 17, Paragraph 5(4).

106 *SFO v. XYZ* [2016] (identity of defendant subject to reporting restrictions at the time of publication); redacted preliminary and final judgments available at https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/; *SFO v. Rolls-Royce PLC and Rolls-Royce Energy Systems Inc* [2017], available at https://www.sfo.gov.uk/cases/rolls-royce-plc/.

and had fully co-operated with the SFO. The court in its judgment stated that the reduction was made to encourage others to act in a similar way when confronting corporate criminality.[107] In the *Rolls-Royce* DPA no such initial self-report was made by the company but the court still reduced the financial penalty by 50 per cent. Leveson P cited Rolls-Royce's 'extraordinary cooperation' in the SFO's investigation, including voluntary disclosure of internal investigation materials, not winding up companies of interest to the SFO's investigation and identifying conduct to the SFO that went beyond what had triggered the SFO's initial investigation, as factors that he had regard to when reducing the financial penalty.[108]

In addition to a reduced fine, as a DPA does not amount to a conviction, the mandatory debarment provisions of the Regulations will not apply. However, if a DPA is agreed and approved by the court, the DPA and the underlying facts and conduct will be published. A contracting authority may consider that the underlying facts and conduct as set out in the DPA are an 'appropriate means' of demonstrating that a company is guilty of 'grave professional misconduct', in accordance with the Regulations, resulting in discretionary debarment from public procurement procedures, as considered above.

25.17 Disclosure to other authorities

A look at recent UK and US enforcement action shows that UK and US enforcement authorities co-operate with each other and a number of other enforcement authorities around the world. Such co-operation may be governed by legislation, a memorandum of understanding, or less formally through information sharing gateways. It is therefore possible that, if a company or individual is found criminally liable or in breach of its regulatory obligations in the UK or the US, the details of the offence or regulatory breach will be made known to interested enforcement authorities in other jurisdictions. If the company or individual faces liability in those jurisdictions, disclosure by the UK and US authorities may lead to further enforcement action. This issue is naturally one that should be considered prior to a company or individual accepting any criminal or regulatory liability or entering into any type of agreement with enforcement authorities.

See Chapters 23 and 24 on negotiating global settlements

Even if a company is not facing criminal or regulatory liability in other jurisdictions, it will still need to establish whether the local legal requirements would require a disclosure of a finding of criminal liability and subsequent financial penalty. Whether a disclosure is required will depend on the jurisdiction in which the company operates. If there is no local legal requirement to make such a disclosure, foreign enforcement authorities may still expect to be notified of any finding of liability and subsequent financial penalty. Whether a voluntary disclosure is made will turn on what is expected by the local regulator, and what implications that disclosure or non-disclosure may have.

107 *SFO v. XYZ*, para. 57 of preliminary judgment.

108 *SFO v. Rolls Royce PLC and Rolls Royce Energy Systems Inc*, paras. 16-24.

26

Fines, Disgorgement, Injunctions, Debarment: The US Perspective

Rita D Mitchell[1]

Introduction 26.1

This chapter considers the potential fines, penalties and other collateral consequences that companies may face in the United States when defending against or settling an enforcement action with US regulators.

The US enforcement authorities have a variety of means to seek redress from corporates and individuals, including financial penalties and equitable remedies. The general purpose and policy objectives behind such sanctions are (1) to deter the defendant and others from committing such offences in future; (2) to protect the public; (3) to punish the defendant; and (4) to promote rehabilitation of the defendant.[2] In considering fines and penalties, the US enforcement authorities and courts will consider the facts and circumstances of the matter, including whether the defendant accepts responsibility for the conduct, any remediation that has been effected and co-operation by the defendant with the relevant enforcement authorities.

See Chapter 10 on co-operating with authorities

In recent years, both the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have been increasingly successful in extracting significant financial and collateral consequences as part of their enforcement actions and settlements.[3] In the fiscal year ending 30 September 2015, the DOJ collected

1 Rita D Mitchell is a partner at Willkie Farr & Gallagher (UK) LLP and a US-qualified attorney.

2 See, e.g., Department of Justice, United States Attorneys' Manual, § 9-27.110.

3 For example, in 2014, BNP Paribas agreed to plead guilty and pay US$8.9 billion for alleged violations of US economic sanctions in Iran, Sudan and Cuba, of which US$140 million was a fine and US$8.8336 billion was forfeiture. (Department of Justice Press Release, 'BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions' (30 June 2014), available at: https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial.)

a combined total of US$23.1 billion in civil and criminal penalties; in 2016 the combined figure was approximately US$15.3 billion.[4] The SEC obtained orders totalling over US$8.2 billion in disgorgement and penalties for fiscal years 2015 and 2016.[5] In an active enforcement environment, companies and individuals who are facing enforcement action should be mindful of the potential consequences and the opportunities to manage and reduce the ultimate fines and penalties.

See Chapter 24 on negotiating global settlements

26.2 Standard criminal fines and penalties available under federal law

26.2.1 Maximum financial penalties

Many federal statutes contain their own fine provisions, which typically include a maximum fine amount. Additionally, for some crimes, the Alternative Fines Act provides for an alternative maximum fine of double the gross gain (or gross loss caused to another) from the unlawful activity.[6] Where a fine is imposed against an officer, director, employee, agent or shareholder of an issuer, the fine may not be paid, directly or indirectly, by the issuer.[7]

In addition, for certain offences, the DOJ may seek criminal or civil forfeiture, or both, of property that constitutes, or is derived from proceeds traceable to, the offence.[8] Recent examples of forfeiture include the United States' complaint

---

In 2016, VimpelCom reached an approximately US$800 million resolution with the US and Dutch authorities over allegations of bribery of an Uzbek government official, of which US$230 million was a criminal penalty to the DOJ, US$167.5 million was disgorgement and prejudgment interest to the SEC, and US$397.5 million was paid to Dutch prosecutors as a criminal penalty. (Department of Justice Press Release, 'VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme' (18 February 2016), available at: https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million). In a related action, which has been stayed until November 2017, the DOJ is also seeking US$850 million in forfeiture of the corrupt proceeds of the alleged scheme (*United States of America v. All Funds Held in Account Number CH1408760000050335300*, 1:16-cv-01257, (S.D.N.Y.) Docket No. 21).

4 Department of Justice Press Release, 'Justice Department Collects More Than $23 Billion in Civil and Criminal Cases in Fiscal Year 2015' (3 December 2015), available at: https://www.justice.gov/opa/pr/justice-department-collects-more-23-billion-civil-and-criminal-cases-fiscal-year-2015; Department of Justice Press Release, 'Justice Department Collects More Than $15.3 Billion in Civil and Criminal Cases in Fiscal Year 2016' (14 December 2016), available at: https://www.justice.gov/opa/pr/justice-department-collects-more-153-billion-civil-and-criminal-cases-fiscal-year-2016.

5 Securities and Exchange Commission Press Release, 'SEC Announces Enforcement Results for FY 2015' (22 October 2015), available at: https://www.sec.gov/news/pressrelease/2015-245.html; Securities and Exchange Commission Press Release, 'SEC Announces Enforcement Results for FY 2016' (11 October 2016), available at: https://www.sec.gov/news/pressrelease/2016-212.html.

6 See 18 U.S.C. § 3571; *Southern Union Co. v. United States*, 132 S.Ct. 2344, 2350-52 (2012).

7 15 U.S.C. § 78ff(c)(3).

8 See, e.g., 18 U.S.C. § 982(a) (in connection with sentencing persons convicted of certain federal offences, including money laundering and other financial crimes, courts shall order criminal forfeiture of property 'involved in such offense, or any property traceable to such property');

against Chinese company Mingzheng International Trading Limited, seeking civil forfeiture of $1,902,976 in connection with allegations that the company acts as a front to launder US dollars for sanctioned North Korean entities,[9] and an agreement by Banamex USA to forfeit $97.44 million in connection with criminal violations of the Bank Secrecy Act stemming from its wilful failure to maintain an effective anti-money laundering programme and to file Suspicious Activity Reports.[10]

Defendants may also be required to pay restitution, taking into consideration the amount of loss sustained by each victim, the financial resources of the defendant and any other factors the court deems appropriate.[11]

United States Sentencing Guidelines 26.2.2

Federal courts in the United States use the United States Sentencing Guidelines (the Sentencing Guidelines) as guidance in considering the aggravating and mitigating circumstances of a crime and imposing a sentence. These apply to both corporates and individuals. Although not bound to apply the Guidelines strictly

18 U.S.C. § 981(a) (property involved in certain federal offences, including money laundering and other financial crimes, 'or any property traceable to such property', is subject to civil forfeiture). Under civil forfeiture statute 18 U.S.C. § 981(a)(1)(C), property relating to a 'specified unlawful activity' as defined in 18 U.S.C. § 1956(c)(7) is subject to civil forfeiture. Among the 'specified unlawful activities' listed in 18 U.S.C. § 1956(c)(7) are racketeering, bribery of a public official, fraud by or against a foreign bank, export control violations and violations of the Foreign Corrupt Practices Act. Further, 28 U.S.C. § 2461(c) 'permits the government to seek *criminal* forfeiture whenever civil forfeiture is available *and* the defendant is found guilty of the offense.' *United States v. Newman*, 659 F.3d 1235, 1239 (9th Cir. 2011) (original emphasis).

9 Department of Justice Press Release, 'United States Files Complaint to Forfeit More Than $1.9 Million From China-Based Company Accused of Acting as a Front for Sanctioned North Korean Bank' (15 June 2017), available at: https://www.justice.gov/usao-dc/pr/united-states-files-complaint-forfeit-more-19-million-china-based-company-accused-acting.

10 Department of Justice Press Release, 'Banamex USA Agrees to Forfeit $97 Million in Connection with Bank Secrecy Act Violations' (22 May 2017), available at: https://www.justice.gov/opa/pr/banamex-usa-agrees-forfeit-97-million-connection-bank-secrecy-act-violations.

11 18 U.S.C. § 3663(a)(1)(B)(i). See, e.g., *United States v. Savoie*, 985 F.2d 612, 619 (1st Cir. 1993) (holding civil settlement did not bar defendant, convicted of racketeering violations, of having to pay restitution of US$93,476.67, as restitution 'is not a civil affair; it is a criminal penalty meant to have deterrent and rehabilitative effects.'). In *Kelly v. Robinson*, the Supreme Court commented on restitution as follows: 'The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant. As the Bankruptcy Judge who decided this case noted in *Pellegrino*: "Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose."' 479 U.S. 36, 52, 107 S. Ct. 353, 362, 93 L. Ed. 2d 216 (1986).

in sentencing, district courts must consult them and take them into account. In practice, they continue to be closely followed.[12]

For companies, the calculation of the applicable fine is made by (1) identifying a 'base fine';[13] (2) identifying the minimum and maximum multipliers that combined with the base fine create a 'fine range';[14] and (3) considering potential 'departures', upward or downward, from the fine range.[15]

In calculating the base fine under the Sentencing Guidelines, the first step is to identify the 'offence level', which depends on the characteristics of the crime. The 'base offence level' is set according to the nature of the conduct or the statute violated, and then the overall offence level will increase or decrease depending on certain factors.[16] For example, for an FCPA anti-bribery violation, the base offence level is 12.[17] Factors that may affect the overall offence level include the number of bribes, the dollar amount involved and the position of the foreign official receiving the payment or benefit.[18] The total offence level helps to determine the base fine, which is the greatest of the amount specified in a table that translates the offence level into a base fine, the pecuniary gain to the organisation from the offence, or the pecuniary loss from the offence caused by the organisation, 'to the extent the loss was caused intentionally, knowingly, or recklessly.'[19]

The second step is to calculate the 'culpability score', which yields the minimum and maximum multipliers to be applied to the base fine. The culpability score is based on the characteristics of the defendant. Relevant factors may include the size of the organisation and the degree of participation in, or tolerance of, the wrongdoing; the defendant's prior criminal history; whether the defendant has violated an order or injunction, or violated a condition of probation by committing similar misconduct to that for which probation was ordered; obstruction of justice; the existence of an effective compliance programme; and self-reporting, co-operation and acceptance of responsibility.[20] The potential multipliers can range from 0.05 (a 20 times reduction of the base fine) to 4.0 (four times the base fine), depending on the culpability score. The fine range reflects the minimum and maximum multipliers as applied to the base fine.

Finally, the Sentencing Guidelines allow for upward or downward departures from the fine range. This may include a downward departure for substantial assistance to the government in its investigation of others,[21] or remedial costs that

12 The Sentencing Guidelines were mandatory until the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

13 United States Sentencing Commission, Guidelines Manual, § 8C2.4.

14 United States Sentencing Commission, Guidelines Manual, §§ 8C2.6, 8C2.7.

15 United States Sentencing Commission, Guidelines Manual §§ 8C4.1-8C4.11.

16 Base offence levels are set out in Chapter Two of the Guidelines Manual.

17 United States Sentencing Commission, Guidelines Manual § 2C1.1.

18 United States Sentencing Commission, Guidelines Manual §§ 2C1.1(b)(1)-(3).

19 United States Sentencing Commission, Guidelines Manual § 8C2.4.

20 United States Sentencing Commission, Guidelines Manual § 8C2.5.

21 United States Sentencing Commission, Guidelines Manual § 8C4.1.

exceed the gain to the company.[22] Unlike the factors that are considered for calculating the offence level and culpability score, the detriments or benefits that result from departures are not quantified. The court in its discretion imposes a fine within the fine range, or above or below the range by taking into account any departures. For negotiated resolutions, a company through its counsel will often negotiate and agree a downward departure recommendation beyond the low end of the fine range. In addition to the fine, any gain to the company from an offence that is not otherwise part of the company's restitution or remediation is subject to disgorgement.[23]

Civil penalties 26.3

Civil monetary sanctions can include penalties, disgorgement and prejudgment interest. Each of these has a different purpose and method of calculation.

The SEC may impose civil monetary penalties on any person who violates or causes a violation of the securities laws. The Securities Act of 1933 and the Securities Exchange Act of 1934 authorise three tiers of civil penalties. Most civil violations fall into the first tier, where the penalty is no more than US$9,054 for an individual or US$90,535 for a company for 'each act or omission' of the federal securities laws. The second tier applies to violations involving fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, for which the maximum penalty is US$90,535 for individuals and US$452,677 for companies, again for each act or omission. Finally, the third tier applies to violations involving tier two conduct that directly or indirectly resulted in 'substantial losses . . . to other persons' or 'substantial pecuniary gain to the person who committed the act or omission.'[24] Third tier penalties have a limit of US$181,071 for individuals and US$905,353 for companies, for each act or omission.[25]

The DOJ likewise may seek civil penalties in certain types of matters, such as violations of federal financial, health, safety, civil rights and environmental laws.[26]

22 United States Sentencing Commission, Guidelines Manual § 8C4.9.

23 United States Sentencing Commission, Guidelines Manual § 8C2.9.

24 15 U.S.C. § 78u-2(b); 17 C.F.R. § 201.1001 and Securities and Exchange Commission, 'Inflation Adjustments to the Civil Monetary Penalties Administered by the Securities and Exchange Commission (as of January 18, 2017)', available at: https://www.sec.gov/enforce/civil-penalties-inflation-adjustments.htm (effective 18 January 2017). The maximum civil penalty amounts noted above are for violations after 2 November 2015. Maximum civil penalty amounts will be adjusted annually for inflation as described in 17 C.F.R. § 201.1001.

25 Id.

26 See, e.g., 12 U.S.C. § 1833a (providing a civil money penalty provision to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 which allows the DOJ to seek civil penalties against persons who violate one of 14 enumerated statutes); 42 U.S.C. § 3614(d)(1)(C) (allowing DOJ to seek civil penalties for violations of the Fair Housing Act of 1968).

26.4 Disgorgement and prejudgment interest

The SEC may also seek disgorgement to prevent an entity or individual from profiting from illegal conduct and to deter subsequent misconduct.[27] It is intended as an equitable remedy to prevent unjust enrichment.[28] Disgorgement has often accounted for a significant portion of the overall enforcement sanction. For example, in August 2015, BNY Mellon agreed to pay US$14.8 million to settle allegations that it had violated the FCPA's anti-bribery and internal controls provisions, of which US$8.3 million (56 per cent of the total) was disgorgement.[29] In January 2014, Alcoa Inc resolved civil charges brought by the SEC in relation to alleged FCPA violations by its subsidiary companies by disgorging US$175 million; there was no separate fine amount.[30]

The SEC's ability to extract such large disgorgement payments is in part a consequence of its seeking disgorgement beyond the typical five-year limitation period that applies to any 'action, suit or proceeding for the enforcement of any civil find, penalty, or forfeiture, pecuniary or otherwise.'[31] In defence of this practice, the SEC's position has historically been that disgorgement is not a 'civil fine, penalty, or forfeiture' and that as a result the SEC is not constrained by any limitations period when seeking disgorgement. On 5 June 2017, however, the US Supreme Court unanimously rejected the SEC's position in *Kokesh v. SEC*, holding that '[d]isgorgement in the securities-enforcement context is a "penalty" . . . and so disgorgement actions must be commenced within five years of the date the claim accrues.'[32] In so doing, the Supreme Court resolved a Circuit split on this issue, making clear that the SEC may not seek disgorgement for conduct that occurred more than five years before the claim accrued.[33] As a consequence

27 See *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993); *SEC v. Cavanaugh*, 445 F.3d 105, 117 (2d Cir. 2006) (noting that disgorgement 'has the effect of deterring subsequent fraud').

28 *SEC v. Contorinis*, 743 F.3d 296, 306-07 (2d Cir. 2014) ('[W]hile both criminal forfeiture and disgorgement serve to deprive wrongdoers of their illicit gain, the two remedies reflect different characteristics and purposes – disgorgement is an equitable remedy that prevents unjust enrichment, and criminal forfeiture a statutory legal penalty imposed as punishment. . . . Moreover, unlike disgorgement, which is a discretionary, equitable remedy, criminal forfeiture is mandatory and a creature of statute. Thus, unlike the criminal forfeiture case, the district court's discretion in determining disgorgement is not confined by precise contours of statutory language, but rather serves the broader purposes of equity.').

29 *In the Matter of The Bank of New York Mellon Corporation*, Administrative Proceeding File No. 3-16762 (18 August 2015), available at https://www.sec.gov/news/pressrelease/2015-170.html.

30 Securities Exchange Act of 1934 Release No. 71261, Accounting and Auditing Enforcement Release No. 3525, Administrative Proceeding File No. 3-15673 (9 January 2014).

31 28 U.S.C. § 2462.

32 *Kokesh v. SEC*, No. 16-529, slip op. at 1 (U.S. 5 June 2017).

33 *Compare SEC v. Graham*, 823 F.3d 1357, 1363-64 (11th Cir. 2016) (holding that § 2462's statute of limitations applies to disgorgement) with *SEC v. Kokesh*, 834 F.3d 1158, 1164-67 (10th Cir. 2016) (holding that the disgorgement sought was neither a penalty nor a forfeiture under § 2462) and *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2011) (holding that disgorgement is not a 'civil penalty' and therefore not subject to the five-year statute of limitations); *SEC v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008) ('[T]he applicable five-year statute of limitations period [the defendant] invokes applies only to penalties sought by the SEC, not its request for injunctive

of this decision, there may be a substantial impact on the amount the SEC is able to recover in certain cases. In *Kokesh v. SEC*, for example, the District Court had ordered the defendant to pay US$34.9 million in disgorgement, of which US$29.9 million related to conduct outside the limitation period and is therefore now time-barred.[34]

The calculation of disgorgement can be complicated in practice. Given the challenges in distinguishing between legally and illegally derived profits, in considering the amount to be disgorged, courts have broad discretion and need only consider a 'reasonable approximation of profits causally connected to the violation.'[35] Disgorgement amounts may include both 'direct pecuniary benefit[s]' and 'illicit benefits . . . that are indirect or intangible.'[36] By way of example, in insider trading cases, tippers have been required to disgorge the benefits enjoyed by their tippees. In calculating disgorgement, courts have found '[a] tippee's gains [to be] attributable to the tipper, regardless whether benefit accrues to the tipper.'[37] Once the SEC meets its burden of establishing a reasonable approximation of profits causally connected to the fraud, the burden shifts to the defendant to demonstrate that his gains were not affected by the offence.[38] The final decision rests with the court.

Defendants face significant challenges in trying to reduce disgorgement amounts or carve out certain categories of costs and expenses. Although revenue received from improper conduct may be disgorged, it is less clear whether and how the costs associated with that revenue would be used to reduce the disgorgement amount. Several courts have permitted defendants to deduct expenses that are directly associated with the revenue to be disgorged.[39] On the other hand, courts have generally refused to allow defendants to deduct overhead costs or general business expenses from disgorgement amounts on the basis that they were

---

relief or the disgorgement of ill-gotten gains.'), reinstated in relevant part, 597 F.3d 436, 450 (1st Cir. 2010).

34 *Kokesh v. SEC*, No. 16-529, slip op. at 4 (U.S. 5 June 2017).

35 See, e.g., *SEC v. Contorinis*, 743 F.3d 296, 304-5 (2d Cir. 2014) (noting that disgorgement must be a 'reasonable approximation of profits causally connected to the violation') (quoting S*EC v. Patel*, 61 F.3d 137, 139-40 (2d Cir. 1995); *Allstate Insurance Co. v. Receivable Finance Co., LLC*, 501 F.3d 398, 413 (5th Cir. 2007) (citing *SEC v. First City*, 890 F.2d 1215, 1231 (D.C. Cir. 1989)); *SEC v. Global Express Capital Real Estate Investment Fund, I, LLC*, 289 Fed. Appx. 183, 190 (9th Cir. 2008); *SEC v. Warren*, 534 F.3d 1368, 1370 (11th Cir. 2008);

36 *SEC v. Contorinis*, 743 F.3d 296, 306 (2d Cir. 2014).

37 *SEC v. Warde*, 151 F.3d 42, 49 (2d Cir. 1998).

38 *SEC v. Razmilovic*, 738 F.3d 14, 32-33 (2d Cir. 2013).

39 *SEC v. McCaskey*, 2002 WL 850001 at *4 (S.D.N.Y. 26 March 2002) (noting that a court may deduct any 'direct transaction costs' such as brokerage commissions from the disgorgement amount); *SEC v. Shah*, 1993 WL 288285 at *5 (S.D.N.Y. 28 July 1993) (allowing defendant to deduct the commissions paid to his broker in order to effectuate trades based on inside information). But see *F.T.C. v. Bronson Partners, LLC*, 654 F.3d 359, 375 (2d Cir. 2011) ('it is well established that defendants in a disgorgement action are "not entitled to deduct costs associated with committing their illegal acts."') (quoting *SEC v. Cavanagh*, 2004 WL 1594818 at *30 (S.D.N.Y. 16 July 2004), aff'd, 445 F.3d 105 (2d Cir. 2006).

not directly related to the illegal conduct at issue and would have been incurred irrespective of the conduct.[40] By way of example, courts have denied requests to deduct from revenue expenses related to employees' salaries,[41] capital gains taxes paid in connection with illicit profits,[42] and fees paid to clearing agents that could not be directly tied to the illegal sales.[43] As a consequence, 'SEC disgorgement sometimes exceeds the profits gained as a result of the violation.'[44]

Because until the Supreme Court's *Kokesh* decision disgorgement was not generally viewed as a 'fine' or 'penalty', practitioners have also considered the possibility that an FCPA disgorgement payment might be tax-deductible. As a general matter, IRS regulations preclude a tax deduction for penalties and fines paid to government authorities, on the basis that taxpayers should not be permitted to enjoy a tax benefit based on a payment designed to be punitive.[45] However, the Tax Code does not specifically address disgorgement. On 6 May 2016, the Office of the Chief Counsel of the Internal Revenue Service released an Advice Memorandum stating that the disgorgement payment to the SEC in a corporate FCPA action was not tax-deductible, on the basis that a disgorgement amount would, in its view, fall within Section 162(f) of the Tax Code stating that deductions are not allowed 'for any fine or similar penalty paid to a government for the violation of any law.'[46] Although this type of internal memorandum is not binding, it reflects the position of the IRS on this matter. It is also consistent with the Supreme Court's subsequent ruling in *Kokesh v. SEC*.

Under its rules, as part of an administrative proceeding the SEC is also required to compute prejudgment interest to accompany any disgorgement amount.[47] A court may award prejudgment interest in a civil proceeding, though it is not mandatory.[48] The interest rate applied is typically the 'underpayment' rate

40 *SEC v. Svoboda*, 409 F. Supp. 2d 331, 345 (S.D.N.Y. 2006); *SEC v. Great Lakes Equities Co.*, 775 F. Supp. 211, 215 (E.D. Mich. 1991) ('[T]here is no basis for deducting the costs of fixed expenses since those expenses would be incurred whether or not the fraud took place.').

41 *SEC v. Benson*, 657 F. Supp. 1122, 1134 (S.D.N.Y. 1987).

42 *SEC v. Svoboda*, 409 F. Supp. 2d 331, 345 (S.D.N.Y. 2006).

43 *SEC v. Zwick,* 2007 WL 831812 at *23 (S.D.N.Y. 16 March 2007).

44 *Kokesh v. SEC*, No. 16-529, slip op. at 10 (U.S. 5 June 2017).

45 26 C.F.R. § 1.162-21.

46 See https://www.irs.gov/pub/irs-wd/201619008.pdf.

47 17 C.F.R. § 201.600(a). In recent years, the SEC has increasingly sought to use administrative proceedings rather than federal court proceedings to enforce the federal securities laws. In 2012, for example, there were nearly twice as many administrative proceedings as civil actions brought by the Commission. See Sonia Steinway, 'SEC 'Monetary Penalties Speak Very Loudly,' But What Do They Say? A Critical Analysis of the SEC's New Enforcement Approach,' Yale Law Journal, 124:209 (2014). The increased use of administrative proceedings has led to widespread criticism of the Commission around unfairness as well as constitutional challenges around due process. In September 2015, the SEC proposed amendments to its Rules of Practice governing the SEC's internal administrative proceedings which were adopted in July 2016. These amendments, however, do not fully address the concerns that have been raised and challenges to the use of administrative proceedings continue.

48 *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1476 (2d Cir. 1996).

set by the Internal Revenue Service.[49] There is no single approach for measuring when the clock begins to run on interest calculations. In some cases, it has been measured from the date when the ill-gotten funds were received, up to the date of judgment.[50] In others, it may run from multiple dates where the matter involves multiple transactions,[51] or, where the applicable dates are difficult to identify, from the date of the complaint.[52]

Injunctions 26.5

The DOJ and SEC may also seek affirmative relief by way of an injunction where it is deemed necessary to advance public interests or enforce governmental functions. Injunction actions may be specifically provided for by statute, or permitted to enforce statutes which do not specifically provide such a remedy.

The SEC has the express authority to seek a civil injunction against any person who may cause future violations of the securities laws.[53] The test for whether an injunction is appropriate is whether 'there is a likelihood that, unless enjoined, the violations will continue.'[54] Injunctions can be either preliminary or permanent. In considering whether a permanent injunction is appropriate, courts consider the following factors:

> *the fact that defendant has been found liable for illegal conduct; the degree of scienter involved; whether the infraction is an 'isolated occurrence;' whether defendant continues to maintain that his past conduct was blameless; and whether, because of his professional occupation, the defendant might be in a position where future violations could be anticipated.*[55]

Although settlements of SEC enforcement actions typically include an injunction against future violations of the relevant securities laws, this practice has been challenged and questioned recently by the Eleventh and DC Circuits, which have

49 Id., 101 F.3d at 1476 (citing SEC Rules & Regulations, 60 Fed. Reg. 32738, 32788 (23 June 1995)). See also, 17 C.F.R. § 201.600(b). The underpayment rate charged by the IRS is three percentage points above the federal short-term rate and for purposes of calculating interest on sums disgorged is compounded quarterly. 26 U.S.C. § 6621(a)(2); 17 C.F.R. § 201.600(b).

50 *SEC v. DiBella,* 2008 WL 6965807 at *3 (D. Conn. 18 July 2008); *SEC v. GMC Holding Corp.*, 2009 WL 506872 at *6 (M.D. Fla. 27 February 2009) ("The time frame for the imposition of prejudgment interest usually begins with the date of the unlawful gain and ends at the entry of judgment.') (quoting *SEC v. Yun*, 148 F. Supp. 2d 1287, 1293 (M.D. Fla. 2001).

51 *SEC v. Savino*, 2006 WL 375074 at *18 & n.10 (S.D.N.Y. 16 February 2006) (calculating interest from the first day of the month following each improper trade).

52 *SEC v. United Energy Partners, Inc.*, 2003 WL 223393 at *2 n.12 (N.D. Tex. 28 January 2003), aff'd, 88 F. App'x 744 (5th Cir. 2004) (using date of complaint for accrual of prejudgment interest award where dates on which defendant acquired disgorged funds were not clear); *SEC v. GMC Holding Corp.*, 2009 WL 506872 at *6 (M.D. Fla. 27 February 2009) (same).

53 15 U.S.C. § 77t(b); 15 U.S.C. § 78u(d)(e)

54 *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1477 (2d Cir. 1996) (quoting *CFTC v. American Bd. of Trade, Inc.*, 803 F.2d 1242, 1250-51 (2d Cir. 1986).

55 *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 100 (2d Cir. 1978).

argued for more specific and tailored injunctions. For example, in *SEC v. Graham*, the Eleventh Circuit criticised the SEC for seeking an injunction that 'merely tracks the language of the securities statutes and regulations', or what is commonly referred to as an 'obey-the-law' injunction, noting that such injunctions are unenforceable.[56]

26.6 Other collateral consequences

In addition to the criminal and civil penalties noted above, defendants may also face civil and criminal forfeiture of assets, including real and personal property constituting or derived from proceeds traceable to a violation, or a conspiracy to commit a violation.[57] Investigation or prosecution by US authorities may also lead to subsequent investigations or prosecutions, or both, by authorities in other jurisdictions.[58]

The consequences of an enforcement action by the DOJ and SEC do not end after settlement or conviction of the charges. Defendants may still face a variety of actions from other US government agencies, international organisations, other companies or even shareholders and employees. These actions may impact the company's ability to participate in both US and foreign contracts and may involve additional litigation and other monetary penalties. For certain types of offences, individuals or entities indicted or convicted of criminal violations may be barred from doing business with the United States or other governments, or deemed ineligible to receive export licences, or both.[59] Debarment may be triggered by a criminal conviction or an adverse civil judgment under certain circumstances,[60] and typically lasts up to three years. Debarment applies to all subdivisions of a corporation unless the decision is limited by its terms to specific divisions or organisational units.[61] Suspension is a short-term exclusion imposed on a contractor for a temporary period pending the completion of an investigation or legal proceeding if an agency determines that immediate action is required to protect

56 *SEC v. Graham*, 823 F.3d 1357, 1362 n.2 (11th Cir. 2016) (quoting *SEC v. Goble*, 682 F.3d 934, 952 (11th Cir. 2012).

57 See: 18 U.S.C. §§ 981, 1956(c)(7); 28 U.S.C. § 2461(c).

58 For example, after Daimler AG settled with US enforcement authorities, Russian authorities opened a criminal investigation into Daimler's conduct in Russia. See Rubenfeld, 'Russia Launches Criminal Probe of Daimler Bribery,' Wall Street Journal (12 November 2010), available at http://blogs.wsj.com/corruption-currents/2010/11/12/russia-launches-criminal-probe-of-daimler-bribery.

59 Federal Acquisition Regulation § 9.402.

60 Examples of categories for debarment include fraud, criminal offences in connection with obtaining, attempting to obtain, or performing a public contract or subcontract; embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, or any other offence indicating a lack of business integrity or business honesty, which seriously and directly affects the present responsibility of a government contractor or subcontractor. 48 C.F.R. § 9.406.2(a).

61 48 C.F.R. § 9.406-1(b).

the government's interest.[62] Like debarment, suspension affects all organisational divisions of a contractor and is government-wide.[63]

With respect to certain types of enforcement actions, such as FCPA enforcement, money laundering and sanctions violations, companies may also be subject to corporate compliance monitors.

See Chapter 32 on monitorships

Financial penalties (and prison terms) under specific statutes 26.7

By way of example, we outline below the fines, penalties and other sanctions associated with particular federal criminal statutes that have been the subject of recent enforcement activity.

Foreign Corrupt Practices Act 26.7.1

The anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA) generally prohibit US issuers, domestic concerns and other covered persons from making, authorising, or offering a corrupt payment to a non-US official for purposes of influencing that official in his or her official duties or otherwise securing an improper advantage to assist the covered person or another in obtaining or retaining business.[64] The FCPA also contains separate accounting provisions that require issuers to maintain adequate books, records and internal accounting controls.[65]

For criminal anti-bribery violations of the FCPA, corporates or other business entities may be fined up to US$2 million per anti-bribery violation.[66] A company that violates the accounting provisions may be fined up to US$25 million per violation.[67] The Alternative Fines Act, however, provides for an alternative maximum fine of twice the gross pecuniary gain or loss from the violation.[68] An individual may be fined up to US$100,000 (US$250,000 under the Alternative Fines Act, or twice the gain or loss from the violation), or imprisoned for up to five years, or both, for a criminal violation of the FCPA's anti-bribery provisions. For criminal violations of the accounting provisions, individuals are subject to a fine of up to US$5 million, or imprisoned for up to 20 years, or both. In addition, the DOJ may seek forfeiture of property that constitutes or is derived from proceeds traceable to a criminal FCPA violation.[69] Issuers, as defined under the

62 48 C.F.R. § 9.407-1(b)(1).

63 48 C.F.R. § 9.407-1(c) and (d).

64 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

65 15 U.S.C. § 78m. This requirement does not apply to domestic concerns.

66 15 U.S.C. §§ 78dd-2(g)(1)(A), 78 dd-3(e)(1)(A), 78ff(c)(1)(A).

67 18 U.S.C. § 78ff(a).

68 18 U.S.C. § 3571 (c), (d).

69 28 U.SC. § 2641(c) (the government may seek forfeiture in criminal proceedings involving the violation of a statute that authorises civil or criminal forfeiture of property); 18 U.S.C. § 981(a)(1)(C) (property relating to a 'specified unlawful activity' as defined in 18 U.S.C. § 1956(c)(7) is subject to forfeiture); 18 U.S.C. § 1956(c)(7)(D) (listing felony FCPA violations among 'specified unlawful activity').

FCPA, are prohibited from paying the criminal fines that may be imposed on an officer, director, employee, agent or stockholder.[70]

For civil violations of the FCPA, an issuer may be subject to penalties as high as US$20,111 per anti-bribery violation,[71] and US$905,353 per accounting provisions violation.[72] For an individual who violates the FCPA anti-bribery provisions, civil penalties may be as high as US$20,111 per violation.[73] Civil penalties for such persons who violate the accounting provisions may be up to US$181,071 per violation.[74] Issuers may not directly or indirectly pay the civil anti-bribery penalties of its officers, directors, employees, agents or stockholders.[75]

In addition to its criminal penal authority, the DOJ may also bring a civil action to seek an injunction against domestic concerns and persons other than issuers to prevent a current or imminent violation, or forfeiture of property that constitutes, or is derived from proceeds traceable to, a criminal FCPA violation.[76] The SEC may seek injunctions against issuers.[77]

Disgorgement is often a key component of a civil resolution of the FCPA. The SEC first sought and obtained disgorged profits in connection with an FCPA resolution in 2004 against ABB Ltd.[78] Since then, the SEC has routinely pursued and obtained disgorgement in FCPA matters. Since 2014, the SEC has received more than US$1.6 billion from companies in connection with FCPA-related matters, of which over US$1.3 billion is disgorgement and over US$99 million prejudgment interest.

---

70 15 U.S.C. § 78ff(c)(3).

71 15 U.S.C. § 78ff(c)(1)(B); 17 C.F.R. § 201.1001 and Securities and Exchange Commission, 'Inflation Adjustments to the Civil Monetary Penalties Administered by the Securities and Exchange Commission (as of 18 January 2017)', available at: https://www.sec.gov/enforce/civil-penalties-inflation-adjustments.htm (effective 18 January 2017).

72 15 U.S.C. § 78u(d)(3); 17 C.F.R. § 201.1001 and Securities and Exchange Commission, 'Inflation Adjustments to the Civil Monetary Penalties Administered by the Securities and Exchange Commission (as of 18 January 2017)', available at: https://www.sec.gov/enforce/civil-penalties-inflation-adjustments.htm (effective 18 January 2017).

73 15 U.S.C. § 78ff(c)(2)(B);); 17 C.F.R. § 201.1001 and Securities and Exchange Commission, 'Inflation Adjustments to the Civil Monetary Penalties Administered by the Securities and Exchange Commission (as of 18 January 2017)', available at: https://www.sec.gov/enforce/civil-penalties-inflation-adjustments.htm (effective 18 January 2017).

74 15 U.S.C. § 78u(d)(3); 17 C.F.R. § 201.1001 and Securities and Exchange Commission, 'Inflation Adjustments to the Civil Monetary Penalties Administered by the Securities and Exchange Commission (as of 18 January 2017)', available at: https://www.sec.gov/enforce/civil-penalties-inflation-adjustments.htm (effective 18 January 2017).

75 15 U.S.C. § 78ff(c)(3).

76 15 U.S.C. §§ 78dd-2(d), 78dd-3(d); 18 U.S.C. § 981 (a)(1)(C) (property relating to a 'specified unlawful activity' defined in 18 U.S.C. § 1956 (c)(7) is subject to civil forfeiture); 18 U.S.C. § 1956(c)(7)(D) (listing felony FCPA violations as 'specified unlawful activit[ies]').

77 15 U.S.C. § 78u(d)(1).

78 *SEC v. ABB Ltd.*, Case No. 1:04-cv-01141-RBW (D.D.C. 2004) (ordering payment of US$5.9 million in disgorgement and prejudgment interest, and US$10.5 million as a civil penalty).

In April 2016, the DOJ announced a new FCPA 'Pilot Program'. According to the parameters of the Pilot Program, companies that co-operate, remediate and voluntarily self-disclose will be eligible for the 'full range of potential mitigation credit', including a reduction of 'up to 50 percent below the low end of the applicable US Sentencing Guidelines fine range'.[79] The Program was set to expire on 5 April 2017, but in March 2017, the DOJ announced that it would be temporarily extended.[80]

See Chapter 10 on co-operating with authorities

Federal criminal money laundering 26.7.2

The principal federal criminal money laundering statues are 18 USC Sections 1956 and 1957. These statutes generally prohibit a person who knows that property represents the proceeds of certain crimes (predicate offences referred to as 'specified unlawful activities') from engaging in financial transactions that either promote further unlawful activity, conceal the proceeds, evade taxes or avoid reporting requirements. They also prohibit a person from transferring, or attempting to transfer, funds to, through or from the United States with the intent of engaging in a specified unlawful activity.[81] The predicate offences may be certain state crimes,[82] foreign crimes[83] or federal crimes.[84]

Any violation of Section 1956 is punishable by imprisonment for not more than 20 years. For Section 1957, the maximum penalty is 10 years. For both sections, fines can range from US$250,000 to US$500,000, or twice the value of property or amount involved in the offence. Defendants are also subject to a civil penalty of no more than the greater of US$10,000 or the value of the property involved in the offence, asset forfeiture and the proceeds of the offence.

Export controls and trade sanctions 26.7.3

The US Department of the Treasury's Office of Foreign Assets Control (OFAC) administers and enforces most US economic sanctions, which implement UN measures and otherwise address national security and foreign policy concerns.

79 Department of Justice Press Release, 'Criminal Division Launches New FCPA Pilot Program,' (5 April 2016), available at: https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program.

80 'Acting Assistant Attorney General Kenneth A. Blanco Speaks at the American Bar Association National Institute on White Collar Crime,' (10 March 2017), available at: https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national.

81 18 U.S.C. §§ 1956, 1957.

82 The list of state crimes is effectively any state crime involving an act or threat of murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter or dealing in a controlled substance or listed chemical, which is chargeable under state law and punishable by up to one year in prison.

83 Relevant foreign crimes are similar to the state law crimes, but where they would be violations of the law of another country where there is a financial transactions that occurs in whole or in part in the United States.

84 The list of federal crimes is much longer, as it includes specific offences, such as the FCPA or the Travel Act.

The US Commerce Department's Bureau of Industry and Security (BIS), the DOJ's National Security Division (NSD), the New York District Attorney and the Federal Reserve also enforce some aspects of US sanctions. The sanctions can be either comprehensive for a jurisdiction or targeted to particular individuals and entities, and use the blocking of assets and trade restrictions to accomplish national security and foreign policy objectives. US sanctions generally restrict activities that take place in the US or involve a 'US person', which is defined widely to include US citizens, permanent residents, persons present in the US, companies organised under the laws of the US, and the non-US branches of US companies.[85] Foreign subsidiaries of US companies are also restricted in certain cases, such as with respect to sanctions imposed against Cuba and Iran.[86] Non-US persons and companies can face penalties under US sanctions for 'causing' a violation by a US person.[87] Non-US persons can also face sanctions of their own for engaging in certain activity outside US jurisdiction involving Iran or Hezbollah under so-called 'secondary sanctions'.[88]

The fines for violations of the sanctions regulations can be significant. Between 2009 and 2016, enforcement actions were brought against a number of European banks for breaching US sanctions laws by removing or omitting references to sanctioned persons or entities from payment messages sent to US financial institutions. The fines and penalties paid in those cases ranged from US$298 million to US$8.9 billion.

Criminal penalties for wilful violations of OFAC sanctions can include fines ranging up to US$1 million per violation and imprisonment of up to 20 years.[89] In March 2017, for example, ZTE Corporation agreed to pay a criminal fine of US$286,992,532 for alleged sanctions and export control violations in Iran, the largest to date in an export control case.[90] The government can also pursue fines and penalties under Title 18, Section 3571, of the greatest of US$500,000, the amount specified in the law setting forth the offence, twice the pecuniary gain derived from the offence, or twice the gross pecuniary loss to persons other than the defendant resulting from the offence, as well as forfeiture under 18 USC Section 981. Civil penalties for violations of the Trading with the Enemy Act can range up to US$85,236 per violation.[91] Civil penalties for violations of the International

85 31 C.F.R. § 560.314.

86 General License H, released by OFAC on 16 January 2016, permits some transactions between foreign subsidiaries of US companies and Iran, but many restrictions remain.

87 See, e.g., 50 U.S.C. § 1705(a).

88 General License H, released by OFAC on 16 January 2016, lifted many secondary sanctions with respect to Iran, but some remain in place.

89 See, e.g., 50 U.S.C. § 1705(c).

90 Department of Justice Press Release, 'ZTE Corporation Agrees to Plead Guilty and Pay Over $430.4 Million for Violating U.S. Sanctions by Sending U.S.-Origin Items to Iran' (7 March 2017), available at https://www.justice.gov/opa/pr/zte-corporation-agrees-plead-guilty-and-pay-over-4304-million-violating-us-sanctions-sending.

91 31 C.F.R. § 501.701.

Emergency Economic Powers Act (IEEPA) can range up to US$289,238 or twice the amount of the underlying transaction for each violation.[92]

Racketeer Influenced and Corrupt Organizations Act (RICO) 26.7.4

RICO provides criminal penalties as well as a civil, private cause of action for acts performed as part of a criminal organisation or enterprise.[93] The statute contains variations on the proscribed conduct, but generally criminalises participation in an 'enterprise' in interstate or foreign commerce using ill-gotten gains that result from a 'pattern of racketeering activity',[94] which can be any one of a series of enumerated offences referred to as 'predicate acts'. These include such things as violations of state anti-bribery laws, mail and wire fraud, extortion, and money laundering violations, to name a few. The statute also makes it unlawful for a person to conspire to participate in proscribed conduct.

If found guilty of a RICO violation, a defendant may be imprisoned for up to 20 years and made to forfeit any interest acquired or maintained through the violation, any interest in any enterprise that was established, operated, controlled, conducted or participated in as part of the RICO violation (or the property of such an enterprise) and any property constituting or derived from any proceeds that the person obtained, directly or indirectly, from racketeering activity.[95]

Additionally, the government may seek pre-indictment restraining orders for the purpose of preventing defendants from transferring assets the government may potentially seek to have forfeited. To obtain such an order, the government must establish that (1) there is a substantial probability that it will prevail on the forfeiture issue; (2) property will be destroyed or placed beyond the court's reach without the order; and (3) the need to maintain the property's availability outweighs the hardship of a restraining order. Pre-indictment restraining orders are effective for 90 days.[96]

There are also civil remedies under RICO available to any person injured by a RICO defendant, which include treble damages sustained by the injured party and the cost of the lawsuit, including reasonable attorneys' fees.[97]

92 50 U.S.C. § 1705; 31 C.F.R. § 501, Appendix A, Note to Paragraph (A).

93 18 U.S.C. §§ 1961, et seq.

94 18 U.S.C. § 1962. The first variation makes it unlawful for any person who has received any income derived from a pattern of racketeering activity to use any part of such income or its proceeds to acquire, establish or operate any enterprise involved in interstate or foreign commerce. 18 U.S.C. § 1962(a). The second variation makes it unlawful for any person to engage in a pattern of racketeering activity to acquire or maintain any interest in any enterprise involved in interstate or foreign commerce. 18 U.S.C. § 1962(b). The third variation makes it unlawful for any person employed by or associated with any enterprise involved in interstate or foreign commerce to conduct the enterprise's affairs through a pattern of racketeering activity. 18 U.S.C. § 1962(c).

95 18 U.S.C. § 1963(a).

96 18 U.S.C. § 1963(d).

97 18 U.S.C. § 1964(c).

27

Global Settlements: The In-house Perspective

Stephanie Pagni[1]

27.1 Introduction

This chapter explores some of the key commercial considerations likely to arise in the context of a global settlement. Typically, global settlements involve liaison with multiple enforcement agencies operating across numerous jurisdictions and will therefore ordinarily present coordination challenges of a greater scale and complexity than might arise in domestic settlements.

The early agreements reached with the tobacco industry in the 1990s serve as good illustrations of the scale and materiality of global settlements. In November 1998, tobacco companies reached a settlement with 46 US states exempting them from legal liability for the harm caused by use of tobacco in return for which the tobacco companies agreed to make annual payments to the states in perpetuity, guaranteeing a minimum of US$206 billion over the first 25 years. The payments were intended to fund public health programmes and anti-smoking campaigns.[2] Similarly significant resolutions were also reached with a number of the world's largest pharmaceutical companies. Between 1991 and 2012 pharmaceutical companies reached over 230 separate settlements with the US federal government and state governments amounting to more than US$30 billion[3] for withholding the health risks of their medications, manufacturing defective medical devices and illegally marketing drugs for off-label purposes, among other improprieties.

1 Stephanie Pagni is general counsel of Barclays UK. The views expressed are the author's (or as otherwise attributed) and do not represent the views of Barclays UK or Barclays Bank PLC.

2 https://www.justice.gov/opa/pr/glaxosmithkline-plead-guilty-and-pay-3-billion-resolve-fraud-allegations-and-failure-report.

3 www.citizen.org/hrg2073.

However, these settlements have since been definitively superseded by the series of global settlements reached with major banks in the years since the 2008 financial crisis. In aggregate, the settlements reached with banks over the last five years are now estimated to stand well in excess of €200 billion[4] with further settlements anticipated as a result of publicly announced ongoing enforcement investigations.

In addition to the involvement of multiple agencies across more than one jurisdiction, a global resolution is also likely to engage multiple legal frameworks with the potential for simultaneous agreements to be reached with civil, regulatory and criminal authorities within each of the relevant jurisdictions. Aside from monetary penalties, a component of the resolution may involve significant redress, compensatory payments or consumer-related relief and certain non-monetary elements that may considerably extend the nature and scope of the jurisdiction of the relevant agencies as a term of and following any resolution.[5]

The range of commercial factors to be considered when contemplating a settlement will differ according to the perspective of the potentially impacted parties. This chapter therefore adopts a comparative approach as regards the interests of each of those parties to explore the different commercial considerations that are likely to be engaged.

Commercial considerations for executive management 27.2

By the stage a resolution to an investigation is contemplated, the executive management will almost certainly have invested very significant time, resources and expense in ensuring the appropriate governance and oversight over the investigation preceding the settlement and will have taken a close interest in monitoring the findings to ensure appropriate and timely remedial action has been taken by the company. Having identified the salient issues and, having implemented any appropriate remedial steps, most executive management teams will have a strong desire to achieve closure through resolution to turn their attention back to the other important aspects of managing the company.

Whether the resolution will bring the requisite degree of finality or is merely a phase of resolution in a global investigation with the prospect of further phases is a key question executive management must address in determining the extent to which the proposed resolution is likely to be in the best interests of the company. The proposed terms and likely consequences of any resolution are obviously critical.

The factors for executive management to consider will almost certainly include:

- the potential impact on customers and the likely impact on business areas and the company's ability for business operations to continue;

4 ESRB Report on misconduct risk in the banking sector June 2015 derived from CCP Research Foundation, Financial Times, Financial Conduct Authority and ESRB calculations.

5 For example, probation periods and monitorships or supervision orders in which ongoing compliance efforts and programmes are closely monitored for a stipulated length of time (typically ranging from two to five years).

- the nature, extent and justifiability of factual and (if relevant) legal admissions required to be made as against the evidential record;
- the likely reputational damage to the company by factual or legal admissions;
- the proportionality of the monetary penalties by the authorities and the capacity of the company to absorb the impact;
- the extent to which the resolution and any consequent admissions are anticipated to result in enforcement action by other authorities in other jurisdictions not a party to the settlement;
- the potential for financial impacts beyond the original penalties as a result of follow-on litigation typically in the form of class action or group litigation lawsuits;
- the likely longer term impact on the company of any non-monetary terms imposed such as the installing of a monitor or probationary terms; and
- the extent to which the company considers it has already remediated the issues the subject of the resolution and whether this will be fairly reflected and acknowledged in any terms of settlement; the latter issue being particularly important for customer retention after a resolution.

A global resolution that is insufficiently comprehensive to achieve the desired certainty of outcome for the company may not be advisable. This may occur if enforcement agencies are working to a different timetable for resolution or otherwise refuse to coordinate in reaching an agreed and sufficiently conclusive enforcement outcome. This might also occur where the company faces a very substantial risk of new enforcement actions triggered by the facts and matters admitted pursuant to the terms of any initial resolution. Where there is significant risk to the company of future exposure which cannot be quantified with reasonable certainty, the evaluation of the benefits to the company of co-operation and an early resolution as against the downside risks of seeking to delay or avoid resolution at all can become a much more complex exercise. This may be particularly true for resolutions where the company, even though it has co-operated extensively in the investigation, runs the risk of being disproportionately singled out as a target by other agencies and for follow-on actions.

In summary, putting the company in a position to move forward having learned lessons from the past will usually constitute the desired outcome from the perspective of the executive management subject to a satisfactory degree of certainty that the outcome is reasonably foreseeable and will be proportionate in terms of the overall impact on the company.

27.3 Shareholders

When facing the question of whether to enter into a global settlement, an assessment of the commercial considerations relevant to the company would not be complete without reference to its shareholders. The shareholders, in common with the executive management, will also likely desire the certainty and closure brought by a resolution. They are also likely to require that the company has and continues to take all reasonable steps towards remediating the issues that were the

subject of the resolution so that they can have confidence in the executive management's future oversight of the company's operations.

They will equally expect, however, that any settlement the company reaches will be appropriately calibrated in terms of its impact. Given the constitution of the shareholder base at the time of entering a global resolution is likely to be materially different to the shareholder base when the issues giving rise to the settlement arose, any shareholder holding an interest in the company today will be concerned to understand whether the impact of resolution is likely to represent a reasonable outcome in the circumstances and will not carry unwarranted risks for their investment. If the resolution does not strike the right balance in terms of censure and deterrence as far as impact on investors is concerned then other consequences may follow.

The European Systemic Risk Board (ESRB) has observed that the impact of the sequential, increasingly punitive and unpredictable nature of the global bank resolutions and the associated tail-end risks in recent years may have become a significant factor in flight from investment in the sector.[6] Where there is widespread and sustained loss of investor confidence in a sector, given many investments will typically be held in pension funds and similar investment vehicles held for a wide class of beneficiaries, this may result in much broader detrimental impacts than originally anticipated.

Employees 27.4

The views of the wider workforce may often be inadvertently overlooked in contemplating the commercial impact of a resolution. Typically, companies need a well-motivated workforce to prosper. This, in turn, relies on the workforce having confidence in the company's ability to resolve difficulties encountered in a responsible and proportionate way.

In most cases, the majority of employees of the company will likely have no knowledge of the issues giving rise to the settlement beyond the announcement of the settlement itself but will be impacted by it in a variety of ways in monetary and non-monetary terms. Consequently, settlements that do not differentiate sufficiently those within the company who are responsible for any wrongdoing from the wider employee population and that fail to underscore in a sufficiently balanced way the extent to which the company has succeeded in corrective action can have disproportionately negative impacts on employee morale.

A resolution that imposes monetary penalties and public censure can be an effective tool in deterring others within the company from similar wrongdoing. However, the right balance between deterrence and prevention must be sought. An industry seeking long-term cultural reform needs a well-motivated values-driven workforce to help bring about such change through a committed focus on behavioural adjustment and the implementation of enhanced prevention

6 ESRB 2015 report on misconduct p. 3 – misconduct penalties are tail events that can create uncertainty about business model, solvency and profitability of banks.

and compliance programmes.[7] If a resolution is not appropriately calibrated to recognise the ongoing efforts of the wider employee population as against the wrongdoing of a few, it may present long-term attrition risks to the company or the industry more broadly with an accompanying flight of good citizens, significantly hampering the company's attempts (and where applicable the industry more broadly) to bring about the desired change for the better.

27.5 Enforcement agencies

In a global settlement, monetary penalties are very often a key, if not in recent times the key, component in the pursuit of credible deterrence strategies by enforcement agencies. The severity of monetary penalties imposed with accompanying public censure can be effective in dissuading others (within the institution or more broadly in the industry) from engaging in similar wrongdoing. However, in instances where penalties are continually levied on an institution (and its shareholders) at the expense of holding individuals responsible, this may create a risk of an imbalance of accountability as between a company and individual employees within the company who are principally responsible for the wrongdoing. Where penalties and censure are borne disproportionately by the corporate entity and its wider associated stakeholders, this may in fact undermine rather than reinforce credible deterrence policies.

In principle, enforcement agencies' policy objective of credible deterrence should be free of commercial considerations. As a matter of practical reality, however, most enforcement arms and prosecuting authorities will need to justify decisions to balance limited resources to cases with outcomes and will need to demonstrate how funding has been allocated to pursue cases to meet their overriding credible deterrence objective. The pressure for an acceptable outcome comprising a material monetary component may therefore increase particularly in circumstances where the agency has expended very significant resources pursuing a global investigation over a long period. Equally, where there is a high degree of political pressure to achieve or match equivalent penalties in other jurisdictions, the decision to impose ever greater monetary penalties in substitution for other credible deterrence measures may also increase.

Some commentators have opined that the high levels of regulatory fines resulting from enforcement actions against the major banks in the last few years may have in part been driven by a policy objective to drive banks to restructure and become smaller, simpler and less complex.[8] Others have noted that high monetary penalties may be a response to political pressure as, in the US at least, high-profile bankers had not faced criminal prosecution and sentencing.[9] *The Economist* has

7 A company with a strong integrity culture in its employee population is 67 per cent less likely to observe business misconduct; Corporate Executive Board, 'Research Reveals That Integrity Drives Corporate Performance: Companies With Weak Ethical Cultures Experience 10x More Misconduct Than Those With Strong Ones', 15 September 2010.

8 www.wsj.com/articles/no-more-regulatory-nice-guy-for-banks-1419957394.

9 www.reuters.com/article/us-bnpparibas-fines-exclusive-idUSKBN0EH0KN20140606.

observed that many enforcement outcomes are opaque and hard for the public to understand; without full understanding as to the specific circumstances or wrongdoing, public attention often settles on the fine. *The Economist* has also noted that regulators and prosecutors – some of whom have to stand for election – often encourage the media to focus on such outcomes.[10] A similar conclusion was reached in a report by Thomson Reuters into the rising costs of non-compliance by financial institutions.[11] The report noted that 'regulators have been under immense political and public pressure to hold those responsible [for misconduct] to account' and that 'widespread and persistent negative media coverage has been responsible, at least in part, for driving up the levels of monetary fines. Firms needed to be seen to be punished and headlines covering ever-bigger fines were a predictable regulatory response'. Whatever the reasons for the very significant increase in monetary penalties, it is clear that the associated revenues have resulted in a range of collateral benefits.

To illustrate:

- The New York Department of Financial Services budget for 2015 and 2016 allocated over US$7 billion received from bank settlements, including US$4.6 billion for one-off capital projects to support economic development and infrastructure investments in the State of New York. Examples of such expenditure include replacing a major bridge across the Hudson River and improving broadband access, projects entirely removed from the misconduct that is the subject of the settlements,[12] prompting questions among some commentators about governance and oversight.[13]
- A significant portion of bank settlement payments made to the FCA are paid to HM Treasury. FCA fines relating to LIBOR, which amounted to more than £500 million, were allocated by the then Chancellor in budget speeches for various good causes, including the NHS, charities and emergency services, often attracting positive media coverage.
- It has been reported that over US$110 billion in bank fines have been levied in connection with retail mortgage-backed securities losses since the financial crisis of which it is estimated that less than half has been allocated for 'consumer-relief' with the remaining funds being received by the US Treasury, various US state attorneys-general and the prosecutors that led most of the negotiations.[14]

Where economic, commercial and even political benefits accrue that significantly exceed those required by the relevant agency to justify its expenditure to meet

10 www.economist.com/news/briefing/21614101-corporate-america-finding-it-ever-harder-stay-right-side-law-mammoth-guilt.

11 https://risk.thomsonreuters.com/sites/default/files/GRC01700.pdf.

12 https://www.budget.ny.gov/budgetFP/FY16FinPlan.pdf.

13 www.nytimes.com/2015/11/08/nyregion/cyrus-vance-has-dollar-808-million-to-give-away.html?_r=0.

14 *The Wall Street Journal* Article, 9 March 2016, 'Big Banks Paid $110 Billion in Mortgage Fines. Where Did the Money Go?'.

credible deterrence objectives and to meet compensation requirements for those harmed by any wrongdoing, there is a risk that such collateral benefits could be perceived to influence the determination as to the manner in which cases are pursued. As a consequence, other important and more sustainable credible deterrence policy tools such as coordination in the investment of prevention and compliance programmes may become subordinate to revenue-generating considerations and other collateral benefits accruing to the agencies involved. Where this occurs, then aside from the other consequences already explored in this chapter, such action may in the longer term inadvertently undermine rather than reinforce credible deterrence measures.

27.6 Other stakeholders

Over time, and if global settlements are sufficiently punitive or perceived as such, an economically rational risk management response by a company (and indeed in more extreme scenarios, an entire sector or industry) may be wholesale withdrawal or retrenchment from the activity where the compliance costs and risks associated with the activity are, or are perceived as being, disproportionately high and economically unsustainable. The phenomenon of withdrawing from geographical and business lines deemed to be high risk is known as 'de-risking' and can be seen to have impacted the servicing of certain customer segments and activities following the series of banking fines (for example, withdrawal from support for the money services business sector).

De-risking should be seen as a negative effect, however, when it results in the wholesale withdrawal of legitimate services and activity because of a general concern that highly punitive sanctions may be imposed in the event of any incidence of non-compliance. The consequences of de-risking may take time to manifest themselves, but may include adverse socioeconomic impacts on financial infrastructures of developing economies and the exacerbation of financial exclusion. Where this occurs, there may be compounding effects on categories of stakeholder beyond those already described in this chapter including end users and the economy more broadly. Aside from the scale, frequency and unpredictability of enforcement actions affecting the major banks, the other crucial factor that appears to have resulted in unintended consequences is the vital role performed by banks to the proper functioning of global financial markets. By 2013, 85 per cent of all the major fines had been made against the most globally systemically important banks resulting in concentration risk. The ESRB has observed that there may be factors that render the banking sector (as compared to other companies or sectors) more susceptible to risks that could result in the unintended imposition of costs on end users of the financial system (as a result of depletion of bank capital and the associated reduction of lending and other financial service activities affecting end users and the wider economy).[15]

15 ESRB Report on misconduct risk in the banking sector, June 2015.

Given that end users of the impacted products or services will often be the stakeholders that the enforcement agencies seeking settlement intend to convey some measure of protection or redress, it is likely to become increasingly important in evaluating the potential impact of a global settlement for agencies to consider any longer term unintended consequences for this wider group of stakeholders.

Conclusion 27.7

One obvious route to avoiding some of the potential downsides and collateral consequences explored above is to place greater emphasis on prevention. The most effective compliance programmes employ preventive measures to detect early issues before they become large enough to warrant major enforcement action. Such steps can help avoid some of the costs associated with penalties and can help supervisors and policymakers to focus resources toward more proactive, forward-thinking preventive solutions as opposed to after the event enforcement outcomes. Proactive market studies and industry-led cultural change initiatives, such as those exemplified by the Fair and Effective Markets Review through the Banking Standards Board,[16] can also be highly effective in bringing about transformational change impacting complex market infrastructures.

Even with better prevention measures, in some cases, enforcement action accompanied by monetary penalties will be necessary and appropriate to deploy both as a punitive and credible deterrence tool. In such instances, however, more can and arguably should be done to coordinate enforcement outcomes to bring greater certainty and predictability to mitigate some of the risks explored in this chapter. While many of these risks may be unique to the banking sector because banks are subject to multiple regimes across multiple jurisdictions, given the essential role played by such institutions to the global economy, there ought to exist a mechanism among the various enforcement agencies to coordinate enforcement to ensure better overall proportionality and fewer collateral effects.[17] In an increasingly complex globally interconnected world economy, given that action taken in one market or geography can quickly have an impact on another, this seems a necessary principle that should underpin all policy objectives.

16 Fair and Effective Markets Review – Implementation Report, July 2016.

17 Proportionality is recognised as a principle by most if not all enforcement agencies in the application of penalty polices but is usually considered through the lens of the domestic enforcement outcome only. The European Systemic Risk Board and the Financial Stability Board have recently called for a set of best practice principles for national authorities to follow when applying penalties to cross border banks to ensure adequate coordination and communication. It has also been noted that OICV-IOSCO or FINCONET which has a mandate regarding conduct of business issues could also serve as useful coordination fora. Co-operation between these different fora could ensue a proper coordination between prudential and conduct regulators.

28

Extraterritoriality: The UK Perspective

Tom Epps, Mark Beardsworth and Anupreet Amole[1]

28.1 Overview

English criminal law applies to all persons who come within the territory of England and Wales. In addition, there are now a number of mechanisms that enable UK authorities to investigate and prosecute offences committed overseas.

In the context of economic crime, the past three decades have seen a sustained legislative policy of extending the jurisdiction of the UK authorities. For certain economic crimes, authorities may bring prosecutions in the United Kingdom notwithstanding that all the relevant criminal conduct occurred overseas. The most obvious example is the Bribery Act 2010 (the Act), which we discuss further below. In line with the United Kingdom's extension of its jurisdictional reach, the authorities have increased their coordination and co-operation with other countries' prosecutors. Recent examples of that growing co-operation include the investigation into Rolls-Royce by the US, UK and Brazilian authorities,[2] and the secondment of a US Department of Justice prosecutor to the Serious Fraud Office (SFO) and the Financial Conduct Authority. The trend towards greater cross-border information sharing and coordinated investigations is likely to continue in accordance with ongoing domestic and international obligations.[3] This

1 Tom Epps and Mark Beardsworth are partners, and Anupreet Amole is counsel at Brown Rudnick LLP.

2 An investigation that resulted in the company agreeing a deferred prosecution agreement with the SFO in January 2017. The company also reached separate agreements with both the United States Department of Justice and Brazil in relation to the same conduct. The agreements imposed a combined £671 million in fines on Rolls-Royce.

3 For example, the Common Reporting Standard (formally the Standard for Automatic Exchange of Financial Account Information) is an OECD initiative aimed at hindering tax evasion and money laundering. By May 2017, over 100 countries had committed to join the CRS.

chapter provides an overview of the extraterritorial aspects of UK law regarding economic crime.

The Bribery Act 2010 28.2

In overview, the Act came into force on 1 July 2011 and created offences of (1) offering, promising or giving a bribe and (2) requesting, agreeing to receive or accepting a bribe either in the United Kingdom or abroad, in the public or private sectors, more specifically:

- sections 1 and 2 – bribing another person (active bribery) and being bribed (passive bribery);
- section 6 – bribery of a foreign public official; and
- section 7 – failure of commercial organisations to prevent bribery.

Each of the above offences has extraterritorial application, as outlined below.

Offences under sections 1, 2 and 6 28.2.1

UK prosecutors may pursue an offence under sections 1, 2 or 6, even where no act or omission forming part of that offence took place in the United Kingdom. This is the position provided that:

- a person's acts or omissions outside the United Kingdom would form part of such an offence if they had occurred in the United Kingdom;[4] and
- the person has a 'close connection with the United Kingdom'.[5]

A 'close connection with the United Kingdom' is defined in the Act and includes British citizens and UK companies.[6]

Considering a hypothetical example helps to demonstrate this broad jurisdictional scope of the Act. Assume that one Mr John Smith was born and raised in the United Kingdom, and, following university, he moved to live and work in Latin America. While Mr Smith has lived overseas for, say, 10 years, he has retained British citizenship. Mr Smith is a business consultant in the oil and gas sector, and one of his key clients is an energy company based in India. Assume also that Mr Smith bribed a person in, say, Mexico, and did so in the course of his services to the Indian company, and in so doing he intended that he would obtain or retain business (in Mexico) for the Indian company. Even where none of Mr Smith's conduct made any contact with the United Kingdom, he would be at risk of criminal prosecution in the United Kingdom because he was a British citizen

4 Section 12(2)(b).

5 Section 12(2)(c).

6 Section 12 (4). A person has a close connection with the United Kingdom if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made: a body incorporated under the law of any part of the United Kingdom, a British overseas territories citizen, a British national overseas, a British overseas citizen, a person who under the British Nationality Act 1981 is a British subject, a British protected person under the British Nationality Act 1981, an individual ordinarily resident in the United Kingdom, or a Scottish partnership.

at the time of the offence, and therefore had a 'close connection' to the United Kingdom as defined by section 12(3) of the Act. In practice, of course, a prosecutor would need to consider carefully whether proceedings against Mr Smith would ultimately be in the public interest both in itself and as part of a wider prosecution strategy against others; in this case, for example, the Indian company if it had been carrying on business in the United Kingdom.[7]

28.2.2 Corporate offence under section 7

This offence is committed by a 'relevant commercial organisation' if a person associated with the organisation (an associated person)[8] bribes another person intending to obtain or retain business, or an advantage in the conduct of business, for the organisation. In those circumstances, the organisation's only defence to the strict liability offence is to show that it had 'adequate procedures' in place designed to prevent bribery on its behalf.[9]

A 'relevant commercial organisation' includes a company or partnership (wherever incorporated) that carries on any part of its business in the United Kingdom. On the basis of information in the public domain currently, the courts are yet to consider a case where it is disputed that a commercial organisation indicted under section 7 was carrying on business within the United Kingdom.[10] Until the courts hear argument on that specific point, practitioners continue to refer to the Ministry of Justice guidance regarding the corporate offence. That guidance recommends a 'common sense approach' and notes that a 'demonstrable business presence' is required. Neither having the company's shares listed on the London Stock Exchange nor having a UK subsidiary would necessarily mean that a foreign company is carrying on business for the purposes of section 7 of the Act.[11]

For a high-profile application of the concept of an associated person, the case of *Sweett Group PLC*[12] (2015), the SFO's first corporate conviction under

7 Note that pursuant to section 14 of the Act, if a section 1, 2 or 6 offence was committed with the 'consent or connivance' of a 'senior officer' of a body corporate, or a person purporting to act in such a capacity, the senior officer (and the body corporate) is guilty of an offence.

8 An 'associated person' is defined in the Act as a person who performs services for or on behalf of the company in any capacity (i.e., an employee, agent or subsidiary), which is to be determined by reference to all the relevant circumstances and not merely the nature of his or her relationship with the company. It is worth bearing in mind that a section 7 offence will be committed only if the associated person intended to obtain or retain business or an advantage in the conduct of business for the relevant organisation.

9 Section 7 of the Act. Although 'adequate procedures' is not defined in the Act, the Ministry of Justice's guidance (March 2011) broadly outlines what businesses need to demonstrate to mount a successful 'adequate procedures' defence, for example proper risk-assessment procedures, due-diligence protocols and top-level commitment.

10 The section 7 offence is in addition to, and does not displace, liability that might arise under the Act where the commercial organisation itself commits an offence by virtue of the common law 'identification' principle. For more information on the common law 'identification principle' see the Introduction of this book.

11 Ministry of Justice Guidance to the Bribery Act 2010 (March 2011), paras. 34-36.

12 See https://www.sfo.gov.uk/cases/sweett-group/.

section 7 is instructive. The defendant, a UK company, was found liable for the bribery of a non-UK national in the United Arab Emirates by a Sweett Group subsidiary in Cyprus (Cyril Sweet International Limited); the bribe being paid to secure a contract relating to construction of a £63 million hotel in Dubai. On the facts, the court was satisfied that Sweett's subsidiary was an 'associated person' under the Act, and that the bribes were intended to obtain an advantage in the conduct of business for Sweett. The company pleaded guilty, and a financial penalty totalling £2.25 million was levied against it.[13]

It is irrelevant whether the acts or omissions forming part of the section 7 offence took place in the United Kingdom or elsewhere.[14] Therefore, it is possible for either of the following scenarios to form the factual basis for a section 7 offence:

- any business formed or incorporated in the United Kingdom, where the bribery is conducted entirely outside the United Kingdom by an associated person who has no connection with the United Kingdom and who is performing services outside the United Kingdom; and
- any business formed or incorporated outside the United Kingdom, but that carries on part of its business in the United Kingdom, where the bribery is conducted entirely outside the United Kingdom by an associated person who has no connection with the United Kingdom and who is performing services outside the United Kingdom.

Money laundering offences under Part 7 of POCA 2002 28.3

Money laundering has a broad meaning under UK law. The money laundering regime is designed to tackle the routes through which the proceeds of criminal activity are handled. The principal offences are found in sections 327 to 329 of the Proceeds of Crime Act 2002 (POCA), being:

- concealing, disguising, converting, transferring or removing from the United Kingdom, any criminal property (section 327);
- entering or becoming concerned in arrangements that one knows or suspects facilitate the acquisition, use, etc., of criminal property (section 328); and
- acquiring, using or possessing criminal property (section 329).

Property is 'criminal property' if it represents a person's benefit from criminal conduct; in turn, 'criminal conduct' is conduct that either is an offence in the United Kingdom or would be an offence if it had taken place within the United Kingdom.[15] Although the prosecution must adduce evidence of a predicate offence from which the proceeds of crime emanate, a prosecutor need not prove the type of predicate offence in every instance. Instead, the prosecutor will need to provide the court with detailed particulars explaining why the property that is the subject of the money laundering offence should be regarded as criminal in origin, and that

13 This figure comprised a £1.4 million fine, a confiscation order of £850,000 and an order for costs to the SFO of £95,000.

14 Section 12(5) Bribery Act 2010.

15 Section 340(2) and (3) POCA 2002.

evidence should be sufficiently potent to demonstrate that the only reasonable inference is that the property arose from criminality.

In the case of *R v. Anwoir* and others[16] the appellants were convicted of a number of money laundering offences under section 328 of POCA. They appealed on the basis that the prosecution should have been required to prove at least the class or type of criminal conduct involved in generating the criminal property. Allowing the appeal in part, the court held that there were two ways it could be proven that property had derived from crime. One was by showing that it derived from conduct of a specific and unlawful nature. The second method was by evidence of the circumstances in which the property was handled that gave rise to the irresistible inference that it could only have been derived from crime.[17]

The location of the underlying criminal conduct is immaterial. Instead, the pertinent issue is whether the conduct would constitute a criminal offence in the United Kingdom had it occurred here. This principle was confirmed by the Court of Appeal in 2014 in the case of *R v. Rogers*,[18] which served to emphasise the wide scope of the money laundering regime. Mr Rogers, a UK citizen resident in Spain, permitted money generated by a fraudulent scheme in the United Kingdom to be paid into a Spanish bank account that he controlled, and allowed another person, the scheme's principal, to withdraw money from that account. Mr Rogers was convicted under section 327(1)(c) POCA of converting criminal property. He subsequently appealed against that conviction, arguing that the court did not have jurisdiction to hear Part 7 offences against a non-UK resident where the relevant conduct occurred entirely outside the United Kingdom.

In dismissing the appeal, the court expressly considered the wording of section 340(11)(d) POCA, that money laundering is an act that would constitute an offence under sections 327, 328 or 329 if done in the United Kingdom, and concluded that the language clearly indicated that Parliament had intended for the Part 7 offences to be extraterritorial in effect. The court went on to state that, even if they were wrong on that interpretation of the statute, the modern approach to jurisdiction required 'an adjustment to the circumstances of international criminality', noting that '[t]he offence of money laundering is *par excellence* an offence that is no respecter of national boundaries. It would be surprising indeed if Parliament had not intended the Act to have extra-territorial effect (as we have found it did).'[19]

In light of this extraterritorial effect, the court was able to establish a sufficient jurisdictional nexus to try Mr Rogers on the basis that the acts that led to the property becoming criminal property for the purposes of POCA plainly took

16 *R v. Anwoir* [2008] EWCA Crim 1354.

17 This case has since been applied by the Court of Appeal in *R. v. Anwar (Nasar)* [2013] EWCA Crim 1865.

18 [2014] EWCA Crim 1680. This case was applied in *Jedinak v. Czech Republic* [2016] EWHC 3525 (Admin) and followed in *Sulaiman v. France* [2016] EWHC 2868 (Admin).

19 *R v. Rogers* (Bradley) *and others* [2014] EWCA Crim 1680 (*per* Treacy LJ) at p. 1026, paras. 52 and 54.

place, and had an impact on victims, in the United Kingdom, and that the laundering of the proceeds by Mr Rogers in Spain was directly linked to those acts in the United Kingdom. The court added that this was:

> *not a case where the conversion of criminal property relates to the mechanics of a fraud which took place in Spain and which impacted upon Spanish victims. In those circumstances our courts would not claim jurisdiction. But in this case when the significant part of the criminality underlying the case took place in England, including the continued deprivation of the victims of their monies, there is no reasonable basis for withholding jurisdiction . . . .*[20]

The court's decision in *Rogers* makes plain that UK persons based overseas, including, for example, professional legal or tax advisers, face the risk of criminal liability in the United Kingdom for money laundering offences committed wholly overseas.

There exists a limited exception described as the 'overseas conduct defence'. A person will not be liable under sections 327 to 329 if:

- he or she knew or reasonably believed that the relevant criminal conduct occurred abroad; and
- that relevant criminal conduct was not, when it took place, unlawful under the criminal law of that other country.[21]

The 'overseas conduct defence', however, does not apply to conduct that (despite being legal under local law) would constitute an offence punishable by a maximum sentence of imprisonment over 12 months in the United Kingdom if it had occurred in the United Kingdom.[22] In practice, therefore, most cases (e.g., bribery, corporate fraud, tax evasion) relevant to readers will remain squarely within the wide extraterritorial scope of POCA.

Civil recovery orders

Separately, the civil recovery regime set out in POCA[23] enables UK prosecutors to seek orders from the High Court to recover property that either is or represents property obtained through unlawful conduct. As applications for civil recovery orders and property freezing orders are determined through civil, not criminal, proceedings before the High Court, the evidential burden is the balance of probabilities. The High Court may issue such an order against any person or property wherever domiciled or situated, if there is or has been a connection between the

20 *R v. Rogers (Bradley) and others* [2014] EWCA Crim 1680 (*per* Treacy LJ) at pp. 1026–1027 at para. 55.

21 Sections 327(2A), 328(3) and 329(2A) POCA 2002.

22 The Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006.

23 Part 5 of POCA 2002.

facts of the case and any part of the United Kingdom.[24] Combined with the wide jurisdictional scope of the definition of 'unlawful conduct',[25] civil recovery orders are a powerful and attractive tool in the hands of UK prosecutors. While foreign courts did not traditionally recognise the enforceability of these orders against assets in their jurisdictions, a relatively recent case saw the United Kingdom's National Crime Agency (NCA) succeed in persuading the Luxembourg court to enforce an order against a UK person's bank accounts in that jurisdiction.[26] This was the first time that a foreign court had enforced a civil recovery order, permitting the NCA to recover unlawful property held entirely outside the United Kingdom. It remains to be seen whether other jurisdictions will take a similarly collaborative approach to UK civil recovery efforts overseas.

28.4 Tax evasion and the Criminal Finances Act 2017[27]

The Criminal Finances Act 2017 has introduced a new corporate offence focused on tax evasion. As with the Bribery Act's corporate offence, this represents another significant departure from the traditional 'directing mind' identification doctrine for corporate criminal liability under English law.

See Chapter 1

Part 3 of the Criminal Finances Act 2017 creates two new corporate offences of failure to prevent the facilitation of tax evasion. The offences are modelled on section 7 of the Bribery Act 2010 and apply to both domestic and overseas tax evasion. The new offences are:

See Section 28.2.2

- failure to prevent the facilitation of UK tax evasion offences (section 45): a company or partnership is guilty of an offence if a person commits a UK tax evasion facilitation offence when acting in the capacity of a person associated with that company or partnership;[28] and
- failure to prevent the facilitation of foreign tax evasion offences (section 46): a company or partnership is guilty of an offence if at any time a person commits a foreign tax evasion facilitation offence when acting in the capacity of a person associated with that company or partnership, and any of the following conditions is satisfied:

24 Section 282A POCA 2002, inserted by section 48 of the Crime and Courts Act 2013 following the UK Supreme Court decision in *Perry v. SOCA* [2012] UKSC 35. Section 282A and Schedule 7A POCA have retrospective effect – see paragraph 7(7) of Schedule 7A POCA.

25 Defined as (1) conduct within the United Kingdom that is unlawful under UK criminal law or (2) conduct outside the United Kingdom that is unlawful in that other country and would have been unlawful in the United Kingdom, had it occurred here. This is, therefore, a dual criminality test. The recent insertion of a new section 241A POCA 2002 (by section 13 of the Criminal Finances Act 2017) adds 'gross human rights abuse or violation' to the definition of unlawful conduct for the purposes of Part 5 POCA (civil recovery). This is the United Kingdom's introduction of the concept of targeting assets owned by those involved in repressive regimes anywhere in the world; this follows the approach in the United States to a statute known as the Magnitsky Act of 2012.

26 *National Crime Agency v. Azam* [May 2015], District Court of Luxembourg.

27 This Act received Royal Assent on 27 April and came into force on 30 September 2017.

28 The UK tax offence will be investigated by Her Majesty's Revenue and Customs (HMRC), with prosecutions brought by the Crown Prosecution Service.

- the relevant body is incorporated or formed in the United Kingdom;
- the relevant body carries on business or part of a business in the United Kingdom; or
- any conduct constituting part of the foreign tax evasion facilitation offence took place in the United Kingdom.[29]

If the offence took place outside the jurisdiction, however, UK prosecutors must still prove to the criminal standard that both the taxpayer and the associated person committed an offence. The prosecutor will also need to prove dual criminality of the conduct. The offences consist of three component parts. First, the prosecution must prove criminal evasion by a taxpayer; and there must have been dishonest[30] facilitation of tax evasion by an associated person. Where these two components are satisfied, the relevant body is criminally liable (unless it can show that it had 'reasonable preventative procedures' in place, or that it was unreasonable to expect the company to have had such procedures in place).

A 'relevant body' is a company or a partnership, wherever it may be incorporated or formed.[31] A 'person associated' with the relevant body is an employee, an agent or any other person performing services for or on behalf of that relevant body.[32] Again, this is broadly comparable to the concepts within section 7 of the Bribery Act. Section 46 of the Criminal Finances Act 2017 provides that a company or partnership that carries on business in the United Kingdom will commit an offence if a 'person associated' with it commits a 'foreign tax evasion facilitation offence', unless the company or partnership had reasonable procedures in place to prevent the facilitation offence. A foreign tax evasion facilitation offence means conduct that amounts to:

> *an offence under the law of a foreign country . . . relates to the commission by another person of a foreign tax evasion offence under the law of that country, and . . . would, if the foreign tax evasion offence were a UK tax evasion offence, amount to a UK tax evasion facilitation offence . . . .*[33]

The UK government recently published guidance on the meaning of reasonable preventative procedures.[34] The guidance states that those procedures should be informed by the same six guiding principles as those expected by the Bribery Act model. The six principles are proportionality, top level/board level commitment, risk assessment, due diligence, training and communication, and monitoring/

29 Section 46(2).

30 In the sense of *R v. Ghosh* [1982] EWCA Crim 2.

31 Section 44(2) and (3)

32 Section 44(4).

33 Section 44(6).

34 Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion, HM Revenue and Customs, 1 September 2017, available at https://www.gov.uk/government/consultations/tackling-tax-evasion-a-new-corporate-offence-of-failure-to-prevent-the-criminal-facilitation-of-tax-evasion.

review. Companies doing business in the United Kingdom should consider carefully how to prepare their own reasonable preventative procedures to address the risk of associated persons facilitating tax evasion.

28.5 Financial sanctions

While they are driven by geopolitical issues, international sanctions have direct practical and legal consequences for businesses of all shapes and sizes. The use of international sanctions has grown over recent years, particularly in relation to the military conflicts in Ukraine and Syria. In fact, this continues a trend that began in modern times with the United Nations' Oil-for-Food Programme regarding Iraq after the Gulf War of 1991. At the time of writing, the United Kingdom applies financial sanctions in 27 separate programmes, targeting governments and terrorist groups such as the governments of Burundi, North Korea and Syria, and the Taliban, ISIL and Al-Qaida.

Financial sanctions restrict the provision of financial services, or access to global capital markets, or both. More specifically, those restrictions can include bans on investments in a particular country, or the denial of banking relationships. Trade sanctions restrict the trading of certain products or commodities (e.g., arms, oil and diamonds) from targeted countries (e.g., Iran, Russia and Syria); and control the export of certain products (e.g., military or dual-use items) to targeted countries. A recent decision by the European Court of Justice, which upheld the EU sanctions against Russia regarding its annexation of Crimea in 2014, demonstrates the rationale in practice:

> *Contrary to what is claimed by Rosneft, there is a reasonable relationship between the content of the contested acts and the objective pursued by them. In so far as that objective is, inter alia, to increase the costs to be borne by the Russian Federation for its actions to undermine Ukraine's territorial integrity, sovereignty and independence, the approach of targeting a major player in the oil sector, which is moreover predominantly owned by the Russian State, is consistent with that objective and cannot, in any event, be considered to be manifestly inappropriate with respect to the objective pursued.*[35]

For the purposes of this chapter, we focus on financial sanctions.[36] The UK legal framework regarding financial sanctions is not contained in any one particular

35 *PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others*, Case C-72/15, 28 March 2017 at 147.

36 For trade sanctions, see the Export Control Act 2002 (and the related Export Control Order 2008) and the Customs and Excise Management Act 1979. The Customs and Excise Management Act 1979 imposes criminal liability where a person exports goods from the United Kingdom 'when the exportation or shipment is or would be contrary to any prohibition or restriction for the time being in force'. The Export Control Order 2008 imposes those restrictions. The ECO 2008 specifies a three-tier categorisation of goods, with Category A products including items designed for torture; Category B includes arms and ammunition; Category C being items that have a dual civil/military use. See Part 4 and Schedule 1 of the ECO 2008. Trade sanctions apply

statute. Instead, the United Kingdom uses secondary legislation to implement various sanctions programmes made by each of the United Nations Security Council and the European Union. At the same time, the United Kingdom may also issue domestic financial sanctions under certain specific statutes, such as the Terrorist Asset-Freezing Act 2010.[37] The specific restrictions imposed by any one set of financial sanctions (e.g., those relating to Russia's involvement in Ukraine) will vary in each case. Those advising businesses concerned about liability should carefully review the text of the specific statutory instrument, and the underlying EU regulation, in each case. Broadly, however, UK financial sanctions impose criminal liability for a person who:

- makes funds or economic resources available, whether directly or indirectly, to a designated person;
- deals with funds or economic resources belonging to or controlled by a designated person; or
- acts in a way, whether directly or indirectly, to circumvent the relevant financial sanction prohibitions.[38]

Financial sanctions also carry positive reporting obligations for financial services firms. Where a firm detects relevant information, for example that a customer or counterparty is a designated person, the firm must notify the Office of Financial Sanctions Implementation (OFSI), which is part of HM Treasury.[39]

While the jurisdictional scope of UK financial sanctions is broad, they do require some element of UK nexus. The sanctions apply to:

- anybody present in the United Kingdom, namely all persons (natural and legal) 'who are within or undertake activities within the UK's territory'; and
- all UK nationals and all UK legal entities (including branches, and the UK subsidiaries of foreign companies), wherever they may be in the world and irrespective of where their activities occur.[40]

In recent guidance, the OFSI emphasised that establishing a UK nexus would be determined by the facts in each case, and that it would not seek to 'artificially bring something within UK authority that does not clearly and naturally come under it'.[41] This may provide some degree of comfort to foreign businesses with no UK footprint.

---

to (1) anybody present in the UK, i.e., all persons (natural and legal); (2) all UK subjects anywhere in the world; and (3) any legal entity incorporated under UK law.

37 The other relevant UK statutes, which also take a broad jurisdictional approach, are the Counter Terrorism Act 2008 and the Anti-Terrorism, Crime and Security Act 2001.

38 Office of Financial Sanctions Implementation, *Financial Sanctions: Guidance*, April 2017, page 8. The maximum term of imprisonment was recently increased from two to seven years – see sections 144 and 145 of the Policing and Crime Act 2017 (PCA 2017).

39 Office of Financial Sanctions Implementation, Guidance, August 2017, p. 62.

40 Office of Financial Sanctions Implementation, Financial Sanctions: Guidance, April 2017, p. 7.

41 Office of Financial Sanctions Implementation, Monetary penalties for breaches of financial sanctions – Guidance, August 2017, p. 12.

Until recently, enforcement options were limited, taking the form of either an official warning letter from HM Treasury or full criminal proceedings by a prosecutor. The Policing and Crime Act 2017, effective from 3 April 2017, introduced a wider range of enforcement options, specifically (1) making sanctions offences eligible for consideration for a deferred prosecution agreement;[42] (2) making sanctions offences eligible for (civil) Serious Crime Prevention Orders under the Serious Crime Act 2007;[43] and (3) empowering the OFSI to impose (civil) financial penalties.[44] These developments are all consistent with the general trend in UK law since the Bribery Act 2010 came into effect towards increased enforcement against companies, including for misconduct overseas.

28.6 Information sharing powers under the Criminal Finances Act

As demonstrated by several recent enforcement actions, the UK authorities have increased their sharing of information with counterparts around the world. That coordination is developing further. The Criminal Finances Act 2017 includes certain amendments to POCA, the effect of which will be to enhance the information flow to the UK authorities (specifically, the NCA in the first instance),[45] and most importantly for the purpose of this chapter, to facilitate the NCA's assistance of law enforcement bodies overseas.

28.7 Conspiracy

Readers will be familiar with cases involving suspected or alleged conspiracies to commit substantive offences. When considering conspiracy in the economic crime context, practitioners should be aware of the interplay between (1) common law conspiracy to defraud, (2) the conspiracy offence in section 1A Criminal Law Act 1977, and (3) the Fraud Act 2006, whose extraterritorial reach is specified by the Criminal Justice Act 1993 (as amended).

42 Section 150 of PCA 2017.

43 Section 151 of PCA 2017.

44 Section 146 of PCA 2017.

45 Section 10 of the Act serves to extend the moratorium period for investigations into suspicious activity reports (SARs) and provides the NCA with new powers to request information from regulated companies. Under this section, a 'senior officer' of a relevant authority can apply to the crown court for an extension of the current seven-working-day moratorium period for SARs. If the application is granted, the court can extend the moratorium period for no more than a further 186 days. The court will only be in a position to grant an extension of 31 days at a time, with the relevant authority being required to continue to make further applications for additional extensions should it be deemed necessary. This will enable the court to exercise judicial scrutiny over the relevant authorities. If an application is refused by the court, the relevant authority has a further 31 calendar days in which it can investigate and either take action to freeze the funds or give its consent to proceed with the transaction.

Common law conspiracy to defraud 28.7.1

The leading case defines a conspiracy to defraud as an agreement 'to deprive a person dishonestly of something which is his or to which he is or would be or might be entitled' or 'by dishonesty to injure some proprietary right'.[46]

Common law conspiracy to defraud is one of the very few remaining common law conspiracy offences, section 5 of the Criminal Law Act 1977 having replaced all others with a general statutory offence. The rationale for its retention despite the statutory offences introduced by the Fraud Act 2006 was that the common law offence was broad (as indicated by the definition above), and therefore allowed prosecutors to roll several offences into a smaller number of indictments than would otherwise be required to prosecute multiple examples of fraudulent conduct, and present a single cogent narrative to the court, without needing to charge, and evidence, several separate statutory offences.[47] Statute has made clear that a person charged with conspiracy to defraud may be liable irrespective of whether he or she became a co-conspirator in England or whether any act in relation to the conspiracy occurred in England.[48]

Statutory conspiracy to commit offences abroad 28.7.2

The Criminal Justice Act 1987 provides that a prosecutor may pursue common law conspiracy to defraud even in circumstances where the substantive offence would be covered by a specific statute.[49] However, in many cases, ranging from *Innospec Limited*[50] in 2010 to the recently announced indictment (in June 2017) of Barclays Bank regarding Qatar, the SFO has relied on section 1(1) of the Criminal Law Act 1977 to bring charges of conspiracy to commit offences.[51]

In 1998, the Criminal Law Act 1977 was amended to provide expressly for a discrete offence of conspiracy to commit criminal offences outside the

46 *Scott v. Metropolitan Police Commissioner* [1975] AC 819 at 840F.

47 See the Attorney General's Guidance on use of the common law offence of conspiracy to defraud, (2007), and the Ministry of Justice Post-Legislative assessment of the Fraud Act 2006 (June 2012).

48 Section 3(2) Criminal Justice Act 1993.

49 Section 12 Criminal Justice 1987, which retained the offence at common law of conspiracy to defraud – see section 5(2) Criminal Law Act 1977.

50 The charge against Innospec Ltd was that between February 2002 and December 2006, the company, through various agents, engaged in systematic and large-scale corruption of senior government officials of Indonesia to secure contracts for the supply of a fuel additive, tetraethyl lead (TEL). The corrupt behaviour took the form of bribes, totalling approximately US$8 million. The seriousness of the corruption was aggravated by the fact that Innospec Ltd's behaviour was aimed at blocking legislative moves to ban TEL, owing to environmental and public health concerns. The company pleaded guilty to conspiracy contrary to section 1 of the Criminal Law Act 1977 and was fined $12.7 million.

51 In *R v. Turner*, *Kerrison, Papachristos and Jennings* in 2014 (and the subsequent appeal *SFO v. Papachristos and Kerrison* [2014] EWCA Crim 1863), four former executives of Innospec were convicted and imprisoned for conspiracy offences in relation to their roles in bribing state officials in Indonesia and Iraq in order to secure contracts from the governments of those countries for the supply of products produced by Innospec Ltd.

jurisdiction.[52] By section 1A of the Act, a conspiracy may involve the doing of an act in a place outside England and Wales that constitutes an offence in that other jurisdiction. The purpose of section 1A was to extend existing UK law, and to give the English courts extraterritorial jurisdiction in relation to a conspiracy (1) partly formed or carried out in England and Wales, and (2) where the object was the commission of a foreign offence (where there is an equivalent offence in England and Wales). This section only applies, however, where four nexus conditions are satisfied:

- pursuit of the agreed conduct would involve an act by one or more of the parties outside the United Kingdom;
- that act is an offence under local law in that other country;
- that the agreement would be a conspiracy (within section 1(1) CLA 1977) but for the fact that the offence would not be an offence triable in England and Wales if committed in accordance with the parties' intentions; and
- a party to the agreement, whether directly or via an agent, did anything in England and Wales regarding formation of the agreement before its formation, became a party to it in England and Wales, or did or omitted anything in England and Wales pursuant to the agreement.[53]

Where those conditions are satisfied, the prosecutor may pursue conspiracy charges under section 1A, referring to the offence as being a conspiracy to commit the underlying substantive offence (e.g., drug trafficking or people smuggling)[54] but for the fact that it was not triable in England and Wales.[55]

Similarly, the Fraud Act 2006 has expressly broad extraterritorial application.[56] Put simply, where any element of a statutory fraud offence[57] occurs within England and Wales, the court will have jurisdiction to try a defendant whether or not he or she was in the jurisdiction at any material time, and whether or not he or she was a British citizen at the time.

28.7.3 Inchoate offences

Separately, practitioners should not overlook the inchoate offences of encouraging or assisting others in the commission of offences. The Serious Crime Act 2007 includes statutory inchoate offences (under sections 44 to 46) of encouraging or assisting the commission of offences; these have extraterritorial application in certain circumstances.[58]

---

52 Inserted by the Criminal Justice (Terrorism and Conspiracy) Act 1998, section 5.

53 Section 1A(1) to (5), Criminal Law Act 1977.

54 Respectively, *R v. Welsh (Christopher Mark)* [2015] EWCA Crim 1516, and *R v. Sophia Patel* [2009] EWCA Crim 67.

55 Section 1A(6), Criminal Law Act 1977.

56 Part 1 of the Criminal Justice Act 1993 as amended by the Fraud Act 2006 (schedule 1)

57 Being fraud by false representation (section 2), fraud by failing to disclose information (section 3), or fraud by abuse of position (section 4 Fraud Act 2006).

58 Through operation of section 52 of, and the conditions specified in Schedule 4 to, the Serious Crime Act 2007.

Where a person within England and Wales knows or believes that what is anticipated might occur wholly or partly in a place outside the jurisdiction, he or she will be liable under the Serious Crime Act 2007 if the anticipated offence would be triable in England if it were committed abroad or the anticipated conduct would amount to an offence under the local law of that other state.[59] Where that person is also outside the jurisdiction at the time of encouraging or assisting the anticipated offence, he or she will be liable under sections 44 to 46 if he would otherwise be triable within England and Wales, for example on the basis of his or her British citizenship.[60]

Mutual legal assistance and the extraterritorial authority of UK enforcement agencies 28.8

Mutual legal assistance (MLA) allows a state to seek co-operation from another state in the investigation or prosecution of criminal offences via a formal letter of request. MLA is generally used when the enquiries require coercive means.[61]

Much of the cross-border co-operation between authorities is informal, relying on established liaison relationships, whether directly between states or through organisations such as Interpol and Europol.[62] MLA is generally not appropriate if the material can be obtained directly via law enforcement co-operation for intelligence purposes or if the material otherwise is admissible in that form. Police-to-police or agency-to-agency co-operation can be extremely helpful to conduct negotiations for the voluntary transmission of documents and evidence and even to secure bail in advance of a voluntary surrender of a suspect.

The framework governing the United Kingdom's approach to MLA is contained in a number of instruments, primarily the Crime (International Co-operation) Act 2003 (CICA), the European Convention on Mutual Legal Assistance in Criminal Matters 2000, and various bilateral and multilateral treaties (for example, with the United States in 1994, with Brazil in 2005 and with

59 Paragraphs 1 and 2 of Schedule 4, Serious Crime Act 2007.

60 For a recent discussion of this extraterritorial application, see the judgments in *R (Khan) v. Foreign Secretary*, regarding allegations that British intelligence officers committed offences under sections 44 to 46 of the SCA when they passed location information to agents of the United States Government for use in missile strikes by drone aircraft targeting individuals in Pakistan. *R (Khan) v. Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 24; and at first instance at [2012] EWHC 3728 (Admin). Ultimately, however, the claim did not continue because the court refused permission to proceed as the case would inevitably risk judicial condemnation of the actions of a foreign sovereign state.

61 While MLA is used for gathering and exchanging information, and requesting and providing assistance in obtaining evidence located abroad, extradition is the legal process by which an individual is transferred from one state to another for the purposes of being tried or serving a sentence already imposed. The Extradition Act 2003 sets out the UK extradition legal framework

62 For example, see the NCA website regarding its international co-operation. For a discussion of the European arrest warrant, see chapter 17 on individuals in cross-border investigations.

India in 1995). The UK Home Office Central Authority[63] is primarily tasked with receiving, and acceding to, MLA requests.[64]

Outgoing MLA requests (i.e., those from the United Kingdom to a foreign state) seeking evidence must be issued by a court or a designated prosecuting authority.[65] The MLA request can only be issued if it appears to the court or designated prosecuting authority that: an offence has been committed or there are reasonable grounds for suspecting that an offence has been committed; or proceedings in respect of the offence have been instituted by the designated prosecuting authority or the offence is being investigated.[66] The request must relate to the obtaining of evidence for use in the proceedings or investigation.[67] The defence can also apply for an MLA request once criminal proceedings have begun.[68] The usual policy for central or executing authorities is to keep the MLA request confidential and not to share its content beyond government departments, agencies, the courts or enforcement agencies.[69]

Evidence obtained from or by the United Kingdom pursuant to an MLA request cannot be used for any purpose other than that specified in the request without consent of the foreign authority.

Individuals or companies that are the subject of a request from a foreign authority, whether formal or informal, should ensure that they do not disclose material that is legally privileged, and ensure they take all appropriate steps to protect their rights under UK law, including as to the privilege against self-incrimination. For example, one method of MLA to foreign states is to compel witnesses to attend court.[70] However, a witness cannot be compelled to give evidence where he or she could not otherwise be compelled to testify under either UK law or that of the requesting state.[71]

Furthermore, in the appropriate case, there is scope for judicial review of the UK authorities' response to a letter of request (LOR) from a foreign authority. The recent decision of the High Court in *R (on the application of Soma Oil and Gas Ltd) v. Director of the SFO*[72] makes clear that judicial review challenges to investigation decisions by authorities should be very rare, and only pursued in

63 If the request relates to tax and fiscal customs matters, the competent authority is HMRC.

64 There are exceptions such as EU freezing orders for property, which need to be sent directly to the relevant UK prosecuting authority.

65 The Director and any designated member of the Serious Fraud Office, the Financial Conduct Authority and the Bank of England are examples of designated prosecuting authorities.

66 Section 7(5), CICA 2003.

67 Section 7(2)), CICA 2003.

68 Section 7(1)(b) and (3)(c), CICA 2003.

69 In *Blue Holdings (1) Pte Ltd and another v. National Crime Agency* [2016] EWCA Civ 760, the appellant succeeded in inspecting an MLA request from the US Department of Justice to the National Crime Agency following the court's balancing exercise between the right to inspect a document in proceedings and an enforcement authority's claim to confidentiality.

70 Section 15 CICA 2003.

71 Schedule 1 CICA 2003.

72 [2016] EWHC 2471.

exceptional circumstances.[73] However, it does remain open to individuals subjected to a LOR to seek protection; the court noted that '[a] balance must be struck between the public interest in international cooperation in investigating and prosecuting serious crime and the rights of the individual . . . . Though such challenges are not at all to be encouraged . . . they would dovetail well with the statutory and treaty regime *provided* their focus was upon compliance with the CICA and treaty conditions for the making of a LOR.'[74]

In cases of concurrent or overlapping jurisdiction, prosecutors are encouraged to meet with their counterparts from overseas to discuss the relevant factors, such as the location and interests of witnesses and whether the prosecution can be appropriately split into separate cases. Where a case touches on issues of US jurisdiction, which has wide extraterritorial application, the UK prosecutor will need to consider the Attorney-General's long-standing agreement with the US Department of Justice, and the related guidance (January 2007), which requires consultation and regular liaison from the outset of a relevant investigation.

Within the European Union, issues of concurrent jurisdiction are handled by Eurojust, the role of which is to stimulate and facilitate co-operation in the investigation of serious cross-border crime, particularly organised crime. With the UK government now in negotiations for Britain's exit from the EU, the UK authorities will no doubt be seeking to negotiate for continued co-operation between jurisdictions to allow for effective liaison with their European counterparts.

73 *R (on the application of Unaenergy Group Holdings Pte Ltd and others) v. Director of the SFO* [2017] EWHC 600 (Admin) at para. 34 (iii) (*per* Gross LJ).

74 Ibid. at 35 (original emphasis).

29

Extraterritoriality: The US Perspective

Daniel Silver and Benjamin Berringer[1]

29.1 Extraterritorial application of US laws

US regulators and prosecutors frequently investigate non-US entities and individuals for overseas conduct, even though there is an at best limited connection to the United States. Despite the seemingly broad remit of US authorities, US courts generally apply a 'presumption against extraterritoriality' when determining the scope of statutes. The contours of this presumption have been the subject of extensive litigation and several United States Supreme Court rulings in recent years, with the court most recently revisiting the issue in 2016 in *RJR Nabisco, Inc v. European Community*.[2] In essence, the presumption means that 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'[3]

Despite the existence of this presumption, US authorities justify investigating and prosecuting conduct that occurs largely outside the United States by arguing that the use of the US financial system or other limited contact with the United States renders the conduct at issue domestic rather than extraterritorial. Whether there is a sufficient US nexus to render the conduct at issue 'domestic' will turn on the focus of the statutes. Therefore, it is important to understand the scope of the statutes that US authorities most commonly use to reach overseas conduct as well as the types of overseas activity that can fall within the reach of US law. This chapter will address recent jurisprudence regarding the presumption against

1 Daniel Silver is a partner and Benjamin Berringer is an associate at Clifford Chance US LLP.

2 136 S.Ct. 2090 (2016).

3 *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

extraterritoriality and its application to some of the most commonly invoked statutes in criminal and regulatory investigations.

RJR Nabisco and the presumption against extraterritoriality 29.2

Pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), it is unlawful to engage in a 'pattern of racketeering activity' in association with an 'enterprise'.[4] Racketeering activity includes a variety of enumerated wrongful acts.[5] These offences are frequently referred to as RICO 'predicates'. Using RICO, federal prosecutors can bring charges against individuals or corporate entities that are alleged to have engaged in two or more illegal acts. RICO provides for both civil and criminal penalties, as well as a private right of action for victims.

In 2016, in *RJR Nabisco Inc v. European Community*,[6] a private civil action, the Supreme Court considered the extent to which RICO applies extraterritorially. The court made clear that there is a two-step framework for analysing extraterritoriality.[7] First, a court must 'ask whether the presumption against extraterritoriality has been rebutted – that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially.'[8] Second, if a statute is not extraterritorial, the court must:

> *determine whether the case involves a domestic application of the statute, and [the court does] this by looking to the statute's 'focus.' If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in US territory.*[9]

The court further held that RICO applies extraterritorially only to the extent that the underlying predicate offences have extraterritorial application.[10] The court noted that Congress must have intended that RICO reach at least *some* foreign activity, given that several RICO predicates expressly apply to conduct that occurred abroad.[11] The incorporation of such statutes, the court concluded, 'gives a clear, affirmative indication that § 1962 applies to foreign racketeering activity – but only to the extent that the predicates alleged in the particular case themselves apply extraterritorially.'[12]

4 See 18 U.S.C. § 1962.
5 See 18 U.S.C. § 1961(1).
6 136 S.Ct. 2090 (2016).
7 136 S.Ct. at 2101.
8 Id.
9 Id.
10 136 S.Ct. at 2091
11 Id. (citing as an example 18 U.S.C. § 2332(a), which prohibits the killing of a US national outside the United States).
12 Id. at 2102.

While RICO does not require an 'enterprise' be based in the US, the court noted in *RJR Nabisco* that it still requires some nexus between the enterprise and the United States.[13] The statute requires proof that an enterprise engages in or affects interstate or foreign commerce (i.e., commerce that crosses state lines within the United States or between the United States and another country). According to the court, 'a RICO enterprise must engage in, or affect in some significant way, commerce directly involving the United States' and '[e]nterprises whose activities lack that anchor to US commerce cannot sustain a RICO violation.'[14]

In the criminal context, courts have also applied *RJR Nabisco* to determine if a RICO prosecution is domestic or extraterritorial.[15] In criminal cases, the extraterritorial reach is also coterminous with the underlying predicate offences.[16] Therefore, whether a specific application of RICO is extraterritorial will depend on the nature of the underlying offence.

29.3 Securities laws

The extraterritorial scope of US securities laws has been the subject of frequent litigation in recent years. The Securities Exchange Act of 1934 (the Exchange Act) and, in particular, Rule 10b-5 thereunder, which prohibits fraudulent or manipulative devices in connection with the purchase or sale of any security, is one of the primary laws by which US securities markets are regulated. The SEC may bring civil enforcement actions against companies and individuals for violations of the Exchange Act. Additionally, the United States Department of Justice (DOJ) may seek criminal sanctions for wilful violations.[17] The DOJ may also bring prosecutions under other federal criminal statutes, such as charges alleging wire fraud or bank fraud, for conduct relating to a securities fraud violation.

Morrison and its application

Prior to the Supreme Court's 2010 decision in *Morrison v. National Australia Bank Ltd*,[18] courts employed the 'conduct and effects test', to analyse the foreign application of the Exchange Act. Pursuant to this test, US law applied if there was sufficient domestic conduct or a substantial effect in the United States. Determining whether there was sufficient conduct or effects required an intensive inquiry into the operative facts. The conduct prong was satisfied if 'substantial acts in furtherance of the fraud' were committed within the United States. This occurred when '(1) the defendant's activities in the United States were more than "merely preparatory" to a securities fraud conducted elsewhere and (2) the activities or culpable

13 Id. at 2105.

14 Id.

15 *United States v. Hawitt*, 2017 WL 663542, *9 (E.D.N.Y. 17 February 2017).

16 Id. at *10.

17 15 U.S.C. § 78ff(a).

18 561 US 247 (2010).

failures to act within the United States "directly caused" the claimed losses.'[19] The effects test was satisfied where there was 'a substantial effect in the United States or upon United States citizens.'[20] A claimant did not need to prove both conduct and effects, but courts often looked at the two in combination.[21]

The *Morrison* court replaced this long-standing approach with a new standard. The *Morrison* case was a so-called 'foreign-cubed' private civil securities fraud suit involving claims by foreign investors who purchased shares of a foreign company on a foreign exchange. The investors claimed that the defendant, an Australian company, had defrauded them by issuing misleading financial statements. The US Supreme Court rejected the argument that the Exchange Act applied to these extraterritorial claims, holding that because the Exchange Act is silent as to its extraterritorial application, it only applies to claims that concern securities listed on domestic exchanges or domestic transactions in securities.[22] Therefore, pursuant to *Morrison*, only claims that concern securities listed on domestic exchanges or domestic transactions in other securities can be adjudicated domestically.[23] In reaching this decision, the court clarified that the extraterritorial application of US statutes is a merits, rather than jurisdictional, question.[24] Even if a court has subject-matter jurisdiction over the proceeding and personal jurisdiction over the defendants, if the statute in question has no extraterritorial application, a plaintiff cannot state a cause of action.

Following *Morrison*, the Second Circuit has found that transactions involving securities that are not traded on a domestic exchange are nonetheless 'domestic transactions' if irrevocable liability is incurred or title passes within the United

19 *SEC v. Berger*, 322 F.3d 187, 193 (2d Cir. 2003) (internal citation and quotation omitted). For example, in *SEC v. Berger*, the court found that the conduct test was met when creation of false financial information, the transmission of that false financial information overseas, and approval of the resulting false financial statements all occurred in the United States. *Berger*, 322 F.3d Id. at 194.

20 Id. at 192.

21 See *City of Edinburgh Council ex rel. Lothian Pension Fund v. Vodafone Grp. Pub. Co.*, 2008 WL 5062669, at *3 (S.D.N.Y. 24 November 2008).

22 The application of *Morrison* to criminal prosecutions is unsettled. In particular, some federal courts after *Morrison* have stated that '[t]he presumption that ordinary acts of Congress do not apply extraterritorially . . . does not apply to criminal statutes.' *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011). On the other hand, following *Morrison*, some courts have limited the extraterritorial application of certain federal criminal offences. For example, in *United States v. Vilar*, the court held that Section 10(b) of the Exchange Act does not apply extraterritorially, regardless of whether liability is sought criminally or civilly. 729 F.3d 62, 72 (2d Cir. 2013)

23 See *Morrison* at 256 (observing that rejection of the presumption of extraterritoriality had 'produced a collection of tests for divining what Congress would have wanted, complex in formulation and unpredictable in application').

24 Id. at 258 ('[T]o ask what conduct [Section] 10(b) reaches is to ask what conduct [Section] 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, refers to a tribunal's power to hear a case.' (citation omitted) (internal quotation marks omitted)).

States.[25] While the exact meaning of 'irrevocable liability' remains ambiguous, the test would probably be satisfied if a party enters into a binding agreement to purchase a security in the United Sttaes.

Just days after the *Morrison* decision was handed down, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[26] In section 929P of Dodd-Frank, Congress included a provision apparently aimed at overturning *Morrison*'s holding and restoring the conduct and effects tests, at least with respect to criminal and SEC enforcement actions.[27] However, many courts and commentators have questioned whether the provision accomplishes what Congress seemingly intended.[28]

Section 929P provides that the 'district courts of the United States . . . shall have jurisdiction' over actions brought by the SEC or the United States that allege a violation of the Exchange Act's anti-fraud provisions and involve conduct within the United States in furtherance of the violation or conduct occurring outside the United States with a substantial effect within the United States.[29] While this provision purports to grant jurisdiction to US courts over certain kinds of enforcement actions, *Morrison* explicitly stated that a statute's exterritorial reach is a merits question, determined by the scope of the statute itself, rather than by the court's subject-matter jurisdiction.[30] Therefore, read literally, Section 929P merely grants courts with jurisdiction they already possessed to determine whether particular violations fall within the scope of US law.[31]

Whether Section 929P was successful in reinstating the 'conduct and effects' tests remains an open question.[32] A number of courts have assumed Section 929P

---

25 *Absolute Activist Value Master Fund Ltd. v. Ficeto*, No. 11-0221-CV, 2012 WL 661771 (2d Cir. 1 March 2012).

26 Pub. L. No. 111-203, 124 Stat. 1376 (2010).

27 Id. § 929P (codified at 15 U.S.C. § 78aa(b)).

28 See, e.g., Daniel E. Herz-Roiphe, *Innocent Abroad? Morrison, Vilar, and the Extraterritorial Application of the Exchange Act*, 123 Yale L. J. 1875 (2014); Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was it Effective, Needed, or Sufficient?*, 1 Harv. Bus. L. Rev. 195 (2011).

29 The provision in its entirety states:
The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this chapter involving – (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.
15 U.S.C. § 78aa(b).

30 See *Morrison*, 561 US at 253-54.

31 See id. ('The District Court here had jurisdiction under 15 U.S.C. § 78aa to adjudicate the question whether § 10(b) applies to [the respondent's] conduct.').

32 See *SEC v. Battoo*, 158 F. Supp. 3d 676, 692 n.12 (N.D. Ill. 2016) ('There is no binding case law that decides whether the Dodd-Frank Act reinstated the conduct-and-effects test for actions brought by the SEC.').

had such an effect, but did so in *dicta*, and without analysis.[33] One of the few courts to have directly confronted the issue ultimately avoided reaching a conclusive determination by holding that the SEC's complaint satisfied both the 'conduct' and 'effects' tests, as well as the *Morrison* 'transactional' test.[34] Companies or individuals facing potential regulatory liability under US securities laws should therefore consider not only whether the relevant transactions occurred in the United States, but also whether conduct forming part of the alleged fraud occurred in the United States or affected investors in the United States.

Foreign Corrupt Practices Act 29.4

By its express terms, the Foreign Corrupt Practices Act (FCPA) applies to certain enumerated categories of non-US entities and individuals. However, in practice, US authorities have sought to expand the FCPA's extraterritorial reach through aggressive use of accessorial theories of liability. US authorities assert that individuals who fall outside the scope of the FCPA, but nonetheless aid and abet, or conspire with, individuals or entities that are subject to the statute, are liable as if they themselves were a covered person. This approach has been challenged by the defendant in *United States v. Hoskins,* a case currently pending before the US Court of Appeals for the Second Circuit.[35]

The FCPA prohibits two types of activities – bribery of foreign officials and falsification of the books and records of an issuer of US securities.[36] The SEC may seek civil penalties for violations of the FCPA by regulated entities, and the DOJ may pursue criminal penalties. The FCPA specifically delineates the companies and individuals that are subject to its anti-bribery provisions, namely, if they: (1) are a US entity or individual (i.e., a 'domestic concern');[37] (2) have securities listed on a US stock exchange or are required to file periodic reports with the SEC;[38] or (3) use 'the mails or any means or instrumentality of interstate commerce', or 'commit any other act in furtherance of' a corrupt payment, 'while in the territory of the United States'.[39] Additionally, the FCPA applies to any stockholder, officer, director, employee, or agent acting on behalf of a company that is

33 See, e.g., *SEC v. Tourre*, No. 10 Civ. 3229(KBF), 2013 WL 2407172, at *1 n.4 (S.D.N.Y. 4 June 2012); see also *SEC v. Chicago Convention Center, LLC*, 961 F. Supp. 2d 905, 910 n.1 (N.D. Ill. 2013) (collecting cases).

34 See *Chicago Convention Center*, 961 F. Supp. 2d at 916-17 (N.D. Ill. 2013) (holding after a lengthy discussion of Section 929P and its legislative history that, '[t]he Court need not resolve this complex interpretation issue, however, because . . . under either the *Morrison* 'transactional' inquiry or the allegedly revived 'conducts and effects test,' the SEC's Complaint survives the present motion to dismiss').

35 See *United States v. Hoskins,* No. 16-1010 (2d Cir. filed 1 April 2016).

36 See 15 U.S.C. §§ 78dd-1 to -3 (2012); id. § 78m. Issuers may also be liable for failing to maintain adequate internal controls to prevent corrupt activity. See 15 U.S.C. § 78m(b)(2)

37 Id. §§ 78dd-1(g), 78dd-2(i).

38 Id. §§ 78dd-1(a), 78dd-2(a).

39 Id. § 78dd-3(a).

subject to the FCPA, including consultants, contractors, joint venture partners or other business associates.[40]

As the foregoing description makes clear (not to mention the title of the act itself), Congress clearly intended for the FCPA to cover conduct that might otherwise be considered 'extraterritorial', namely occurring outside the United States. As far as the DOJ and SEC are concerned, although the FCPA does not directly apply to non-US subsidiaries of US issuers or domestic concerns, guidance from both authorities explains that a parent company may nonetheless be liable under the FCPA's anti-bribery provisions for the actions of a subsidiary not only when the parent directly participated in the subsidiary's misconduct, but also 'under traditional agency principles'.[41] To determine whether a subsidiary is an agent of its parent such that its knowledge and conduct are imputed to the parent, the DOJ and the SEC evaluate 'the parent's control – including the parent's knowledge and direction of the subsidiary's actions, both generally and in the context of the specific transaction'.[42]

Similarly, the US authorities' published guidance suggests that limited conduct within the United States may render an otherwise foreign scheme subject to the jurisdiction of the FCPA. If, for example, a foreign scheme involves 'placing a telephone call or sending an email, text message, or fax from, to, or through the United States' or 'sending a wire transfer from or to a US bank or otherwise using the US banking system, or traveling across state borders or internationally to or from the United States' the US authorities will probably contend that those actions suffice to bring the conduct within the FCPA's scope.[43] While there is limited case law interpreting the boundaries of FCPA jurisdiction, prior enforcement actions have supported the government's expansive view. For example, in *United States v. JGC Corp*, the court approved a deferred prosecution agreement (DPA), which charged a Japanese defendant with violating the FCPA.[44] Pursuant to the agreed statement of facts in that case, the government alleged that the defendant bribed Nigerian officials to obtain government contracts. The jurisdictional basis for the charge was that the defendant allegedly conspired with an American joint-venture partner, and that wire transfers in furtherance of the scheme, which were sent from one foreign bank to another, were routed at some point through New York.[45]

40 Id. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

41 Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act 27 (2012).

42 Id.

43 Id. at 11.

44 Deferred Prosecution Agreement, *United States v. JGC Corporation*, No. 11 CR 260, 2011 WL 1315939 (S.D. Tex. 6 April 2011).

45 Trial Pleading, *United States v. JGC Corporation*, No. 11 CR 260, 2011 WL 1359521 (S.D. Tex. 6 April 2011).

In *United States v. Hoskins,* the DOJ brought criminal FCPA charges against a British national who was formerly employed by a French conglomerate.[46] Although Mr Hoskins never entered the United States during the course of the alleged scheme, the DOJ contended that Mr Hoskins acted as an 'agent' of his employer's US subsidiary, and moreover was liable under the general conspiracy and aiding-and-abetting statutes for working in concert with others within the United States who were subject to the FCPA. The trial court ruled in Mr Hoskins's favour that non-US persons who were not expressly covered by the FCPA could not be subject to secondary liability for conspiring with, or aiding and abetting, individuals or companies who were covered by the statute.[47] However, the DOJ has appealed this ruling to the US Court of Appeals for the Second Circuit.

In sum, the limits of extraterritorial jurisdiction under the FCPA are difficult to assess because there are relatively few court decisions interpreting the statute. The government's aggressive prosecution of FCPA actions has proceeded with relatively limited judicial oversight since the stiff criminal sanctions that the FCPA carries incentivise targets of FCPA investigations to enter into negotiated settlements or plea bargains, rather than litigate the contours and reach of the statute.

Commodity Exchange Act 29.5

The US Commodity Futures Trading Commission (CFTC) is responsible for enforcing the Commodity Exchange Act (CEA). As a result, the CFTC has broad enforcement authority over 'commodities', which are broadly defined under the CEA to include 'all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in.'[48] In effect, a commodity is any product that is or may in the future be traded on a futures exchange.[49] This includes financial instruments and currencies, as well as traditional commodities such as oil, metals and agricultural products.[50] As with the SEC, the DOJ has concurrent authority to seek criminal penalties for any wilful violations of the CEA, and can also bring criminal charges under related statutes, including wire fraud.

Prior to *Morrison*, courts applied the CEA extraterritorially where either the conduct or effects test was satisfied. The conduct test applied where a plaintiff

46 *United States v. Hoskins*, No. 3:12CR238 (JBA), 2016 WL 1069645 (D. Conn. 16 March 2016).

47 Id. at *5. Similarly, in *United States v. Yakou* (a case that arose in the context of a criminal prosecution for violation of the Arms Export Control Act (AECA)), the US Court of Appeals for the District of Columbia Circuit rejected a prosecution of a foreign defendant who was not personally covered by the AECA, holding that '[t]he aiding and abetting statute is not so broad as to expand the extraterritorial reach of the underlying statute.' 428 F.3d 241, 252 (D.C. Cir. 2005).

48 7 U.S.C. § 1a(9).

49 See *Commodity Futures Trading Comm'n v. American Bd. of Trade, Inc.*, 803 F.2d 1242, 1248 (2d Cir. 1986) ('[A]nything other than onions could become a "commodity" . . . simply by its futures being traded on some exchange.') (footnote omitted).

50 7 U.S.C. § 1a(9).

alleged that manipulative conduct in the United States caused harm abroad.[51] The effects test applied where a plaintiff alleged that foreign activities caused 'foreseeable and substantial harm to interests in the United States'.[52] However, courts hearing civil CEA claims brought by private litigants have begun to apply *Morrison*, and the Second Circuit Court of Appeals endorsed the application of Morrison's transaction-based test to private suits under the CEA in *Loginovskaya v. Batratchenko*.[53]

Whether *Morrison* applies to actions brought by the CFTC, rather than by private plaintiffs, has yet to be determined. Although Dodd-Frank specifically provides for the SEC's continued use of the conduct and effects tests, no such explicit provision was made for the CFTC. However, the CFTC has noted that, in light of other Dodd-Frank amendments that provide the CFTC with jurisdiction over swaps that have a 'direct and significant connection' with the United States, the CEA is no longer 'silent' with respect to its extraterritorial application.[54] In the CFTC's view, this means that Congress has specified that the CEA does apply overseas to swaps activity with a 'sufficient nexus' to US commerce.[55]

29.6 Antitrust laws

The principal US antitrust law – the Sherman Act – prohibits 'every contract, combination . . . or conspiracy in restraint of trade'.[56] How a court examines a particular antitrust violation depends on the nature of the conspiracy. A horizontal conspiracy, that is, a price-fixing arrangement between competitors, is a *per se* violation of the antitrust laws.[57] Other conduct that may restrain trade is only illegal if it constitutes an *unreasonable* restraint of trade.[58] Although antitrust laws

51 See, e.g., *Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd.*, 2007 WL 2659990, at *26-27 (N.D. Ill. 28 August 2007) (exercising subject-matter jurisdiction over the CFTC's claim under the conduct test because the foreign defendant used a US futures exchange to defraud foreign investors), vacated in part on other grounds, 511 F.3d 762 (7th Cir. 2007).

52 Id. at *26 (quoting *Pyrenee, Ltd. v. Wocom Commodities, Ltd.,* 984 F.Supp. 1148, 1155 (N.D. Ill. 1997).

53 764 F.3d 266 (2d Cir. 2014). In *Loginovskaya*, the court first found that there is an 'absence of any "affirmative intention" by Congress to give the CEA extraterritorial effect,' and thus, it must be presumed that the CEA 'is primarily concerned with domestic conditions.' Id. at 273. The court next considered the 'focus of congressional concern' for the Section 22 private right of action, deciding that because 'CEA § 22 limits the private right to suit over transactions [in the commodities market], the suits must be based on transactions occurring in the territory of the United States.' Id. Finally, the court found that the plaintiff had not sufficiently alleged a 'domestic transaction', because although the plaintiff took certain steps toward her transaction within the United States, the complaint failed to allege that either title had passed or irrevocable liability was incurred within the United States. Id.

54 See *Loginovskaya v. Batratchenko*, No. 13-1624, CFTC Letter to Clerk of Court at 2 (2d Cir. 10 September 2014).

55 Id.

56 Sherman Act, 15 U.S.C. § 1 (2004).

57 *Leegin Creative Leather Prods., Inc.v. PSKS, Inc.*, 551 US 877, 893 (2007).

58 Id. at 885 ('[T]he Court has repeated time and again that § 1 [of the Sherman Act] 'outlaw[s] only unreasonable restraints."') (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)).

are often enforced civilly, the DOJ's Antitrust Division may also bring criminal prosecutions for violations of the antitrust laws. These are typically limited to *per se* violations such as when competitors fix prices or rig bids.[59]

The Supreme Court addressed the extraterritoriality of antitrust laws in 2004, when it refused to infer a congressional intent to authorise antitrust actions based on wholly extraterritorial conduct with purely extraterritorial effects under the Sherman Act and the Foreign Trade Antitrust Improvements Act (FTAIA).[60] Nonetheless, the DOJ often enforces US antitrust laws against foreign actors. Pursuant to the FTAIA, US antitrust laws apply to any violation that 'significantly harms imports, domestic commerce, or American exporters', even if the relevant trade or commerce occurs outside the United States.[61] Moreover, US antitrust law can also reach wholly foreign conduct, as long as it has a 'direct, substantial, and reasonably foreseeable' effect on US commerce.[62] In practice, courts have set this 'direct effects' bar fairly low. For example, the Ninth Circuit recently upheld convictions related to a foreign price-fixing conspiracy in which the conspirators fixed the prices of components that were later included in products that were imported into the United States because there was a direct effect in the United States.[63]

Therefore, if the conduct at issue has some effect on trade with, or within, the United States it will probably be subject to US antitrust laws. As part of the settlement of the benchmark interest rate investigations that the CFTC and DOJ conducted, many of the defendants admitted that the underlying conduct also constituted a violation of the Sherman Act. For example, as part of its settlement of the DOJ and CFTC's investigation into LIBOR and EURIBOR manipulation, Deutsche Bank was charged with one count of wire fraud and one count of price fixing in violation of the Sherman Act pursuant to a deferred prosecution agreement with the DOJ.[64] The DOJ alleged that Deutsche Bank violated the Sherman Act due to its participation in a scheme to coordinate their EURIBOR requests with traders at other banks to benefit their trading positions.[65] The parties agreed that this conduct by Deutsche Bank traders based outside the United States was nonetheless subject to US antitrust jurisdiction because it affected US commerce, as some of Deutsche Bank's counterparties were based in the United States.[66]

---

59 The Antitrust Laws, available at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited 16 August 2017).

60 See *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 US 155, 169 (2004).

61 Id.

62 15 U.S.C. § 6a.

63 See, e.g., *United States v. Hui Hsiung*, 778 F.3d 738, 746-49 (9th Cir. 2015) (affirming criminal conviction of foreign company and executives in connection with price-fixed LCD panels sold abroad).

64 *United States v. Deutsche Bank AG*, 15-cr-61 (D. Conn. filed on 23 April 2015). DB Group Services UK Limited, a London-based affiliate pled guilty to one count of wire fraud. *United States v. DB Group Services UK Limited*, 15-cr-62 (D. Conn. filed on 23 April 2015).

65 Id.

66 Id.

29.7 Wire fraud

One of the most widely used US criminal statutes is the wire fraud statute, which prohibits the use of a wire transmission in 'interstate or foreign commerce' as part of a scheme to defraud. To prove wire fraud, the DOJ must show that (1) the defendant participated in a scheme to defraud another person out of money or property; (2) the defendant had an intent to defraud; (3) the relevant scheme involved a material deception; and (4) the scheme involved an interstate or foreign wire transmission (i.e., a phone call or email).[67] Therefore, so long as there was a wire communication (such as an email or bank transfer) that passed through the United States in furtherance of the fraud, the DOJ could potentially establish jurisdiction.[68]

Moreover, the wire transmission need not be central to the defendant's conduct or the alleged scheme.[69] Indeed, the defendant does not need to have personally sent the wire to be charged, so long as the use of the wires was a reasonably foreseeable result of the conspiracy.[70] Despite this broad application to schemes that involve the use of US wire transmissions, courts are currently divided on whether the wire fraud statute applies extraterritorially under the principles articulated in *Morrison* and its progeny. The Third Circuit has held that it does apply extraterritorially;[71] the Second Circuit has held that it does not;[72] and a number of other circuits have avoided the question by finding that using US wires is a domestic application of the statute.[73]

One of the most extensive discussions of the extraterritoriality of the wire fraud statute occurred in the Second Circuit's *European Community v. RJR Nabisco* decision, which was subsequently reversed by the Supreme Court on other grounds in *RJR Nabisco v. European Community*. The Second Circuit held that the wire fraud statute lacks extraterritorial effect because the references to 'foreign commerce' in the statute are derived from the Commerce Clause of the US Constitution and relate to Congress's authority to regulate commerce between the United States and foreign nations, rather than a congressional intent that the statute apply extraterritorially.[74] However, in that decision, the Second Circuit sidestepped the second stage of the analysis, concluding that 'wherever the line should be drawn [between domestic and extraterritorial applications of the wire

67 18 U.S.C. § 1343 (2012).

68 See *United States v. Sidorenko*, 102 F. Supp. 3d 1124, 1132 (N.D. Cal. 2015) (dismissing wire fraud claim that did not include the use of US wires).

69 *United States v. Iorio*, 465 F. App'x 60, 61 (2d Cir. 2012)

70 *United States v. Gill*, 909 F.2d 274, 278 (7th Cir. 1990).

71 *United States v. Georgiou*, 777 F.3d 125, 137-38 (3d Cir. 2015) (holding that the wire fraud statute applies extraterritorially based on Congress's inclusion of the phrase 'foreign commerce').

72 *European Community v. RJR Nabisco, Inc.*, 764 F.3d 129, 140-41 (2d Cir. 2014) rev'd on other grounds, 136 S. Ct. 2090 (2016).

73 See, e.g., *United States v. Coffman*, 574 F. App'x 541, 558 (6th Cir. 2014) (finding that the wire fraud statute was being applied domestically because US wires were used in the scheme).

74 764 F.3d 129, 140-41 (2d Cir. 2014) rev'd on other grounds, 136 S.Ct. 2090 (2016).

fraud statute], the conduct alleged here clearly states a domestic cause of action.'[75] This was so because the plaintiffs had alleged domestic conduct satisfying each of the essential elements of a wire fraud claim.[76]

Following *European Community*, lower courts are divided on how much domestic conduct is necessary for a domestic application of the wire fraud statute. A court in New York examined this issue in *United States v. Prevezon Holdings Ltd*, a civil money laundering suit, where wire fraud was the underlying unlawful activity. In that case, the court found that for wire fraud to be domestic it requires the use of US wires plus some additional domestic contacts.[77] The defendants were accused of orchestrating a scheme to steal the corporate identities of Russian companies and use artificial losses to secure tax refunds from the Russian government.[78] The money was then laundered through shell companies and during that process a wire transfer between two European bank accounts was routed through New York.[79] Despite the use of New York wires, the court held that the domestic contact 'was not sufficiently central to the overall fraud scheme to convert this foreign scheme into a domestic one.'[80] In particular, the court noted that the government 'does not plead that the wire fraud scheme here was formed in the United States, let alone that all of the elements of wire fraud were completed in the United States', and only involved a single US contact – one wire transfer routed through New York.[81] The court further rejected the DOJ's contention that a domestic application of the wire fraud statute was appropriate because proceeds of the scheme were used to invest in New York real estate, finding that this argument improperly conflated the conduct constituting wire fraud with subsequent money laundering conduct.[82]

On the other hand, in *United States v. Hayes*, a criminal wire fraud case arising from the LIBOR scandal, the trial court focused only on whether the scheme involved the use of US wires.[83] In that case, the court concluded that even though the defendant was accused of manipulating a foreign interest rate benchmark (the Yen London Interbank Offered Rate) from foreign locations (London and Tokyo), wire fraud charges were appropriate because he 'caused the publication of the manipulated interest rate information in New York, New York.'[84] According to the court, this conduct was the focus of the wire fraud statute because 'Congress's

75 Id. at 142.
76 Id.
77 122 F. Supp. 3d 57, 71 (S.D.N.Y. 2015).
78 Id. at 62.
79 Id. at 63.
80 Id. at 71-72.
81 Id.
82 Id. at 72.
83 99 F. Supp. 3d 409 (S.D.N.Y.), aff'd on other grounds, 118 F. Supp. 3d 620 (S.D.N.Y. 2015), appeal dismissed (15 March 2016).
84 Id. at 629.

legislative concern was "to prevent the use of [US wires] in furtherance of fraudulent enterprises.". . . [T]he location of the wires is the Court's primary concern.'[85]

Other courts have imposed relatively high standards for establishing a domestic wire fraud violation. In *Laydon v. Mizuho Bank Ltd*[86] for example, the court rejected the plaintiff's attempted use of wire fraud as a predicate for a civil RICO claim. The conduct at issue in *Laydon*, manipulation of benchmark interest rates, was substantially similar to the conduct alleged in *Hayes.*[87] In *Laydon*, however, the court held that the plaintiff must make 'extensive factual allegations' beyond the mere use of US wires to establish a domestic violation.[88] The court required allegations detailing that the fraudulent scheme was managed from and directed at the United States.[89] Ultimately, the *Laydon* court concluded that the alleged actions of 'foreign and international institutions that submitted false information to [benchmark rate administrators], located in London and Tokyo,' were insufficient to support a RICO claim predicated on wire fraud.[90]

Therefore, much uncertainty remains regarding the extraterritorial application of the wire fraud statute. Nonetheless, it is clear that many schemes that are based outside the United States may be subject to US jurisdiction.

29.8 Sanctions

The US Treasury Department's Office of Foreign Assets Control (OFAC) administers US economic sanctions against certain countries, governments, entities and individuals. OFAC may bring administrative enforcement actions for violations of US sanctions and impose civil monetary penalties. The DOJ may bring concurrent criminal actions against entities and individuals for wilful violations and seek monetary penalties as well as potentially imprisonment (for individuals). The primary statute through which sanctions regimes are criminally enforced is the International Emergency Economic Powers Act (IEEPA).[91] The extraterritorial application of each sanctions programme varies according to the specific regulations governing that particular sanctions regime. OFAC administers many distinct sanctions programmes, each pursuant to a complex set of authorising statutes, regulations or executive orders. Prohibitions may apply not only to particular countries or territories, and individuals and entities resident or domiciled in sanctioned countries, but also to targeted individuals and entities globally. For example, OFAC targets individuals and entities by listing them on the Specially Designated Nationals[92] and Blocked Persons List, including designating terrorists, international narcotics traffickers, nuclear proliferators and dealers in weapons of

85 Id. at 628 (quoting *United States v. Kim*, 246 F.3d 186, 191 (2d Cir. 2001)).
86 2015 WL 1515487, at *9 (S.D.N.Y. 31 March 2015).
87 Id. at *1.
88 Id. at *9.
89 Id.
90 Id.
91 50 U.S.C. §§ 1701-1706.
92 (SDNs).

mass destruction.[93] Prohibitions may also apply to persons designated as foreign sanctions evaders (FSEs) by OFAC for engaging in conduct relating to the evasion of US economic sanctions with respect to Iran or Syria. OFAC also imposes blocking sanctions on the Government of Iran and Iranian financial institutions listed on the Executive Order 13599 List. Finally, OFAC imposes limited sanctions on certain companies in specified sectors of the Russian economy through the Sectoral Sanctions Identification List (SSI List).[94] OFAC's SDN and SSI List sanctions also impose sanctions on entities owned 50 per cent or more, directly or indirectly, by such persons.

The applicability of US sanctions to a specific entity or individual depends on the particular sanctions regime and the nature of the transaction. All OFAC sanctions programmes impose compliance obligations at a minimum on 'US persons', defined to include all entities organised under US law (including their foreign branches, but not including foreign affiliates), all persons in the United States, and US citizens or US green card holders globally.[95] OFAC's Iran and Cuba sanctions also impose compliance obligations on entities that are owned or controlled by US persons. More broadly, any transactions that involve the US financial system or US-origin goods or services may also be subject to OFAC sanctions compliance obligations. Payments and other transactions denominated in US dollars, even if beginning and terminating outside the United States, typically entail a US-dollar clearing payment through the United States that will be subject to OFAC's jurisdiction.

In addition to OFAC's primary sanctions (described above), some US sanctions regimes include 'secondary sanctions'.[96] OFAC refers to these measures as secondary sanctions because, unlike the primary sanctions, they authorise the imposition of sanctions on non-US persons for engaging in certain 'sanctionable activity' that involves no US persons, US-origin goods or other US elements. US secondary sanctions do not impose compliance requirements under the authority of US criminal or administrative law. Thus, a non-US person does not violate US law, in any traditional legal sense, by engaging in such activity. Rather, such activity exposes the non-US person to potential US government retaliation through a range of potential sanctions measures intended to restrict access to US markets. OFAC may designate (i.e., target) non-US individuals and corporations under these measures.

93 OFAC maintains and frequently updates a complete list of SDNs included in OFAC's Consolidated Sanctions List, available at https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/consolidated.aspx. OFAC sanctions also apply to entities owned, directly or indirectly, 50 per cent or more by persons or entities on the SDN List.

94 OFAC maintains the FSE List, the EO13599 List and the SSI List, which are included in OFAC's Consolidated Sanctions List. OFAC sanctions also apply to entities owned, directly or indirectly, 50 per cent or more by entities listed under the same Directive on the SSI List.

95 31 C.F.R. Part 560.

96 See, e.g., Iranian Financial Sanctions Regulations (31 CFR Part 561); Iran Freedom and Counter-Proliferation Act of 2012 (22 U.S.C. § 8801, et. seq.).

29.9 Conclusion

Despite the long-standing presumption against extraterritoriality, US prosecutors and regulators continue to take a broad view of their authority to investigate and prosecute the conduct of non-US persons and entities that occurs largely overseas. As a result, it is critical that attorneys advising non-US clients carefully analyse the statutes at issue and their elements to determine whether there may be a sufficient nexus to the United States to impose liability.

30

Individual Penalties and Third-Party Rights: The UK Perspective

Elizabeth Robertson[1]

Individuals: criminal liability 30.1

The Serious Fraud Office (SFO) has agreed to a total of four deferred prosecution agreements (DPAs)[2] with corporates since their introduction in February 2014.[3] The introduction of DPAs reflects a long-standing practice in the United States of granting corporates amnesty from prosecution on criminal charges, either through the use of non-prosecution agreements or DPAs, in exchange for the fulfilment of certain requirements. However, it has been argued that '[a]n increased focus on corporate criminal liability should not result in the culpability of offending individuals within a corporation being overlooked.'[4] Terms of a DPA will likely require the company to co-operate on an ongoing basis, which may include co-operation in the prosecution of individuals.

In addition to the signals given by the SFO that individual penalties will become increasingly important in the years to come, recent changes in the test for 'dishonesty' in criminal law may also have the effect of encouraging prosecutors to pursue individuals for offences involving dishonesty, such as fraud or theft.

---

1 Elizabeth Robertson is a partner at Skadden, Arps, Slate, Meagher & Flom (UK) LLP.

2 DPAs are only available to corporate organisations.

3 See the Approved Judgment of 30 November 2015 in Case No. U20150854 [2016] Lloyd's Rep F.C. 102 between the Serious Fraud Office and Standard Bank, available at https://www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Preliminary_1.pdf, accessed 30 June 2016. *XYZ* [2016] Lloyd's Rep F.C. 509 (Case No. U20150856), available at: https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/; *Tesco*, available at: https://www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/; *Rolls-Royce* [2017] Lloyd's Rep F.C. 249 (Case No. U20170036), available at: https://www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf.

4 V K Rajah SC, Prosecution of financial crimes and its relationship to a culture of compliance, Company Lawyer, 2016, at p. 5, accessed via Westlaw UK.

Under the test for dishonesty in *R v. Ghosh*,[5] the jury was first asked to consider whether the defendant's acts were dishonest by the ordinary standards of reasonable honest people. If the answer to that question was 'yes', the jury would then consider whether the defendant must have realised that their conduct was dishonest by those standards. In the recent case of *Ivey v. Genting Casinos t/a Crockfords*,[6] the Supreme Court held that the second limb of the *Ghosh* test no longer represents the law and that directions based on it should no longer be given to juries. The defendant's conduct, in light of his or her (subjective) knowledge or belief of the facts, must be judged as honest or dishonest by the (objective) standards of ordinary decent people alone. The defendant's (subjective) appreciation of whether his or her conduct would be dishonest according to those standards is not relevant. This change will make it more difficult for defendants to escape liability on the basis of their own moral compass, and potentially easier for prosecutors to secure a conviction.

The fact that 'the most serious cases of bribery generally involve companies'[7] renders the maximum custodial sentences for financial crimes somewhat obsolete as individuals escape the maximum sentences for these serious corruption cases, which instead are borne by corporate entities and their shareholders in the form of unlimited fines. As Richard Alexander comments, 'any kind of agreement that penalises the company concerned, but does not deal with the individuals who were actually behind the commercial bribery, whether by paying the bribes or by arranging for others to do so, fails to recognise the essential nature of what took place.'[8]

Individual penalties are important because they deter offending in the first place. Further, in instances where the individuals alone are punished, it ensures that innocent parties, such as the shareholders, pension funds and other stakeholders in the company, are not punished indirectly; and where the corporate also faces a penalty, the stakeholders can rest assured that the wrongdoing within the company has almost certainly been dealt with.

While DPAs in the United Kingdom are not available for individuals – with no indication that they will be any time soon – there is an increasing emphasis on incentivising individuals to enter an early plea. Enshrined in section 144 of the Criminal Justice Act 2003 (CJA 2003) is the statutory authority that compels the courts to consider a reduction in the sentence of an offender who has pleaded guilty to an offence. Subsection 1 obliges the court to take into account the stage in the proceedings that the offender indicated an intention to plead guilty; and the circumstances in which this indication was given. The Reduction in Sentence for a Guilty Plea: Definitive Guideline (Definitive Guideline) guides the courts in establishing an appropriate level of reduction for the offender in question.[9]

5 [1982] QB 1053.

6 [2017] UKSC 67.

7 Richard Alexander, The Bribery Act 2010 in force: an opportunity to be taken, Company Lawyer, 2011, at p. 2, accessed via Westlaw UK.

8 Ibid. at p. 2.

9 The Definitive Guidelines were updated on 1 June 2017.

Unless, on the facts, there is a sufficiently good reason for a lower amount, there is a presumption that for each of the following categories, the recommended reduction will be given. If the offender pleads guilty (1) at the first reasonable opportunity,[10] he or she can expect the sentence to be reduced by a maximum of one-third; (2) after the trial date has been set, the offender may receive a maximum of a quarter reduction in the sentence, which could be reduced on a sliding scale to one-tenth; or (3) after the trial has begun, the offender may see the sentence reduced by one-tenth and on occasions, to zero, if the guilty plea is entered during the course of the trial. The Serious Organised Crime and Police Act 2005 (SOCPA)[11] contains several provisions that can benefit an offender who assists in the investigation or prosecution of a crime. For example, if an offender provides or offers assistance in the investigation of prosecution of others, the court in return may reduce the offender's sentence;[12] or a defendant, already serving a prison sentence, that provides or offers assistance in this regard could benefit by having a sentence reviewed.[13]

Imprisonment 30.1.1

Pursuant to section 11 of the Bribery Act 2010 (Bribery Act), the maximum sentence for an individual convicted on indictment of an offence by virtue of sections 1, 2 or 6 of the Bribery Act is 10 years' imprisonment.[14] An individual tried and convicted summarily of any of the aforementioned offences is liable to a maximum prison sentence of 12 months. The maximum sentence for individuals under the Bribery Act is identical for any of the fraud offences both at common law and under the Fraud Act 2006 but is far greater (up to a maximum of 14 years' imprisonment) for any of the money laundering offences pursuant to sections 327 to 329 of the Proceeds of Crime Act 2002 (POCA).

Historically, under the corruption regime that persisted until the later part of the 20th century, individuals were liable to three years' imprisonment on conviction of corruption charges. This was subsequently increased to seven years under the Criminal Justice Act 1988 (CJA 1988)[15] and increased again under the current regime. The shift in policy in relation to the penalties imposed on individuals who commit financial crime can largely be attributed to the distrust and anger felt by the public towards misconduct in big business; particularly following the financial crisis of 2008. Nowhere is this so apparent than in the case of Tom Hayes. Mr

10 In Annex 1 of the Definitive Guideline, there is further guidance for the court on how to interpret the words 'first reasonable opportunity', and examples to help the courts adopt a consistent approach. Essentially, the courts should look at the benefit that arose out of the guilty plea (both for those directly involved in the case in question, but also in enabling the courts to deal more quickly with other outstanding cases).

11 Chapter 2 (ss. 71–75).

12 s.73 SOCPA.

13 s.74 SOCPA.

14 An individual cannot be convicted of an offence under s.7 of the Bribery Act because the offence refers only to a 'commercial organisation' for which the only sentence available is an unlimited fine.

15 See s.47 of the CJA 1988.

Hayes is currently serving an 11-year prison sentence (which was cut on appeal from an original sentence of 14 years), one of the longest prison terms on record for UK white-collar crime[16] for his role in the manipulation of the LIBOR rate while he worked as a derivatives trader at UBS and Citigroup. It is widely accepted that the hefty sentence was handed down to serve as a warning to other individuals who may be tempted by the allure of profit to participate in such practices; in passing sentence, the court said that it 'must make clear to all in the financial and other markets in the City of London that conduct of this type, involving fraudulent manipulation of the markets, will result in severe sentences of considerable length which, depending on the circumstances, may be significantly greater than the present total sentence.'[17]

In cases of financial crime, it is rare for defendants to be charged with one count, and in the most serious of cases, and as was the case for Mr Hayes, a judge can order the sentences for each individual count of which a defendant has been convicted to run consecutively; 'Hayes was sentenced consecutively for the conspiracies he was found guilty of while at UBS and those while at Citigroup between 2006 and 2010. Had the market rigging been seen as one offence, Hayes would have faced a maximum 10-year sentence.'[18] Whether a judge perceives a concurrent or consecutive sentence as appropriate on the facts will be decided by reference to the same factors that judges tend to consider when deciding on the severity of a sentence, such as whether the defendant has any previous convictions, the magnitude of the offence (in the Fraud, Bribery and Money Laundering Offences Definitive Guideline, it expressly states that 'consecutive sentences for multiple offences may be appropriate where large sums are involved'[19]) or where it can be established that the defendant failed to respond to warnings about his or her behaviour.

Despite the current prominence of financial crime cases in the media and the apparent fervour of prosecutors and courts to ensure that convicted individuals receive long custodial sentences, suspended sentences may well be considered appropriate in some cases. In *R v. Dougall*,[20] an employee heading a company's corrupt Greek practice, who had failed to convince other employees to end the practice of making payments to medical professionals to persuade them to buy the company's goods, had his 12-month custodial sentence suspended on appeal after Mr Dougall's level of criminality, 'combined with a guilty plea, and full co-operation with the authorities investigating a major crime involving fraud or corruption'[21] were taken into account.

16 https://www.theguardian.com/business/2015/dec/21/libor-trader-tom-hayes-loses-appeal-but-has-jail-sentence-cut-to-11-years, accessed 30 July 2016.

17 *R v. Hayes* [2015] EWCA Crim 1944, at para. 109.

18 http://www.reuters.com/article/us-libor-hayes-appeal-idUSKBN0TJ1V820151130, 30 November 2015, accessed 29 July 2016.

19 At p. 10.

20 [2010] EWCA Crim 1048.

21 *R v. Dougall* [2010] EWCA Crim 1048, at para. 36.

The Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud (Attorney General's Guidelines) set out a process by which a prosecutor may discuss an allegation of serious or complex fraud with a suspect.[22] The implementation of the Attorney General's Guidelines, with the support of the judiciary and prosecuting authorities, has garnered a quasi-plea discussion system that can be advantageous to defendants. Although the Attorney General's Guidelines do not make any provision for a defendant to receive a greater discount on the sentence than is available for simply entering a guilty plea (as set out above), in a case brought by the Financial Services Authority (FSA)[23] against Paul Milsom, a senior equities trader, for disclosing inside information between October 2008 and March 2010, Judge Pegden QC indicated, in passing sentence on 18 March 2013 at Southwark Crown Court, that he had given Mr Milsom full credit for pleading guilty at the earliest opportunity (i.e., a discount of one-third) and extra credit for entering into a plea agreement with the FSA.[24] The sentencing remarks of Judge Pegden QC convey the 'clearest articulation to date that an individual can reasonably expect to receive in excess of one third discount on sentence in circumstances where he enters into early plea discussions with a prosecutor.'[25]

Another case worthy of note, and one that again highlights how co-operation with the authorities can really pay dividends when it comes to sentencing after conviction, was that of Bruce Hall. On 22 July 2014, Mr Hall, CEO of Aluminium Bahrain BSC from September 2001 to June 2005, received a 16-month custodial sentence[26] for conspiracy to corrupt (having allegedly received £2.9 million in bribes[27]). However, were it not for Mr Hall's co-operation and early plea, Judge Loraine-Smith stated that his prison sentence would have been far longer. According to the SFO website, Judge Loraine-Smith said: 'Mr Hall had co-operated with numerous authorities throughout the investigation. If he had not been so co-operative, Mr Hall could have faced around six years in prison, close to the maximum sentence for conspiracy to corrupt, the judge said. Due to his co-operation, Mr Hall was entitled to a 66 per cent reduction in his sentence. He was also entitled to a further reduction of one-third due to entering a guilty plea.'[28]

22 The Attorney General's Guidelines came into force on 5 May 2009.

23 As of 3 April 2013, the FSA became two separate regulatory bodies; the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA).

24 http://www.fsa.gov.uk/library/communication/pr/2013/022.shtml, accessed 29 July 2016.

25 Chris Dyke, The Benefits of Early Plea Discussions, CrimeLine: https://www.crimeline.info/news/the-benefits-of-early-plea-discussions, accessed 29 July 2016.

26 Mr Hall was also ordered to pay a confiscation order of £3,070,106.03 within seven days or face serving an additional term of imprisonment of 10 years; a compensation order of £500,010; and to pay £100,000 as a contribution to the prosecution's costs.

27 https://www.sfo.gov.uk/2014/07/22/bruce-hall-sentenced-16-months-prison/, 22 July 2014, accessed 29 July 2016.

28 Ibid., accessed 29 July 2016.

30.1.2 Fine

Fines for individual perpetrators of financial crime can be unlimited and are handed down either separately or in conjunction with a custodial sentence.
Section 164 of the CJA 2003 regulates the fixing of fines in criminal cases. The Sentencing Council's Fraud, Bribery and Money Laundering Offences Definitive Guideline states that as a general principle in the setting of a fine for fraud, bribery or money laundering, 'The court should determine the appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and requires the court to take into account the financial circumstances of the offender.'[29]

30.1.3 Unexplained wealth orders

The Criminal Finances Act 2017 received Royal Assent on 27 April 2017 and created a new High Court power to make an unexplained wealth order (UWO), which can require a person who is suspected of involvement in or association with serious criminality or is a politically exposed person (PEP) to explain the origin of assets that appear to be disproportionate to their known income.[30] A failure to provide a response will give rise to a presumption that the property is recoverable, in order to assist any subsequent civil recovery action. UWOs are intended to alleviate the burden on enforcement authorities and will have a wide-ranging scope to gather evidence in other jurisdictions and potentially support parallel enforcement actions. It is anticipated that the powers under the Act will come into force in September 2017.

The Act creates a new process for a number of UK regulators and enforcement agencies, namely the SFO, National Crime Agency, HMRC, FCA and the Director of Public Prosecutions, to apply to the High Court for a UWO, regardless of whether civil or criminal proceedings have been initiated against the respondent to the order or whether the respondent is located in the UK or another jurisdiction.

There must be reasonable cause to believe that the respondent holds the property and that the value of the property is greater than £50,000. There must also be reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property. Respondents must also either be (1) a politically exposed person (PEP) or (2) someone for whom there are reasonable grounds for suspecting that they have been involved in serious crime. Under the Act, a person is considered to be involved in serious crime in the UK or another jurisdiction if the person would be so involved for the purposes of Part 1 of the Serious Crime Act 2007. This widens the category of potential respondents significantly to include persons who: (1) have committed a serious offence; (2) have facilitated the commission of an offence; or (3) who conducted

29 At p. 51.

30 Under Part 1 ss.1-9 of the Criminal Finances Act 2017, which amends POCA 2002 s.362.

themselves in a way that was likely to facilitate the commission by themselves – or another person – of a serious offence, whether or not the offence was committed. The Act widens the category of respondents even further to include anyone who is connected with a person who is or has been involved in serious crime, whether in the UK or in another jurisdiction.

Respondents are required by a UWO to provide certain information about the specified property, including the nature and extent of the respondent's interest, how it was obtained and any other information specified in the order. Aside from contempt of court proceedings, the failure to respond to a UWO creates a presumption that the property is recoverable in civil proceedings, which reduces the burden imposed on enforcement authorities under the current Proceeds of Crime Act 2002 (POCA) regime, to prove that property derives from criminal conduct or constitutes the proceeds of crime. Section 262S of POCA (not yet in force) provides that when a UWO is issued, where the enforcement authority believes that the property is outside the United Kingdom, it may send a request for assistance in relation to the property to the Secretary of State, who in turn may forward the request to the government of the receiving country. The request for assistance is a request that any person be prohibited from dealing with the property or assisting with dealing with the property.

Where a respondent complies or purports to comply, the enforcement authority must determine what enforcement or investigatory proceedings, if any, it considers ought to be taken in relation to the property within 60 days starting with the date of compliance.

The Act also provides that a criminal offence is committed if a respondent gives a false or misleading statement in response to a UWO, with a maximum penalty of two years' imprisonment.[31] The Act also amends POCA so that the FCA and HMRC have civil recovery powers to recover property in cases where there has not been a conviction but where it can be shown on the balance of probabilities that property has been obtained by unlawful conduct. Such procedings would be brought in the High Court to recover criminal property without the need for the owner of the property to be convicted of a criminal offence.

Compensation order 30.1.4

Like a confiscation order, a compensation order is an ancillary court order and is designed to compensate a victim for personal injury or any loss or damage that may have resulted from the offence committed by the defendant and is made in addition, or instead of, other sentencing options under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 (PCCSA).

In both a magistrates' court[32] and the Crown Court, the amount that can be awarded as compensation is now unlimited but is restricted to an amount that

31 s.362E Criminal Finances Act 2017.

32 Before 11 December 2013, the amount that a magistrate could award as part of a compensation order was £5,000, but, by virtue of s.131 PCCSA, this limit has been removed.

can feasibly be paid by the defendant. The court must have regard to the evidence of the defendant's financial means when deciding the level of compensation to award the victim and must prioritise the payment of compensation over any other financial penalty.

30.1.5 Confiscation order

It is becoming more common for courts to address the confiscation of the assets of a convicted individual, especially when the court satisfies itself that the defendant was said to be living a 'criminal lifestyle'.[33] Confiscation orders are available only after a defendant has been convicted, and are debts to the Crown. Where a confiscation order is not paid, the defendant will serve a period of imprisonment in default. This mechanism is highlighted in the cases of (1) Phillip Boakes, who, after failing to satisfy the full value of a confiscation order determined by the courts, was ordered to serve 730 days' imprisonment in addition to the 10 years he was already serving after pleading guilty, *inter alia*, to two counts of fraudulent trading;[34] and (2) Alex Hope was sentenced to 603 days' imprisonment for failing to pay the full value of a confiscation order made against him, in addition to the seven years he was serving for being convicted of defrauding investors.[35]

Confiscation orders derive from section 6 of POCA and are intended to deprive the defendant of the benefit of any proceeds of his or her crimes; they are not, however, intended to act as a fine or further punishment. They do not always involve the sequestration of the defendant's personal property. Instead they usually entail the payment of a sum of money; '[w]here, however, a criminal has benefited financially from crime but no longer possesses the specific fruits of his crime, he will be deprived of assets of equivalent value, if he has them.'[36] In accordance with the decision in *R v. Waya*,[37] prosecutors should ensure that the confiscation is proportionate, which entails an assessment of the ability of the defendant to pay the order in full.

In determining the amount of £165,731 that Mr Boakes was required to pay under his confiscation order, the court was able to take into account how the money that he had acquired was spent. The court determined that much of the proceeds that Mr Boakes had benefited from was spent on a lavish lifestyle and unsuccessful financial trading that was indicative of a criminal lifestyle, which the courts will take into account when determining the recoverable amount.

---

33 Pursuant to s.75 of the CJA 2003, '(1) a defendant has a criminal lifestyle if (and only if) the following condition is satisfied. (2) The condition is that the offence (or any of the offences) concerned satisfies any of these tests – (a) it is specified in Schedule 2; (b) it constitutes conduct forming part of a course of criminal activity; or (c) it is an offence committed over a period of at least six months and the defendant has benefited from the conduct which constitutes the offence.'

34 https://www.fca.org.uk/news/phillip-boakes-sentenced-for-failing-to-pay-confiscation-order, accessed on 30 June 2016.

35 https://www.fca.org.uk/news/press-releases/alex-hope-sentenced-failing-pay-confiscation-order.

36 *R v. May* [2008] UKHL 28, at para. 9.

37 [2012] UKSC 51.

The Attorney General's Guidelines are silent as to confiscation orders – they provide no framework to regulate the discussions and agreement of confiscation orders as part of plea discussions. Should the prosecution and the defendant reach any form of agreement in relation to a confiscation order, this agreement would not bind a court. In Mr Milsom's case, however, the judge agreed to make a confiscation order at the sentencing hearing in the value of Mr Milsom's personal benefit from his offending, which had been agreed between the prosecution and the defence within the basis of the plea and joint sentencing submission. This suggests that prosecutors could be willing to negotiate the terms of a confiscation order as part of a plea negotiation, and that the courts may be willing to accept the joint submission which 'provid[es] a defendant with greater certainty and control over his financial liabilities.'[38]

The burden of proof in criminal confiscation orders rests with the defendant, who must show, on the balance of probabilities, that his or her assets are not derived from criminal conduct.

Where it is reasonably foreseeable that a court will make a confiscation order, the prosecution may take steps in the High Court to ensure that the defendant's assets will remain available to meet the terms of the order. Such steps include, *inter alia*, an order requiring the defendant to disclose where assets are kept; an order appointing a receiver; and an order restraining assets.[39]

Disqualification orders 30.1.6

Directors of companies are fiduciaries and there is consequently a high level of probity expected of them by the law. It is therefore expected that '[t]hose who are involved in bribery, whether as individuals or as part of their role as directors, are very likely to be disqualified from acting as a director for a lengthy period of time.'[40]

Directors disqualification orders (DDOs) are designed to help protect creditors and the public from those individuals who may act dishonestly. DDOs can be made where the defendant director of a company has been convicted of an indictable offence which, by virtue of the decision in *R v. Creggy*,[41] must have some relevant factual connection with the management of the company.

A director is disqualified pursuant to section 2 of the Company Directors Disqualification Act 1986 (CCDA). This is a general disqualification that prohibits the former director from conducting various activities as set out in sections 1 and 2 CCDA. Directors can be disqualified for a maximum of 15 years.

38 Chris Dyke, The Benefits of Early Plea Discussions, CrimeLine: https://www.crimeline.info/news/the-benefits-of-early-plea-discussions, accessed 29 July 2016.

39 See s.37(1) Supreme Court Act 1981.

40 Eoin O'Shea, *The Bribery Act 2010, A Practical Guide*, Jordans, at p. 238.

41 [2008] EWCA Crim 394.

30.1.7 Costs

As in all criminal cases, cost orders are usually made against a convicted defendant, who will be required to pay the prosecution's costs as well as any court fees that materialise during the criminal proceedings.

The legislative authority enabling a court to award costs in criminal proceedings is primarily contained in Part II of the Prosecution of Offences Act 1985 (sections 16 to 19B), the Access to Justice Act (in relation to funded clients) and in regulations that have since been made pursuant to these statutes, including the Costs in Criminal Cases (General) Regulations 1986, as amended.

30.2 Individuals: regulatory liability

The FCA has continued the FSA's legacy of adopting a robust enforcement stance, underpinned by its 'credible deterrence' strategy. In furtherance of its policy of 'credible deterrence', the FSA had signalled a willingness to pursue criminal actions through the courts and to seek custodial sentences. For the FCA, the pursuit of criminal prosecutions, where appropriate, remains high on its agenda, particularly for market misconduct offences. This is supported by the FCA's Annual Business Plan for 2017/2018, in which it states that tackling financial crime and money laundering remain a priority. The FCA has also recently appointed Vincent Coughlin QC as the new chief criminal counsel.[42]

Under the Financial Services and Markets Act as amended by the Financial Services Act 2012 (FSMA), the FCA has many tools at its disposal to punish non-criminal offences and breaches. This includes the issuing of public censures or statements, and imposing unlimited financial penalties.

Other sanctions available to the FCA include varying or cancelling a firm's permission under Part 4A of FSMA; intervening against an incoming EEA or EU Treaty firm; suspending or restricting a firm's Part 4A permissions; suspending or restricting the approval given to an approved person; prohibiting an individual from performing regulated functions; withdrawing the approval of an approved person; and imposing a penalty on a person who has performed a controlled function without approval.

There will always be an element of publicity along with the imposition of such sanctions, however, public sanctions are certainly not the only way of dealing with cases of regulatory non-compliance. Taking into consideration the severity of an offence, it may be satisfactorily addressed by using other remedial measures (for example, through the use of private warnings).

Chapter 6 of the FCA's Decision Procedures and Penalties Manual (DEPP 6) contains the FCA's statement of policy in relation to the imposition and amount of penalties under FSMA.[43] DEPP 6A sets out its policy in relation to imposing suspensions or restrictions on firms and on approved persons. Chapter 7 of the

42 See Caroline Binham, 'FCA appoints criminal trials veteran as legal chief', Financial Times 30 April 2017, available at https://www.ft.com/content/cb9da814-2b66-11e7-bc4b-5528796fe35c.

43 In May 2017, the FCA issued a new version of the DEPP.

FCA's Enforcement Guide sets out specific guidance on the FCA's powers in relation to financial penalties and public censures. Further, in April 2017, the FCA published an Enforcement Information Guide, which should be read in conjunction with DEPP and the Enforcement Guide.

See Chapter 25 on fines, disgorgement, etc.

Other issues: UK third-party rights 30.3

Section 393 FSMA gives third parties certain rights in relation to warning and decision notices given to another person in respect of whom the FCA is taking regulatory action. Where a warning notice has been given, section 393(1) provides that a third party prejudicially identified in the notice must be given a copy and a reasonable period to make representations on it.[44]

Section 393(4) gives third-party rights in relation to a decision notice. It provides that a third party prejudicially identified in the notice must be given a copy of it and a reasonable period to make representations on it. Section 393(11) provides that a person who alleges that a copy of the notice should have been given to him or her may refer that alleged failure to the Upper Tribunal.[45]

The scope of the rights conferred by section 393(4) was revisited recently in *Macris v. FCA*.[46]

On 19 May 2015, the Court of Appeal held that Mr Macris had been prejudicially identified in the FCA's settlement notices issued to the firm JP Morgan Chase & Co, which although they did not name him, referred to him as 'CIO London management' and stated that 'CIO London management' had deliberately misled the FCA in a telephone call with the regulator in April 2012.

On 22 March 2017, the majority of the Supreme Court overturned the Court of Appeal's decision. Lord Sumption, writing for the majority, stated that someone is identified in a notice if 'he is identified by name or by a synonym for him, such as his office or job title.' Such a synonym would, in the view of Lord Sumption, need to be 'apparent from the notice itself that it could apply to only one person and that person must be identifiable from information which is either in the notice or publicly available elsewhere.' Information from other sources can only be used to interpret the language of the FCA's notice, rather than to supplement it, and must be easily ascertainable.

In concluding that it was not permissible to rely on information publicly available elsewhere, Lord Sumption stated that he was influenced by the deliberate drafting of section 393 FSMA with regards to fairness and the requirement for the material identifying the individual to come from the notice itself, as well as concern over the impact on the FCA's effectiveness if section 393 were to be interpreted differently. Lord Sumption also stated that the envisaged constituency,

44 Unless he or she has been given a separate warning notice in relation to the same matter.

45 In April 2010 the Financial Services and Market Tribunal, established by s.132 of FSMA as an independent judicial body to hear decision notices issued by the FSA, was abolished and its functions transferred to the Upper Tribunal.

46 [2015] EWCA Civ 490; [2017] UKSC 19.

namely the audience of notices, was the public at large and not just those familiar with a particular industry.

While agreeing with Lord Sumption, Lord Neuberger stated that an individual is identified in a document if '(1) his position or office is mentioned, (2) he is the sole holder of that position or office, and (3) reference by members of the public to freely and publicly available sources of information would easily reveal the name of that individual by reference to his position or office.'

In dissenting, Lord Wilson stated that the majority unfairly prioritised protecting regulatory efficiency over individual reputation. Lord Wilson expressed concern about the majority's analysis that the general public are the constituency for FCA notices, and stated that it failed to reflect how the most serious damage of wrongly being identified for a third party would be within the market in which they operate, as being so identified would damage their employment prospects. Lord Wilson considered that the decision failed to strike a balance between protecting the rights of individuals and regulatory efficiency.

31

Individual Penalties and Third-Party Rights: The US Perspective

Joseph V Moreno and Anne M Tompkins[1]

In the United States, prosecutors have broad discretion in deciding whether to investigate and charge an individual with a crime.[2] As a threshold matter, a prosecutor may bring charges if there is probable cause to believe that the accused has committed a crime.[3] Prosecutors also have broad discretion as to how to charge a specific offence,[4] when to bring charges,[5] and whether to negotiate a plea

1 Joseph V Moreno and Anne M Tompkins are partners at Cadwalader, Wickersham & Taft LLP.

2 See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (holding that the constitutional separation of powers requires broad prosecutorial discretion); *Young v. United States ex. Rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987) (holding that prosecutors have discretion to decide which persons should be the target of an investigation); *Wayte v. United States*, 470 U.S. 598, 607 (1985) (finding that courts are ill equipped to evaluate the strength of a prosecutor's case, a case's deterrent value, and the government's enforcement priorities). See also American Bar Association, Criminal Justice Standards for the Prosecution Function, Standard 3-4.2 (4th ed. 2015), available at www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition-TableofContents.html.

3 See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (holding that, if a prosecutor has probable cause to believe that the accused committed an offence, the decisions whether to prosecute and what charges to file rest entirely within his discretion). See also *Rinaldi v. United States*, 434 U.S. 22, 29-30 (1977) (*per curiam*) (holding that the prosecutor has discretion to dismiss charges unless dismissal would be contrary to the public interest).

4 See *United States v. Batchelder,* 442 U.S. 114, 123-25 (1979) (holding that it is proper for prosecutors to bring charges under any statute unless brought for a discriminatory purpose).

5 See *United States v. Lovasco*, 431 U.S. 783, 795-96 (1977) (holding that an 18-month delay in bringing charges did not violate the defendant's due process rights).

agreement.[6] Courts will generally not interfere with charging decisions absent a showing of selective prosecution[7] or vindictive prosecution.[8]

31.1.2 Principles of Federal Prosecution

Within the discretion provided to federal prosecutors, there is guidance issued by the Department of Justice (DOJ) to help with investigation and charging decisions.

The DOJ's Principles of Federal Prosecution – issued as part of the US Attorneys' Manual (USAM) – provide federal prosecutors with a framework for applying their prosecutorial discretion to 'promote the reasoned exercise of prosecutorial authority and contribute to the fair, evenhanded administration of the Federal criminal laws.'[9] They provide that a prosecutor should commence or recommend prosecution against an individual if the prosecutor has probable cause to believe that the person's conduct constitutes a federal offence and that the admissible evidence will be sufficient to obtain and sustain a conviction unless, in his or her judgment, prosecution should be declined because: (1) no substantial federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution.[10]

In determining whether a 'substantial federal interest would be served', the Principles of Federal Prosecution counsel prosecutors to weigh all relevant considerations, including (1) federal law enforcement priorities; (2) the nature and seriousness of the offence; (3) the deterrent effect of prosecution; (4) the person's culpability in connection with the offence; (5) the person's history with respect to criminal activity; (6) the person's willingness to co-operate in the investigation or prosecution of others; and (7) the probable sentence or other consequences if the person is convicted.[11]

The Principles of Federal Prosecution also establish important boundaries as to what a prosecutor cannot consider when determining whether to bring charges against an individual. Among other things, prosecutors cannot consider: (1) the person's race, religion, sex, national origin, or political association, activities or beliefs; (2) the prosecutor's personal feelings concerning the person, the person's associates or the victim; or (3) the possible effect of the decision on the prosecutor's own professional or personal circumstances.[12]

---

6 See *Weatherford v. Bursey,* 429 U.S. 545, 561 (1977) (holding there is no constitutional right to plea bargain).

7 See *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (selective prosecution of Chinese laundry owners but not similarly situated non-Chinese laundry owners).

8 See *Blackledge v. Perry*, 417 U.S. 21, 28-29 (1974) (prosecution of a defendant for a more serious charge in a new trial following a successful appeal of his original conviction).

9 USAM, Principles of Federal Prosecution, §§ 9-27.000 et. seq., available at https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution (Principles of Federal Prosecution).

10 Id. at 9-27.220.

11 Id. at 9-27.230.

12 Principles of Federal Prosecution, §§ 9-27.260.

DOJ enforcement priorities and policies 31.1.3

The first factor within the Principles of Federal Prosecution for prosecutors to consider – federal law enforcement priorities – are developed annually by the DOJ. Every year, the Attorney General communicates the DOJ's national enforcement priorities, which have ranged from a focus on drug prosecutions during the influx of crack cocaine in the 1980s, to national security and counterterrorism following the attacks of 11 September 2001, and to prosecuting mortgage and financial fraud in the wake of the Wall Street credit crisis of 2008.[13]

In addition the DOJ periodically issues policy guidance that has an impact on prosecutorial discretion, frequently corresponding to changes in DOJ leadership. For example, on 10 May 2017, Attorney General Jeff Sessions issued a memorandum to all federal prosecutors entitled 'Department Charging and Sentencing Policy', which directed that 'prosecutors should charge and pursue the most serious, readily provable offence.'[14] In addition, the memorandum directed prosecutors to disclose to the court 'all facts that impact the sentencing guidelines or mandatory minimum sentences.'[15] By this memorandum, the Attorney General modified charging policies in the USAM, limiting prosecutors' discretion in making charging decisions and sentencing recommendations and requiring any exceptions to be approved by the respective US Attorney. The use of these memoranda by the DOJ leadership is another mechanism by which policy changes are put into effect.

Individual accountability for wrongdoing 31.1.4

Under US law, criminal prosecution and civil actions may be brought against corporations, partnerships, sole proprietorships and other business organisations, notwithstanding their artificial nature as a legal entity.[16] The prosecution of corporate misconduct has long been a stated priority for the DOJ, with a focus on protecting the integrity of the economic and capital markets, protecting consumers and investors, preventing violations of environmental laws and discouraging unlawful business practices.[17] Under this concept of corporate liability, corporations and other business organisations can be indicted, plead guilty, be convicted of offences, be fined and be required to institute remedial measures to prevent future wrongdoing.[18] Just as prosecutors have broad discretion in deciding

13 See, e.g., Press Release, US Department of Justice, Department of Justice FY 2018 Budget Request (23 May 2017), available at https://www.justice.gov/opa/pr/department-justice-fy-2018-budget-request (listing national security, violent crime, and immigration law enforcement as among the DOJ's federal law enforcement priorities for Fiscal Year 2018).

14 Jeff Sessions, Attorney General, US Department of Justice, Department Charging and Sentencing Policy (10 May 2017), available at https://www.justice.gov/opa/press-release/file/965896/download.

15 Id.

16 USAM, Principles of Federal Prosecution of Business Organizations, §§ 9-28.000 et. seq., available at https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

17 Id. at § 9-28.010.

18 Id. at § 9-28.200.

when, how, and whether to prosecute individuals, they have similar latitude in prosecuting and negotiating settlements with corporate defendants.[19]

The DOJ's focus on corporate wrongdoing often led to significant settlements with companies, but without any individuals being held accountable for the crimes charged. Following increasing public and judicial criticism about the lack of individual accountability, in September 2015, the DOJ issued a memorandum titled 'Individual Accountability for Corporate Wrongdoing', authored by Deputy Attorney General Sally Quillian Yates (commonly referred to as the Yates Memorandum).[20] The Yates Memorandum set forth new policy guidance focusing on prosecuting individuals with responsibility for the crimes for which corporations could be held responsible. In acknowledging the historical challenge of identifying and prosecuting individuals who were aware of or complicit in corporate misconduct, the Yates Memorandum listed six key steps to strengthen the DOJ's pursuit of individual wrongdoers.

- *Provision of evidence against individual wrongdoers:* For a company to receive any consideration for co-operation with the government under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the DOJ all relevant facts about any individual misconduct. This includes identifying all individuals responsible for the misconduct at issue, regardless of their position, status or seniority at the company.
- *Investigative focus on individual wrongdoers:* Both civil attorneys and criminal prosecutors at the DOJ will now focus on individual wrongdoing from the beginning of any investigation of corporate misconduct.
- *Coordination between civil attorneys and criminal prosecutors:* Civil attorneys and criminal prosecutors at the DOJ will more regularly consult throughout all phases of an investigation of corporate misconduct and will consider bringing parallel civil and criminal proceedings to take advantage of the full range of the government's potential remedies, including fines, imprisonment, forfeitures, restitution, and suspension and debarment.
- *No shielding of individuals from liability:* Absent extraordinary circumstances, no resolution of a case of corporate misconduct will provide protection from criminal or civil liability for individuals. Any release of criminal or civil liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.
- *No corporate resolution without individual resolution:* If the investigation of individual misconduct has not concluded by the time authorisation is sought to resolve the case against the corporation, a plan must be implemented by the DOJ prosecutor on how to resolve the matter prior to the end of any statute of limitations period.

19 Id.

20 Sally Quillian Yates, Deputy Attorney General, US Department of Justice, Memorandum Regarding Individual Accountability for Corporate Wrongdoing (9 September 2015), available at https://www.justice.gov/dag/file/769036/download.

- *Increased focus on civil settlements:* Civil attorneys at the DOJ will focus on recovering as much money as possible for the public, regardless of an individual's ability to pay. Instead, the decision as to whether to file a civil action against an individual should focus on the seriousness of the person's misconduct, whether it is actionable, whether the admissible evidence will be sufficient to obtain a judgment and whether pursuing the action reflects an important federal interest.

To some practitioners, the Yates Memorandum merely memorialised the DOJ's existing practice of prosecuting culpable individuals in white-collar cases. In a speech discussing the Yates Memorandum shortly after its issuance, Deputy Attorney General Yates alluded to the fact that the policies were effectively already in place at the DOJ, but that the purpose of the new guidance was to ensure consistency in application by DOJ attorneys across the country.[21] Nonetheless, the requirement that the government prove that defendants intentionally and knowingly violated the law remains a significant hurdle, especially in the context of corporate wrongdoing. Indeed, the Yates Memorandum notes that in cases of misconduct in a large corporate setting 'where responsibility can be diffuse . . . it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt.'[22]

In fact, since the issuance of the Yates Memorandum, the DOJ has lost several cases brought against individuals in cases in which the company settled.[23] This may be in part because corporations arguably apply different criteria from an individual when faced with allegations of wrongdoing. Corporations weigh the financial and reputational cost of litigation versus paying a corporate fine and settling a matter. Even where the prosecution's evidence may be weak, corporations may decide that there is value in a speedy resolution. The DOJ may be obtaining settlements from corporations on weak evidence, while individuals are willing to litigate on the same evidence in the face of potential jail time.

21 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 September 2015), available at https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

22 Sally Quillian Yates, Deputy Attorney General, US Department of Justice, Memorandum Regarding Individual Accountability for Corporate Wrongdoing (9 September 2015), available at https://www.justice.gov/dag/file/769036/download.

23 See, e.g., *United States v. Reichel*, 1:15-cr-10324 (D. Mass. 2016) (acquitting a former Warner Chilcott senior executive of charges involving a conspiracy to pay kickbacks to doctors, following an settlement by the company to pay US$125 million to settle charges of illegally promoting pharmaceutical products); *United States v. Vascular Solutions, Inc. et al*, 5:14-cr-926 (W.D. Tex. 2016) (acquitting a medical device company and its chief executive of fraud charges for improper promotion of products without US Food and Drug Administration approval); *United States v. Facteau*, 1:15-cr-10076 (D. Mass. 2016) (acquitting a former medical device chief executive and vice president of sales of 14 felony fraud counts relating to off-label promotion, but finding them guilty of 10 related misdemeanour counts).

The full impact of the Yates Memorandum on the willingness of companies to co-operate with the DOJ in the face of an increased focus on individual criminal and civil liability has yet to be seen. Equally unclear is how the Yates Memorandum will impact the relationship between company attorneys and employees, and whether employees will co-operate with internal investigations knowing that the company is likely to turn over evidence of individual wrongdoing to prosecutors to be perceived as co-operative by the DOJ. Despite initial questions about whether the Trump administration would change course from what was laid out in the Yates Memorandum, Attorney General Sessions has indicated that the DOJ will continue emphasising the importance of holding individuals accountable for corporate misconduct because '[i]t is not merely companies, but specific individuals, who break the law.'[24]

See Chapter 6 on beginning an internal investigation

31.2 Sentencing

31.2.1 Generally

Individuals who are convicted of violating a federal criminal law, including white-collar laws, face a range of possible punishments including fines, probation and imprisonment. In determining the nature and range of a potential sentence following a conviction, there are currently two sources of guidance for judges, prosecutors and defence counsel to refer to: criminal statutes in the United States Code[25] and the United States Sentencing Guidelines (Guidelines).[26]

Prior to 1984, federal judges had broad discretion in sentencing criminal defendants up to and including imprisonment, subject only to mandatory minimum or maximum sentences set forth in individual criminal statutes. Certain criminal statutes contain mandatory minimum sentences – for example, aggravated identity theft is punishable by a mandatory minimum sentence of imprisonment for two years, or by a mandatory term of imprisonment for five years if it relates to a terrorism offence.[27] Drug trafficking offences typically involve mandatory minimum sentences depending on the nature and quantity of the controlled substance involved and the defendant's criminal history.[28] Other statutes establish maximum terms of imprisonment, or a combination of a fine and imprisonment, such as bank fraud, which is punishable by a fine or a term of imprisonment of not

24 Attorney General Jeff Sessions Delivers Remarks at Ethics and Compliance Initiative Annual Conference (24 April 2017), available at https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual.

25 United States Code (U.S.C.), US Government Publishing Office, available at https://www.gpo.gov/fdsys/browse/collectionUScode.action?collectionCode=USCODE.

26 US Sentencing Guidelines Manual (effective 1 November 2016), United States Sentencing Commission, available at http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf.

27 18 U.S.C. § 1028A.

28 See, e.g., 21 U.S.C. § 841(b).

more than 30 years.[29] Not surprisingly, these broad sentencing parameters often resulted in wide sentencing disparities across jurisdictions for similar conduct.[30]

In response, Congress passed the Sentencing Reform Act of 1984 (SRA), which led to the creation of the Guidelines.[31] The Guidelines require a score-based analysis focused on a myriad of factors relating to the circumstances of the offence. This analysis leads to one of 43 different offence levels[32] and six criminal history categories.[33] As originally designed, the Guidelines were mandatory. A sentencing judge was required to apply a sentence from within the Guideline range dictated by the score-based analysis. However, in 2006, the Supreme Court in *United States v. Booke*r determined that mandatory application of the Guidelines was unconstitutional, and that they are advisory recommendations only.[34] As a result of *Booker*, the Guidelines now act as a starting point for a federal judge to determine what sentence should be imposed, consistent with minimum and maximum sentences set forth in the offence of conviction, as well as the factors set forth in the federal sentencing statute.[35]

Imprisonment 31.2.2

The federal prison system is operated by the Bureau of Prisons, and currently contains over 205,000 inmates in over 120 facilities located throughout the United

29 18 U.S.C. § 1344.

30 See US Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 35-39 (1 May 1987), available at https://www.fd.org/docs/select-topics---sentencing/Supplementary-Report.pdf.

31 18 U.S.C. §§ 3551-3586, 3601-3742; 28 U.S.C. §§ 991-998. The SRA required a federal district court judge to consider each of the factors in the federal sentencing statute, 18 U.S.C. § 3553(a), when crafting a sentence, which included: (1) the 'nature and circumstances of the offence' and the defendant's 'history and characteristics'; (2) the general purposes of the SRA; (3) the 'kinds of sentences available'; (4) the 'pertinent policy statements issued by the U.S. Sentencing Commission'; (5) the 'need to avoid unwarranted sentence disparities' between defendants convicted of similar conduct; (6) the 'need to provide restitution to any victims'; and (7) the applicable sentence range recommended by the Guidelines.

32 Guidelines § 5A.

33 Guidelines § 4A1.1.

34 543 U.S. 220, 245-246 (2005) (holding that the Guidelines must be considered as an advisory, not a mandatory, calculation of sentence to be consistent with the Sixth Amendment right to a trial by jury). The *Booker* court held that the federal sentencing statute requires judges to consider the Guidelines sentencing range, and to 'impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.' Id., at 259-260 (citing 18 U.S.C. § 3553(a)).

35 18 U.S.C. § 3553(a). The federal sentencing statute defines the factors to be considered by the judge in imposing a sentence on a defendant and mandates that sentence imposed should be one that is 'sufficient, but not greater than necessary.' 18 U.S.C. § 3553(a)(2). As a result of the Supreme Court's ruling in *Booker*, courts should consider the Guidelines as one factor in imposing a sentence, but a judge may impose a different sentence if other § 3553(a) factors suggest that the Guidelines range is inappropriate. See *Kimbrough v. United States*, 552 U.S. 85, 91 (2007) ('A district judge must include the Guidelines range in the array of factors warranting consideration').

States.[36] Since the 1980s, there has been approximately a tenfold increase in the number of federal prisoners, attributed largely to the expansion of federal criminal statutes, aggressive prosecution efforts and the elimination of parole.[37]

When calculating a potential sentence of imprisonment under the Guidelines, the judge first looks to the 'base offence level' applicable to the defendant's conviction,[38] and adjusts that upward or downward for specific applicable offence characteristics, special instructions and other factors to calculate the 'total offence level'.[39] Next, the judge determines the defendant's criminal history category (categories I to VI), which is increased by prior criminal convictions.[40] Once the total offence level and criminal history category are determined, the judge arrives at the recommended sentence by identifying the applicable range in the Guidelines' sentencing table.[41] Judges have discretion to depart upward or downward from the recommended range upon finding that the case includes one or more aggravating or mitigating circumstance 'of a kind not adequately taken into consideration' by the Guidelines.[42] They also allow judges to depart from the Guidelines if the government moves for a downward departure based on the defendant's substantial assistance in another case.[43] In any case, the judge must state in writing the specific reasons for imposing a sentence outside the applicable Guidelines sentencing range.[44]

31.2.3 Fines

An individual convicted of a federal crime may also be sentenced to pay a monetary fine.[45] The process a judge uses to calculate an applicable fine is similar to that of determining a sentence of imprisonment. Many criminal statutes set forth the range of fines that may be assessed upon conviction; for those felonies whose statute does not so specify, the fine is set at not more than US$250,000.[46] As with terms of imprisonment, the Guidelines contain a fine table that provides the court with an advisory minimum and maximum fine range for defendants, based on the offence level at which the defendant is sentenced.[47]

Judges may depart upwards or downwards from the Guidelines' fine range based on factors such as a defendant's ability to pay, any restitution the defendant

36 Congressional Research Service, The Federal Prison Population Buildup: Options for Congress (20 May 2016), available at https://www.fas.org/sgp/crs/misc/R42937.pdf.

37 Id.

38 Guidelines §§ 1B1.1(a)(1), 1B1.2(a).

39 Guidelines §§ 1B1.1(a)(2), 1B1.1(c).

40 Guidelines § 1B1.1(a)(6).

41 Guidelines § 1B1.1(a)(7).

42 Guidelines § 5K2.0 (quoting 18 U.S.C. § 3553(b)).

43 Guidelines § 5K1.1.

44 18 U.S.C. § 3553(c)(2).

45 18 U.S.C § 3571(a).

46 18 U.S.C § 3571(b)(3).

47 Guidelines § 5E1.2. For example, if a defendant is convicted of bank fraud and is sentenced at offence level 18, the fine table sets a guideline range of US$6,000 to US$60,000. Id.

must make, the potential for collateral consequences the defendant may face (such as civil litigation) and other equitable considerations.[48] Judges looking to assess a fine should also consider the factors in the federal sentencing statute in calculating the amount, including the seriousness of the offence, promotion of respect for the law, provision of just punishment for the defendant and its deterrent factor.[49]

Probation 31.2.4

The US Probation Department supervises individuals sentenced to a term of probation to ensure compliance with conditions imposed by the sentencing judge. Normally, a term of probation follows a term of imprisonment, but in certain cases a sentence of probation alone may be appropriate.[50] When imposing probation, the sentencing judge must consider the Guidelines[51] as well as the factors set forth in the SRA.[52]

The Guidelines contain a list of standard conditions that are recommended in all cases of probation,[53] along with a list of special conditions to be considered under certain circumstances.[54] In addition, a judge may impose additional conditions on a defendant's probation term that are reasonably related to the nature and circumstances of the offence, the history and characteristics of the defendant, and the goals of sentencing.[55] In all cases, the court must provide the defendant with written notice of the conditions.[56] The court may revoke a defendant's probation at any time before the end of its term for any violation of a probation condition that occurs during that time.[57]

Confiscation of assets 31.2.5

Pretrial asset freeze orders 31.2.5.1

Under US law, the government can seek a temporary order freezing an individual's assets, in both the civil and criminal contexts, before a case is proven at trial. In

48 Guidelines § 5E1.2(d).

49 See 18 U.S.C. § 3553(a).

50 Guidelines § 5B1.1.

51 See, e.g., *United States v. Toohey*, 448 F.3d 542, 546-47 (2d Cir. 2006) (holding that a departure from the Guidelines' prison recommendation to probation may be warranted, but the district court should nonetheless 'consider the Guidelines and all of the other factors listed in § 3553(a)').

52 The SRA directs the sentencing judge, when imposing probation, to consider several factors, including: (1) the nature of the offence and history and characteristics of the defendants; (2) the need for just punishment, deterrence, or public protection; (3) the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment; (4) the types of sentences available; (5) the Guidelines; (6) the need to avoid unwarranted sentencing disparities between defendants with similar records for similar conduct; and (7) the need to provide restitution to victims. See 18 U.S.C. § 3553(a).

53 Guidelines § 5B1.3(c).

54 Guidelines §§ 5B1.3(d), (e).

55 Guidelines § 5B1.3(b).

56 18 U.S.C. § 3563(d).

57 18 U.S.C. § 3564(e), 3565(a).

civil enforcement matters, regulators can seek asset freezes from an administrative law judge once an action is initiated, often in *ex parte* proceedings at which the respondent is not present. In criminal matters, prosecutors can seek asset freeze orders from a district court based on a showing of probable cause that the assets are subject to permanent forfeiture.

See Section 31.2.5.2

In the past, courts were unconvinced by the constitutional argument that pretrial asset freeze orders were a violation of a defendant's Sixth Amendment right to counsel, even if those assets would otherwise be used to pay lawyers' fees.[58] However, more recently, the Supreme Court in *Luis v. United States* held that the pretrial restraint of a criminal defendant's assets – which assets were not 'tainted' by the alleged criminal conduct – violates the Sixth Amendment right to counsel.[59] As a result, prosecutors must now distinguish between tainted and untainted assets and seek to freeze only assets that derive from alleged criminal activity.

31.2.5.2 Civil and criminal asset forfeitures

Permanent government confiscation of property is called a 'forfeiture'. There are generally three types of forfeiture proceedings available to US law enforcement and prosecutors: administrative, civil and criminal.[60]

Administrative forfeiture permits a federal agency to seize personal (non-real) property without initiating a judicial proceeding. The authority derives from the Tariff Act of 1930, which states that the following types of property are eligible for administrative forfeiture: (1) property whose value does not exceed US$500,000; (2) merchandise whose importation is prohibited; (3) a conveyance used to import, transport or store a controlled substance; or (4) a monetary instrument.[61]

The deadlines and notice requirements for the various types of administrative forfeiture proceedings are set forth in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA).[62] Once property is administratively seized, the federal agency involved must give written notice of the seizure to each party who appears to have an interest in the seized article.[63] The notice must contain a description of the property seized; the time, cause and place of the seizure; how a person seeking to claim the property should proceed; and, if known, the name and residence of the owner of the seized property.[64] If no one contests the administrative forfeiture

58 See *Caplin & Drysdale v. United States*, 491 U.S. 617, 626 (1989) (holding that '[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney'); *United States v. Monsanto*, 491 U.S. 600, 615 (1989) (holding that the right to counsel was not violated when a defendant's assets were frozen pre-conviction).

59 136 S. Ct. 1083 (2016).

60 The DOJ's Asset Forfeiture and Money Laundering Section publishes an Asset Forfeiture Policy Manual, most recently updated in 2016, to set forth DOJ policy and provide guidance to US Attorneys' Offices on the DOJ's Asset Forfeiture Program. See Asset Forfeiture Policy Manual, available at https://www.justice.gov/criminal-afmls/file/839521/download.

61 19 U.S.C. § 1607.

62 Pub. L. No. 106-185, 114 Stat. 202 (2000).

63 19 U.S.C. § 1607(a).

64 19 C.F.R. § 162.45.

within the deadline specified, claimants lose their ability to contest the forfeiture. If a timely claim of the property is received, the matter is referred to the United States Attorney's Office for a judicial proceeding.

Civil forfeiture is an *in rem* proceeding that is brought directly against a piece of real or personal property that is involved, derived from or traceable to one or more enumerated federal crimes.[65] The property itself is the defendant and no charge against an individual is necessary. In a civil forfeiture proceeding, the government must prove, by a preponderance of the evidence, that the property is subject to forfeiture.[66] If a claimant raises an innocent owner defence, he or she has the burden of proving that the claimant is an innocent owner of the property by a preponderance of evidence.[67]

Criminal forfeiture is an action brought as part of a criminal case against a defendant, not against a specific asset. It is an *in personam* action and requires the government to include a forfeiture charge against the defendant in the indictment, and prove that the property was used or derived from one or more enumerated federal crimes.[68] The indictment or criminal information must contain notice to the defendant that the government is seeking forfeiture of property as part of any sentence.[69] If a defendant disposes of the original asset subject to forfeiture, the government may obtain substitute assets[70] or may obtain a money judgment in an amount equal to the criminal proceeds.

When a criminal defendant is found guilty on charges that include the potential criminal forfeiture of property, the jury then determines whether the government has established 'the requisite nexus between the property and the offense committed by the defendant'.[71] If so, a preliminary order of forfeiture is entered against the defendants. If there are any third parties with an interest in the property, they may seek an ancillary proceeding to prevent the seizure by the government.[72] Once the trial judge has disposed of any third-party claims, a final order of forfeiture is entered and the defendant's interest in the property is divested.[73]

A defendant can challenge the dollar amount of a criminal or civil forfeiture as a violation of the Eighth Amendment to the US Constitution, which restricts the government's ability to impose 'excessive fines' as punishment.[74] Among other

65 18 U.S.C. §§ 981 and 983-5.

66 18 U.S.C. § 982(c)(91).

67 18 U.S.C. § 982(d)(1).

68 18 U.S.C. § 982.

69 Fed. R. Crim. P. 32.2(a).

70 Prosecutors may seek the forfeiture of 'substitute assets' in place of tainted property when certain conditions are met. See 21 U.S.C. § 853(p) (incorporated by reference in various criminal forfeiture statutes).

71 Fed. R. Crim. P. 32.2(b)(4).

72 Fed. R. Crim. P. 32.2(c).

73 Fed. R. Crim. P. 32.2(c)(2).

74 See *Alexander v. United States*, 509 U.S. 544, 558-59 (1993) (holding that the excessive fines clause of the Eighth Amendment applies to in personam criminal forfeiture for purposes of determining whether a penalty is 'excessive'); *Austin v. United States*, 509 U.S. 602, 609-10 (1993) (holding that the excessive fines clause applies to civil forfeitures of conveyances and real property used to

factors, courts conducting such a review will look to whether the forfeiture is disproportionate to the defendant's conduct and, therefore, excessive.[75]

31.2.6 Compensation orders

Under the Mandatory Victims Restitution Act of 1996 (MVRA),[76] defendants convicted of certain federal crimes, as well as defendants sentenced to probation, must in most circumstances make restitution to each of their victims in the full amount of the victim's financial losses that resulted from the defendant's crimes.[77] Restitution by the defendant must be ordered regardless of the defendant's economic circumstances, or any third-party compensation received by the victim.[78] Judges must, however, consider a defendant's economic circumstances when deciding on a payment schedule and form of restitution.[79]

Judges must reduce a restitution amount to be paid to a victim if the victim recovers compensatory damages from the defendant for the same loss in a civil proceeding.[80] In addition, if a victim has received insurance proceeds as compensation for a loss suffered due to the defendant's crimes, the defendant's restitution must be paid to the insurance company.[81]

31.2.7 Disqualification and other consequential orders

In addition to imprisonment, fines, probation, forfeitures and other direct sanctions that may be imposed by a criminal court, there are a number of other federal, state and local legal and regulatory restrictions that may result as 'collateral consequences' of a criminal conviction.[82] These are opportunities and benefits that are no longer fully available to a person, or legal restrictions a person may operate under, because of their criminal conviction. They are imposed automatically upon conviction, even if not expressly included in the criminal court's judgment, or by action of a civil court or administrative agency. Examples of collateral consequences of a criminal conviction may include (1) disqualification from jury

---

facilitate the transport, sale, or possession of controlled substances under 21 U.S.C. §§ 881(a)(4) and (7)).

75 See *Alexander*, 509 U.S. at 558-59.

76 Pub. L. No. 104-132, § 204, 110 Stat. 1214, 1227 (codified at 18 U.S.C. §§ 3556, 3663 and 3664).

77 See *Hughey v. United States*, 495 U.S. 411, 413 (1990) (holding that restitution may only be awarded for losses resulting from the specific conduct for which the defendant was convicted). The *Hughey* decision was subsequently modified by Congress pursuant to the Crime Control Act of 1990, which authorised courts to order any restitution amount agreed to in a plea agreement, and broadened restitution payable to any person directly harmed by the defendant's conduct in the course of a scheme or conspiracy. See Pub. L. No. 101-647 § 2509, codified at 18 U.S.C. § 3663.

78 18 U.S.C. § 3664(f)(1)(A)-(B).

79 18 U.S.C. § 3664(f)(2).

80 18 U.S.C. § 3664(j)(2).

81 18 U.S.C. § 3664(j)(1).

82 See ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons, Standards 19-2.1 and 19-3.1 (3d ed. 2003), available at www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_collateral_toc.html.

service and loss of voting rights; (2) ineligibility for federal employment or military service; (3) inability to obtain a passport or possess a firearm; and (4) for individuals with professional licences, such as attorneys, certified public accountants and securities brokers, suspension or loss of licence.

32

Monitorships

Richard Lissack QC, Nico Leslie, Christopher J Morvillo, Tara McGrath and Kaitlyn Ferguson[1]

32.1 Introduction

In the United States, the past decade has seen a notable increase in the use of independent corporate monitors in connection with the resolution of corporate criminal and regulatory investigations. This trend has also recently found a statutory foothold in the United Kingdom, after a period of sporadic sampling of use of corporate monitorships as a tool in the sentencing armoury. Now, in the wake of the United Kingdom's deferred prosecution agreement regime it is safe to assume that the appointment of a monitor will increasingly feature in the settlement and disposal of corporate investigations. Although monitors come in many shapes and sizes, they typically help to create and supervise the implementation of compliance and remediation programmes to address the perceived deficiencies that gave rise to the wrongdoing. It is expected that monitors will reduce recidivism for corporate misconduct, benefiting the corporation, its shareholders and the public.

In the United States, monitors have been used in both the civil and criminal contexts, typically in conjunction with a settlement agreement negotiated between the parties to a dispute, and often with the approval and supervision of the courts.[2] Outside the criminal context, monitors have been used as conditions

1 Richard Lissack QC and Nico Leslie are members of Fountain Court Chambers. Christopher J Morvillo is a partner, and Tara McGrath and Kaitlyn Ferguson are associates, at Clifford Chance US LLP.

2 In 2014, for instance, the Department of Justice entered into a civil settlement with Citigroup that included a monitorship provision to address Citigroup's false representations to investors regarding its residential mortgage-backed securities. See DOJ Press Release, Justice Department, Federal and State Partners Secure Record $7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages (14 July 2014). Monitors may also be used in private cases, especially where there are concerns that misconduct may reoccur or an institution's

of settlements between business entities and a wide range of federal and state agencies,[3] as well as international bodies such as the World Bank.[4] Even private litigants have included monitors in their settlement agreements.[5]

Yet the prevalence of monitors as a condition of high-profile corporate criminal resolutions sets the stage for close scrutiny of the practice in the United States and has given rise to congressional hearings, several DOJ policy enactments, legal challenges and, more recently, the promulgation of bar association standards. Therefore, this chapter will focus on monitors used in conjunction with the resolution of federal criminal investigations conducted by the United States Department of Justice (DOJ) (including, of course, the various United States Attorney's Offices (USAO)).[6] Because the practice of using monitors is relatively new in the United Kingdom, this chapter will draw parallels and contrasts in UK law and practice where appropriate from the more developed US practice. After briefly discussing the history of corporate monitors in both countries, this chapter will analyse certain key issues surrounding the use of monitors in both jurisdictions, including the appointment, roles, supervision and funding of monitors.

---

culture needs to be remodelled to ensure future compliance. See, e.g., Athletics Integrity Agreement between the National Collegiate Athletic Association and The Big Ten Conference, and the Pennsylvania State University (29 August 2012), available at www.psu.edu/ur/2012/Athletics_Integrity_Agreement.pdf; NCAA, Former Sen. Mitchell Selected as Penn State Athletics Integrity Monitor (1 August 2012), www.ncaa.org/about/resources/media-center/news/former-sen-mitchell-selected-penn-state-athletics-integrity.

3 The Environmental Protection Agency and Securities and Exchange Commission, among many others, also use monitors as part of settlements. See, e.g., Environmental Protection Agency News Release, Duke Energy Subsidiaries Plead Guilty and Sentenced for Clean Water Act Crimes (14 May 2015) (noting that various Duke Energy subsidiaries would be 'monitored by an independent court[-]appointed monitor'); DOJ Press Release, Justice Department, Taiwan-Based AU Optronics Corporation Sentenced to Pay $500 Million Criminal Fine for Role in LCD Price-Fixing Conspiracy (20 September 2012) (discussing a court-appointed monitor in the antitrust matter against AU Optronics Corporation); Seth Schiesel & Simon Romero, WorldCom Strikes a Deal with SEC, N.Y. Times (27 November 2002), www.nytimes.com/2002/11/27/business/worldcom-strikes-a-deal-with-sec.html (discussing WorldCom's settlement with the SEC, which included a monitorship).

4 As part of the World Bank Sanctions Procedures, an independent monitor may be required for parties seeking to remain active with the Bank. World Bank Sanctions Procs. § 9.03 (15 April 2012), available at http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WBGSanctions_Procedures_April2012_Final.pdf.

5 See, e.g., NCAA Appointed Integrity Monitor, supra note 2, at 1. Additionally, monitors are frequently appointed in lawsuits between private plaintiffs and the government. For example, a monitor was appointed as part of the City of New York's settlement with private plaintiffs regarding the police department's discriminatory enforcement of anti-trespassing rules. Memorandum Opinion and Order at 3 n.8, *Davis v. City of New York*, No. 10 Civ. 0699 (S.D.N.Y. 28 April 2015).

6 Unless otherwise specified, references herein to 'monitors' or 'monitorships' concern DOJ/USAO corporate monitorships.

32.2 Evolution of the modern monitor

32.2.1 United States

Most monitorships arise as a result of a corporate guilty plea, deferred prosecution agreement (DPA) or non-prosecution agreement (NPA).[7] The DOJ first used NPAs and DPAs in 1993,[8] with the first recognised monitorship following in 1995, in connection with Consolidated Edison's sentencing for disclosure failures following a deadly steam pipe explosion.[9] Spurred on by the collapse of Enron in 2001 and other high-profile instances of corporate misconduct, the US federal government prioritised and increased the investigation and prosecution of corporations. This increase naturally led to a growth in the number of corporate guilty pleas, DPAs and NPAs, and, concomitantly, the rise of monitorships as a condition of settlement.

See Chapters 9 and 10 on co-operating with authorities and Chapters 23 and 24 on negotiating global settlements

As the frequency of monitorships has increased, so too has their level of scrutiny. One of the most controversial aspects of monitorships has been monitor selection. The issue received considerable attention in 2007 when Chris Christie – then the US Attorney for the District of New Jersey – approved, without a bidding process, a contract for a consulting firm founded by his former boss, Attorney General John Ashcroft, to serve as the monitor for medical device company Zimmer Holdings (a contract reportedly worth between US$28 million and US$52 million in monitor fees).[10] Concerns of cronyism, transparency and conflicts of interest led the US Congress to hold an investigative hearing to better understand the appointment.

---

7 DPAs and NPAs, while similar in that they are both pretrial settlement options available to the DOJ/USAO, have different collateral consequences for corporate defendants. With a DPA, the DOJ files a criminal information, which under the DPA the DOJ agrees to dismiss after a term of months or years if the corporate defendant complies with all other terms of the settlement. DPAs are, by virtue of being filed with a court, publicly available and therefore subject corporate defendants to adverse public relations and scrutiny. By contrast, with a NPA, the government agrees not to bring charges against the corporate defendant if it complies with the terms of the settlement; NPAs are not required to be disclosed, though they frequently are by the corporate defendant and/or the DOJ. Because NPAs do not involve the courts, they tend to be far more flexible and desirable for corporate defendants than DPAs.

8 See US Gov't Accountability Off., GAO-10-260T, Prosecutors Adhered to Guidance in Selecting Monitors for Deferred Prosecution and Non-Prosecution Agreements, But DOJ Could Better Communicate Its Role in Resolving Conflicts (2009).

9 See James C. McKinley, Con Ed Fined and Sentenced to Monitoring for Asbestos Cover-Up, N.Y. Times (22 April 1995), www.nytimes.com/1995/04/22/nyregion/con-ed-fined-and-sentenced-to-monitoring-for-asbestos-cover-up.html. Note, the DOJ was not the first government agency to use monitors. Monitors were used as early as 1978 by the SEC. SEC News Digest, Issue 80-71 at 3 (10 April 1980), available at https://www.sec.gov/news/digest/1980/dig041080.pdf (noting that in *SEC v. Page Airways, Inc.*, the defendant agreed to 'retain a Review Person to evaluate the methods and procedures followed in this investigation').

10 Amy Walsh, Is the Opaque World of Corporate Monitorships Becoming More Transparent?, Bus. L. Today (December 2015), www.americanbar.org/publications/blt/2015/12/08_walsh.html.

In the wake of – and likely to quell criticism over – that controversy, the DOJ first issued guidance on the retention and selection of monitors and has since twice updated its policies. The primary materials issued by the DOJ are as follows:

- *Morford Memorandum:* In March 2008, then acting Deputy Attorney General Craig Morford issued a memorandum establishing guidelines and decision-making procedures for the appointment of monitors titled, 'Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations' (the Morford Memorandum).[11]
- *Breuer Memorandum:* In June 2009, Assistant Attorney General Lanny A Breuer issued a memorandum titled, 'Selection of Monitors in Criminal Division Matters,' in which he built on the Morford Memorandum, outlined the terms required in all monitorship agreements and refined the selection and documentation process for monitors.[12]
- *Grindler Memorandum:* Finally, Gary Grindler, then acting Deputy Attorney General, issued a memorandum in March 2010 titled, 'Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations' (the Grindler Memorandum), outlining the means by which corporations can reject a monitor's recommendation for being too costly. This guidance was the result of the increasing costs of monitorships and heavy public scepticism about their benefits.[13]

As a result of these policies, the DOJ's selection process is arguably the most formalised and transparent of any agency. Nevertheless, despite research suggesting that prosecutors have in fact followed the guidelines established in the DOJ materials,[14] concern over the selection and use of monitors has continued. As a consequence of this escalating debate, the American Bar Association promulgated black-letter standards for monitors in August 2015 (ABA Standards).[15] The ABA

11 Memorandum from Craig S. Morford, Deputy Att'y Gen., to All Component Heads and US Att'ys, Selection and Use of Monitors in Deferred Prosecution Agreements (7 March 2008) (the Morford Memorandum).

12 Memorandum from Lanny A. Breuer, Assistant Att'y Gen., to All Criminal Div. Personnel, Selection of Monitors in Criminal Division Matters (24 June 2009).

13 Memorandum from Gary G. Grindler, Deputy Att'y Gen., Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (25 May 2010) (the Grindler Memorandum). Advocates argue that shifting the costs of compliance from publicly funded regulators to the offending corporations is both fair and economically optimal, as internalising the expenses should make the corporations less likely to offend in the future. But some question whether monitors truly improve compliance and are worth the often multi-million dollar fees they charge to corporations (and by extension their shareholders). See Rachel Louise Ensign & Max Colchester, Meet the Private Watchdogs Who Police Financial Institutions, The Wall Street J. (30 August 2015), www.wsj.com/articles/meet-the-private-watchdogs-who-police-financial-institutions-1440983917.

14 See US Gov't Accountability Off., GAO-10-260T, Prosecutors Adhered to Guidance in Selected Monitors for Deferred Prosecution and Non-Prosecution Agreements (2009), available at www.gao.gov/products/GAO-10-260T.

15 ABA Standards for Monitors (4th ed. forthcoming) (standards adopted August 2015).

Standards address a variety of issues, ranging from the selection and evaluation of monitors to the establishment of monitor work plans, and are 'the culmination of three years of work by an ABA task force in consultation with judges, prosecutors, defence counsel, court personnel, and academics.'[16]

Controversy over monitors has recently extended to the courtroom, as companies and monitors battle over, *inter alia*, the legality of court-appointed monitors and the scope of the monitor's powers,[17] as well as the confidentiality of monitor reports.[18]

See Section 32.5.5

32.2.2 United Kingdom

As the use of corporate monitors grew in the US after the collapse of Enron, so UK authorities increasingly recognised the possibility of deploying similar monitorships as part of the resolution of their own corporate criminal investigations.[19] At the outset, this was done *ad hoc* and at the instigation of the relevant investigating authority. By way of example, in 2008 the Serious Fraud Office (SFO) settled civil proceedings against Balfour & Beatty arising out of a construction project in Alexandria, Egypt. As part of that settlement, the SFO required the company to accede to 'a form of external monitoring for an agreed period'. This was an early example of the SFO fashioning new tools to remedy perceived corporate governance failings.

Another example was the SFO's successful prosecution of a construction firm, Mabey & Johnson Ltd, in 2009. This was the first-ever successful prosecution of a British company on charges of overseas corruption and breaching United

16 Amy Walsh, Is the Opaque World of Corporate Monitorships Becoming More Transparent?, Bus. L. Today (December 2015), www.americanbar.org/publications/blt/2015/12/08_walsh.html. The ABA Standards provide a much more detailed discussion of best practices and considerations for the principles articulated in the DOJ guidance.

17 For example, after a district court in the Southern District of New York found that Apple violated the Sherman Antitrust Act, the court ordered that Apple be subject to a compliance monitor. Apple challenged the appointment both before the district court and, thereafter, the Second Circuit Court of Appeals, alleging, *inter alia*, that the appointment violated the constitutional separation of powers. See *United States v. Apple Inc.*, 787 F.3d 131, 136 (2d Cir. 2015). As but one example of the alleged constitutional violation, Apple highlighted that after it had moved the district court for a stay of the injunction appointing the monitor, the monitor 'coordinated with the plaintiffs . . . and submitted an affidavit as an integral part of the opposition papers.' Id. at 134, 138. The district court found that the monitor's actions did not evidence the monitor's prejudice against Apple, and though the Second Circuit concurred, it was far more critical of the monitor's conduct: 'It is certainly remarkable that an arm of the court would litigate on the side of a party in connection with an application to the court he serves.' The Second Circuit also noted that the monitor's submission on behalf of the plaintiffs 'was the opposite of best practice for a court-appointed monitor.' Id. at 138.

18 Marieke Breijer, ABA London: Keep Monitor Reports Private, Global Investigations Rev. (13 October 2015), http://globalinvestigationsreview.com/article/1024106/aba-london-monitor-reports-private.

19 See further Jo Rickards & Johanna Walsh, DPA Corporate Monitorships in the UK, Global Investigations Rev. (21 September 2015), http://globalinvestigationsreview.com/article/1018143/dpa-corporate-monitorships-uk.

Nations sanctions, and as part of its guilty plea Mabey & Johnson agreed to the appointment of an independent monitor for three years to oversee future conduct. Although this monitorship was approved by the court, Judge Geoffrey Rivlin QC[20] noted that it was likely to prove an expensive exercise and ordered that the costs of the monitor for the first year be capped at £250,000.

Nonetheless, the use of monitorships remained a novelty in the UK in the absence of a formal statutory footing. Indeed, it even drew notable judicial criticism on occasion. In the case of Innospec Ltd,[21] a manufacturer found to have paid substantial bribes to Indonesian officials, the English courts expressly criticised the three-year monitorship regime that had been jointly agreed by the SFO and DOJ as part of a 'global settlement' with the company. This was to be the first-ever US–UK joint monitorship, and illustrated the extent to which the UK investigating authorities were attracted by the US regime in adopting monitorships in the determination of corporate criminal investigations.

However, although the English court was prepared to approve this aspect of the settlement, the case – and in particular the terms of the cross-border determination reached between the parties – was controversial. Most unusually, a senior appellate judge, namely Lord Justice Thomas,[22] was brought in to sit on the case at first instance. He made clear that the court's approval for the appointment of a joint monitorship 'should be no precedent for the future'. In particular, he stated that the dual monitorship risked incurring unnecessary costs, and noted that 'imposing an expensive form of "probation order" seems to me unnecessary for a company which will also be audited by auditors well aware of the past conduct and whose directors will be well aware of the penal consequences of any similar criminal conduct.' In his view, the sums used on such monitoring might have been better allocated to paying fines or compensation. Either way, he made clear that in future 'the request for such an order will have to be fully explained in terms of its cost effectiveness.'[23]

Innospec was widely seen as a setback for bilateral appointment of monitorships and signalled some judicial resistance to the US approach to presenting the court with a sentencing or settlement package to be approved. But, in spite of Lord Justice Thomas's reservations, UK investigating authorities continued to seek and obtain orders for corporate monitorships, and these were included in civil recovery orders agreed between the SFO and both Macmillan Publishers (in 2011) and Oxford Publishing[24] (in 2012). However, the actual and prospective role of monitorships as a tool of corporate compliance has increased substantially since the creation of the new DPA regime in the UK, introduced by the Crime and Courts Act 2013. In light of that legislation, it is now clear that corporate

20 Later and on his retirement as a judge, he became General Counsel to the Serious Fraud Office.

21 See *R v. Innospec Limited* [2010] Crim LR 665.

22 Now Lord Chief Justice of England and Wales.

23 *R v. Innospec Limited* [2010] Crim LR 665 at §§48-49.

24 See the SFO's press release describing the circumstances of this settlement, which arose because of the publisher's unlawful practices in Kenya and Tanzania: https://www.sfo.gov.uk/2012/07/03/oxford-publishing-ltd-pay-almost-1-9-million-settlement-admitting-unlawful-conduct-east-african-operations/.

monitorships have an express and permanent statutory place in the UK criminal law calendar of powers and remedies for holding a corporation to account.[25]

Following the passing of that Act, the SFO launched a consultation process in June 2013 to finalise a Code of Practice for the new DPA regime (the Code). The Code was issued on 14 February 2014, and gives close attention to the role and duties of corporate monitors. Although such monitorships are not a mandatory feature of the new regime, the focus on monitoring in the Code is a powerful indication of the role that UK regulators expect them to play in the future. The Code also sets out a detailed framework for the appointment of monitors, the costs and terms of the monitorship, and the areas that the monitor may be expected to supervise or restructure.[26]

The SFO's first application for a DPA was approved by a senior appellate judge, namely Sir Brian Leveson, President of the Queen's Bench Division, on 30 November 2015.[27] The DPA involved Standard Bank Plc, which was the subject of bribery charges relating to multimillion-dollar payments made by a former sister company in Tanzania. As part of the agreed DPA, Standard Bank agreed to submit, at its own expense, to an 'independent review of its existing internal anti-bribery and corruption controls, policies and procedures regarding compliance with the Bribery Act 2010 and other applicable anti-corruption laws.'[28] The independent reviewer appointed was PricewaterhouseCoopers LLP. In his judgment approving the DPA, Leveson P made a number of observations about the difference between the DPA regimes in the UK and the US, noting that '[i]n contra-distinction to the United States, a critical feature of the statutory scheme in the UK is the requirement that the court examine the proposed agreement in detail, decide whether the statutory conditions are satisfied and, if appropriate, approve the DPA.' In particular, he observed that the court will only approve a DPA if it is fair, reasonable and proportionate in all the circumstances, but that it will typically consider this question in private so as not to prejudice any potential prosecution in the event of an adverse decision.[29] In the case of Standard Bank, he declared himself fully satisfied that the DPA was in the interests of justice.[30]

Following the high-profile *Standard Bank* case the SFO has recently made a second successful application for a DPA, approved by Leveson P on 6 July 2016.[31] The company, which could not be named because of other, parallel legal proceedings, pleaded guilty to charges of conspiracy to corrupt. The DPA provided that the company would undertake a review of its internal compliance controls, and that its chief compliance officer would prepare a report for submission to the SFO on its anti-corruption policies and their implementation, to be submitted within

25 See Crime and Courts Act 2013, Schedule 17, Part I, s.5(3)(e).

26 See in particular section 7 of the DPA Code of Practice, headed 'Terms'.

27 See the SFO's press release: https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/.

28 Idem at §13.

29 See *SFO v. Standard Bank Plc* [2016] Lloyd's Rep FC 102 at §2.

30 Idem at §22.

31 See the SFO's press release: https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/.

12 months of the DPA and then annually for the DPA's duration.[32] Although it is not known why this approach was taken by the SFO, it seems likely that it was because the company in question was relatively small and the appointment of a full-time monitor would have been unduly financially onerous. Again, this would appear to demonstrate the flexibility with which UK authorities are now prepared to apply monitoring tools to fashion bespoke remedies for corporate wrongdoing.

Accordingly, the use of corporate monitorships looks set to increase in the UK, and a greater convergence with US practice can be expected. Subject to the terms of the Code, over the coming years the UK authorities' approach to the appointment and conduct of corporate monitors is ever more likely to follow the lead of the US.

Circumstances requiring a monitor 32.3

In general, the DOJ assesses the need for the appointment of a monitor based on whether the corporation is capable of remediating, or has already remediated, its past wrongdoings without the assistance of a monitor. That, in turn, often translates into an enquiry of 'tone at the top' – whether, *inter alia*, management was involved in the criminal conduct, was negligent in failing to implement a proper compliance programme, fostered a culture that bred non-compliance with ethical and legal duties, and, critically, self-reported the misconduct to the DOJ.[33] Self-reporting has been highlighted as a particularly salient feature throughout the past year, as recent FCPA Pilot Program data seems to suggest companies that self-report have been 'far less likely to receive a monitor.'[34] In addition, the government is also likely to consider the severity of the offence; duration and systemic nature of the misconduct, including the extent of ongoing operations where the misconduct occurred; the size and complexity of the company as a whole; the quality of the company's existing compliance programme; and the extent of remediation.[35]

See Chapters 3 and 4 on self-reporting to the authorities

32 See *SFO v. XYZ Ltd*, unreported, 24 June 2016 at §64.

33 See Is a Corporate Monitor Necessary?, Corp. Crime Rep. (8 May 2013), www.corporatecrimereporter.com/news/200/isamonitornecessary05082013/.

34 See Ryan J. Rohlfsen, Kim B. Nemirow, Dante A. Roldan and Sarah M. Kimmer, Evaluating the FCPA Pilot Program: The Data, The Trends, 13 April 2017 https://www.law360.com/articles/912193?scroll=1. The FCPA Pilot Program was launched by the DOJ in April 2016 with the goal of encouraging corporate compliance by 'rewarding corporate cooperation and remediation with penalty reductions beyond what was historically available under the sentencing guidelines.' While the FCPA Pilot Program is ongoing, an analysis of the trends thus far has shown that 'nine of the companies that did not self-report were required to appoint a monitor, compared to two self-reporting companies where a monitor was not required.'

35 Commentators have noted that monitorships may be appropriate where companies have faced significant cybersecurity breaches, such as Yahoo!, where a recent breach resulted in the theft of data from more than one billion accounts. See Jacob S. Frenkel and Justin L. Root, Analysis: Cyber-Monitoring: The Next Frontier (7 March, 2017), http://www.dickinson-wright.com/-/media/files/news/2017/03/analysis-cyber-monitoring-the-next-frontier.pdf?la=en. In such cases, the severity of the breach and the complexity of the problem are two factors that may well have a bearing on a decision to impose a monitor.

These criteria make sense, of course, because, as commentators have noted:

> *The mere presence of a corporate monitor can help to change the culture of a company and how it approaches its internal controls and compliance and ethics programs. Corporate monitors force the company to direct attention and resources to compliance and ethics that more often than not were missing historically. . . . Both the regulatory body and the company routinely come out ahead because both entities do not have to expend what would otherwise be a huge amount of resources on an investigation and trial.*[36]

A significant indicator of 'tone at the top' is whether a company has self-disclosed the misconduct. John Buretta, then Chief of Staff of the DOJ's Criminal Division, noted during a 2013 conference: 'Self-disclosure – or not – is a huge marker for us. It's not dispositive, but important in assessing the ethical culture in the company. That can have an impact on whether we think a monitor is appropriate.'[37] Further, before a corporation self-reports, it will often take preliminary steps to remediate the situation and improve its compliance programme. In so doing, the corporation may be able to show it is capable of developing a satisfactory compliance programme such that a corporate monitor is unnecessary.[38] Therefore, with increased self-reporting, monitorships may decline.[39] Note that even corporations

See Chapters 3 and 4 on self-reporting to the authorities

36 Ryan C. Pisarik and Jason T. Wright, The Corporate Compliance Monitor's Role in Regulatory Settlement Agreements, SRR (Spring 2014), www.srr.com/article/corporate-compliance-monitors-role-regulatory-settlement-agreements.

37 Is a Corporate Monitor Necessary?, Corp. Crime Rep. (8 May 2013), www.corporatecrimereporter.com/news/200/isamonitornecessary05082013/.

38 See Joel Schectman, SEC Official: Company Reforms Can Make Monitorships Unnecessary, The Wall Street J. (15 October 2014), http://blogs.wsj.com/riskandcompliance/2014/10/15/sec-official-company-reforms-can-make-monitorships-unnecessary/ (quoting Jeffrey Knox, former head of the DOJ fraud section: '[I]f the compliance function is working, the company is on track, things are going well, having a third party [monitor] in there mucking things up might not be positive for anyone, not the company not the public.'). As part of its 2014 DPA for FCPA violations, HP's Polish subsidiary agreed to three-years of compliance reporting but 'successfully convinced DOJ and the SEC the imposition of a monitorship would not be appropriate based on the facts and circumstances.' See Jody Godoy, HP Polish Unit to Shed Deferred Bribery Charges, Law360 (30 May 2017) (quoting the company's external counsel, Christopher Steskal of Fenwick & West LLP). Although the company did not self-report, a monitor may have been deemed unnecessary because, according to HP General Counsel John Schultz, 'The misconduct described in the settlement was limited to a small number of people who are no longer employed by the company [and] HP fully cooperated' with the authorities. See HP Announces Settlement with DOJ and SEC (9 April 2014), http://www8.hp.com/us/en/hp-news/press-release.html?id=1624050#.WTWn5ZLyvmF. See also Department of Justice, Hewlett-Packard Russia Agrees to Plead Guilty to Foreign Bribery (9 April 2014) (acknowledging parent company HP's 'extensive cooperation with the department' and 'robust internal investigation'). On 25 May 2017, the DOJ moved to dismiss the charges after finding that the subsidiary had successfully complied with the terms of the deal. Unopposed Motion to Dismiss Information with Prejudice at 1–2, *United States v. Hewlett-Packard Polska, SP ZOO*, No. 14-0202-BLF (N.D. Cal. 25 May 2017).

39 Deputy Attorney General Sally Quillian Yates's September 2015 memorandum, 'Individual Accountability for Corporate Wrongdoing' (the Yates Memorandum), reinforces the importance

registered under the laws of a foreign country are subject to DOJ monitorships, provided the United States has jurisdiction over the corporation's misconduct. Indeed, in recent years in the United States, monitors have been imposed on foreign offenders with increased frequency.[40]

A similar test is applied in the United Kingdom. The Code sets out some important considerations for the appointment of a monitor, including whether the company already has a 'genuinely proactive and effective corporate compliance programme', and whether the appointment would be fair, reasonable and proportionate in all the circumstances.[41]

As in the United States, there is likely to be a particular focus on the degree of culpability of the management, especially if that management is still in place. Where the management has been entirely replaced, or where misconduct has been self-reported, there may be less need for an extended monitorship (see, for example, the observations made by the court in *Innospec*).[42] Moreover, and again in light of the comments in *Innospec*, the United Kingdom is likely to apply a special focus to matters of cost-effectiveness. Much is likely to turn on an analysis of what is fair, reasonable and proportionate in the circumstances of the specific proposed monitorship.

Selecting a monitor 32.4

The selection of the monitor is often the most controversial aspect of monitorships, as claims of cronyism abound. As outlined by the Morford Memorandum, the government should establish a selection process to ensure that the monitor is highly qualified, does not have any conflict of interests (either with the government or the corporation), and will instil public confidence in the monitorship process.[43] Though the Morford Memorandum eschews a one-size-fits-all solution, and counsels that the selection process must be tailored to the facts of each case, it does suggest the adoption of certain procedures. Namely, the government and the corporation should discuss the monitor's necessary qualifications and consider a pool of at least three qualified candidates.[44] The ABA Standards, which generally align with the Morford Memorandum, further suggest that both parties 'have a

of internal risk assessment and compliance monitoring. As promulgated, the Yates Memorandum requires early and complete self-reporting if a corporation wishes to obtain co-operation credit. Corporations are thus highly incentivised to self-report.

40 See SEC Press Release, VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations (18 February 2016), https://www.sec.gov/news/pressrelease/2016-34.html (noting that the SEC imposed a monitor on Dutch company VimpelCom as part of the parties' settlement to resolve VimpelCom's FCPA violations); Independent Monitor of Takata and the Coordinated Remedy Program, Takata Monitor, www.takatamonitor.org/ (Japanese company Takata agreed to a monitor in connection with its settlement with the US National Highway Traffic Safety Administration for Takata's manufacture and sale of ammonium nitrate airbags.).

41 See in particular section 7.11 of the DPA Code of Practice.

42 *R v. Innospec Limited* [2010] Crim LR 665 at §§48-49.

43 Morford Memorandum, supra note 11, at 3.

44 Id. at 4.

significant role in the selection process,' enumerate multiple selection criteria, and outline mandatory and potential exclusions.[45]

To ensure impartiality in the selection process, the Morford Memorandum requires the DOJ to establish standing or *ad hoc* committees to consider monitor candidates, whose membership is composed of the office ethics adviser, criminal chief or relevant section chief, and at least one other experienced prosecutor. Prosecutors cannot unilaterally accept or veto the selection of monitor candidates and the Office of the Attorney General must approve the monitor. Often, the government will require assurances from the corporation that it will not employ or otherwise be affiliated with the monitor for at least a year from the date the monitor is terminated. Though the Morford Memorandum notes that it may be appropriate for the government to select three acceptable candidates from among the pool, with the corporation picking the final monitor,[46] in practice, it is far more common for the corporation to nominate three candidates, with the DOJ making the final selection.[47]

In line with this practice, in March 2017 the DOJ reached a plea agreement with ZTE for conspiring to violate export control laws, under which ZTE would be subject to a three-year monitorship, with the monitor selected by the DOJ 'in its sole discretion' out of a pool of candidates proposed by ZTE.[48] In an unprecedented move, the court overseeing the matter – the District Court for the Northern District of Texas – amended the terms of the plea agreement to impose a monitor of its own selection and to increase judicial oversight over the monitorship.[49] Specifically, the plea agreement was amended to state that James M Stanton would be appointed as ZTE's monitor;[50] that 'the Monitor is a *judicial*

45 ABA Standards for Monitors §§ 24–2.1; 24–2.4.; 24–2.4(3)–(4).

46 Morford Memorandum, supra note 11, at 4.

47 Rachel G. Jackson, Data Show Trend Away from Monitors for Voluntary Disclosures, Just Anti-Corruption (31 May 2012), https://www.millerchevalier.com/sites/default/files/news_updates/attached_files/data_show_trend_6_5_12.pdf.

48 Plea Agreement at Attachment A ¶¶ 1–2, *United States v. ZTE Corp.*, No. 17-0120-K (N.D. Tex. 7 March 2017) ('[T]he Company will propose to the Department three candidates to serve as the Monitor. . . . The Department retains the right, in its sole discretion, to accept or reject the Monitor candidates proposed by the Company.').

49 The process for selecting the monitor and the terms of the monitorship were outlined in Attachment A to the Plea Agreement. The court subsequently amended Attachment A but left the remainder of the Plea Agreement intact. See Attachment A (Modified) Independent Corporate Compliance Monitor, *United States v. ZTE Corp.*, No. 17-0120-K (N.D. Tex. 22 March 2017). See also Rearraignment Hearing, *United States v. ZTE Corp.*, No. 17-0120-K (N.D. Tex. 22 March 2017) ('Here's what the agreement is as I understand it: It would be a sentence of three years probation on each count, to run concurrently, with an independent corporate compliance monitor appointed by me, by the Court, which is – I have chosen Mr. James Stanton; or if something happens to him or if I choose to change, that would be who it would be, as set out in Attachment A as modified today.').

50 Attachment A (Modified) Independent Corporate Compliance Monitor ¶ 1, *United States v. ZTE Corp.*, No. 17-0120-K (N.D. Tex. 22 March 2017) ('ZTE Corporation . . . agrees to engage James M. Stanton as an independent corporate monitor . . . .').

adjunct pursuant to Federal Rule of Civil Procedure 53';[51] and that '[a]ll reports, submissions, or other materials encompassed by this agreement will be filed [with the Court].'[52] The appointment of Mr Stanton, a lawyer in private practice and a former Texas state judge, is seen by some as particularly unusual given his lack of monitorship experience.[53] Notably, ZTE's monitorship was imposed as part of a plea agreement, which the court must review and approve. Accordingly, the court had the opportunity to amend the terms of the agreement before approving the plea. It remains to be seen whether courts will take as active a role in crafting the terms of monitorships imposed as part of DPAs and NPAs, which do not require the court's approval.[54] In the United Kingdom, a slightly different appointment procedure has been laid down by the Code. As part of the negotiations surrounding a DPA in the United Kingdom, the company must provide the prosecuting authority and the court with details of three potential monitors, including their qualifications, their estimated costs and any links with the relevant company. The company should then indicate their preferred monitor of the three, stating the reasons for their preference. This choice will ordinarily be accepted by the prosecuting authority and court, except where a conflict of interest or a lack of relevant experience has been identified.[55]

In terms of eligibility, the monitor must be independent from the company, and thus former employees, clients and close acquaintances are likely ineligible. Additionally, as the requirements of the monitorship will differ case by case, the monitor should be selected based on how well his or her qualifications pair with the requirements of the relevant monitorship.[56] Though the Morford Memorandum suggests that non-attorney experts 'such as accountants, technical or scientific experts, and compliance experts' may be better qualified for certain monitorships, in practice, monitors are predominantly lawyers, and often former prosecutors.[57]

---

51 Id. ¶ 6 (emphasis added).

52 Id. ¶ 13.

53 See Sue Reisinger, In Rare Move, Judge Imposes Own Monitor in ZTE Plea Deal, The American Lawyer (29 March 2017), http://www.americanlawyer.com/id=1202782436926/In-Rare-Move-Judge-Imposes-Own-Monitor-in-ZTE-Plea-Deal?mcode=0&curindex=0&curpage=ALL (noting that James Stanton is a civil and personal injury lawyer with no prior experience of acting as a monitor and no significant criminal experience, albeit per his resume he has served as a special master and arbitrator in six civil cases).

54 See *United States v. Fokker Services BV*, 818 F.3d 733, 741 (D.C. Cir. 2016).

55 See in particular sections 7.15-7.17 of the DPA Code of Practice.

56 See Morford Memorandum, supra note 11, at 3.

57 One study found that half of all monitors appointed in connection with DPAs and NPAs since 2001 have been former prosecutors, leading some critics to describe the monitoring industry as a 'full employment act for former federal prosecutors'. See Alison Frankel, DOJ Should End Secret Selection Process for Corporate Watchdogs, Reuters Blog (14 July 2014), http://blogs.reuters.com/alison-frankel/2014/07/14/doj-should-end-secret-selection-process-for-corporate-watchdogs/; Steven Davidoff Solomon, In Corporate Monitor, a Well-Paying Job But Unknown Results, The NY Times: Dealbook (15 April 2014), http://dealbook.nytimes.com/2014/04/15/in-corporate-monitor-a-well-paying-job-but-unknown-results/?_r=0. As but one recent example, the former Deputy Chief in the Fraud Section of the Criminal Division of the DOJ was recently appointed to serve as a monitor for Odebrecht in connection as part of its guilty plea for FCPA

The same is true in the United Kingdom. In global settlements, both US and UK authorities are increasingly seeing the value in appointing a monitor experienced in the laws of the relevant jurisdiction.[58]

Note, however, as the requirements of the monitorship can evolve over the duration of the monitorship, and the appointed monitor may prove to be incompatible with the corporation, the government may replace the monitor and the monitor is free to resign. As one example of a rather tumultuous monitorship, Western Union has already gone through four monitors as part of a 2010 settlement for failing to comply with anti-money laundering laws.[59]

To avoid such situations, third-party organisations have devoted themselves to promoting the use, quality and efficiency of monitors.[60] For example, the International Association of Independent Corporate Monitors – whose board is itself composed of many former monitors – offers resources and training to professionals, and has established a Code of Professional Conduct to serve as a template for best standards and practices.[61]

32.5 The role of the monitor

32.5.1 Scope of the monitorship

The scope of the monitorship should be tailored to the circumstances of each case, with the ultimate goal of reducing the risk of recurrence of the corporation's misconduct.[62] Therefore, the monitor's role should normally include a mandate for oversight, review and proposed modification of a company's compliance programme to facilitate rehabilitation of existing misconduct and deterrence of future wrongdoing.[63] Accordingly, the monitor may be required to assist with structural

violations. See Jody Godoy, DOJ Taking $24m Haircut on Odebrecht's $2.6B FCPA Fine, Law 360 (12 April 2017), https://www.law360.com/articles/912549/doj-taking-24m-haircut-on-odebrecht-s-2-6b-fcpa-fine; Biography of Charles E. Duross, Morrison Foerster, https://www.mofo.com/people/charles-duross.html.

58 See infra notes 78–79 and accompanying text discussing Rolls-Royce's monitor, British lawyer Lord Gold.

59 Rachel Louise Ensign & Max Colchester, Meet the Private Watchdogs Who Police Financial Institutions, The Wall Street J. (30 August 2015), www.wsj.com/articles/meet-the-private-watchdogs-who-police-financial-institutions-1440983917.

60 International Association of Independent Corporate Monitors, 'About Us' http://iaicm.org/about-independent-corporate-monitors/ (describing the mission/purpose of the organization and discussing the Code of Professional Conduct) (last visited 5 June 2017).

61 Id. (touting its members as having the 'breadth and depth of relevant skills, knowledge, and experience, together with reputation of character, to effectively serve as [monitors]'). See also Thomas Fox, IAICM Shine a Light on Corporate Monitors, JD Supra, 8 March 2017 http://www.jdsupra.com/legalnews/iaicm-shine-a-light-on-corporate-85994/. Membership is comprised of a 'distinguished panel of current and former corporate monitors, retired judges, and one former FBI agent.'

62 Morford Memorandum, supra note 11, at 5.

63 See for example Dep't of Justice Deferred Prosecution Agreement with Avon Products, Inc., 15 December, 2014, available at https://www.sec.gov/Archives/edgar/data/8868/000000886814000073/exhibit992dpa.htm ('[T]he Monitor will evaluate, in the manner set forth

changes, as well as help alter corporate culture and normative expectations.[64] In the United Kingdom, a list of items and procedures that the monitor may wish to consider as part of its monitoring programme is set out in the Code.[65]

The monitor is an independent third party, and does not serve as an employee or agent of either the corporation or the government.[66] Likewise, the monitor does not have an attorney–client relationship with either the corporation or the government. Nonetheless, it is critical for the monitor to have an open dialogue with, and co-operation from, the corporation and the government throughout the duration of the monitorship, which may include 'iterative work plans, planning meetings prior to any substantive work, and mid-review meetings'.[67] The parties should also stipulate what, if any, role the government or court should play in resolving disputes that may arise between the monitor and the corporation.[68]

Though the monitor does not take on a prosecutorial function, he or she may nonetheless uncover continuing or undisclosed misconduct. The monitorship agreement 'should clearly identify any types of previously undisclosed or new misconduct that the monitor will be required to report directly to the [government].' And, on the other hand, the agreement should identify any misconduct that the monitor can, in its discretion, report to the government, the corporation or both.[69]

Duration of the monitorship 32.5.2

Monitorships can range from months to several years. The duration of the monitorship will in large part depend on the scope of the monitorship, and in particular

below, the effectiveness of the internal accounting controls, record-keeping, and financial reporting policies and procedures of the Company as they relate to the Company's current and ongoing compliance with the FCPA . . . .').

64 Critics complain that '[l]ittle is publicly disclosed about what specifically they are supposed to accomplish [and] what they discover in their examinations . . . .' Rachel Louise Ensign & Max Colchester, Meet the Private Watchdogs Who Police Financial Institutions, The Wall Street J. (30 August 2015), www.wsj.com/articles/meet-the-private-watchdogs-who-police-financial-institutions-1440983917.

65 See in particular section 7.21 of the DPA Code of Practice.

66 Notably, some corporations have taken to hiring their own internal monitors following the government's implementation of a monitor. For example, as part of Western Union's 2010 settlement, Western Union received a monitor. Independently, Western Union also hired a consultant, leading to what in effect was a 'dual system of internal monitors – one stipulated by the settlement and the other hired by the money-transfer firm.' Rachel Louise Ensign & Max Colchester, Meet the Private Watchdogs Who Police Financial Institutions, The Wall Street J. (30 August 2015), www.wsj.com/articles/meet-the-private-watchdogs-who-police-financial-institutions-1440983917.

67 F. Joseph Warin, Michael S. Diamant & Veronica S. Root, Somebody's Watching Me: FCPA Monitorships and How They Can Work Better 13 U. Pa. J. Bus. L. 321, 364 (2011), available at http://scholarship.law.upenn.edu/jbl/vol13/iss2/1.

68 Grindler Memorandum, supra note 13, § II.

69 Morford Memorandum, supra note 11, at 7. Critically, undisclosed or continuing misconduct may invalidate the terms of the settlement and lead to an extension of the term and scope of the monitorship.

the extent of the problems found and the necessary remedial measures.[70] When negotiating duration, the parties should be mindful of, *inter alia*, the 'nature and seriousness of the underlying misconduct'; the 'pervasiveness and duration of the misconduct'; the complicity of senior management; the 'corporation's history of similar misconduct'; the corporate culture; the 'scale and complexity of any remedial measures contemplated by the agreement, including the size of the entity or business unit at issue'; and the current 'stage of design and implementation of remedial measures'.[71]

In most cases, the monitorship agreement will permit the government to extend the monitorship at its discretion if the corporation has not satisfied its obligations under the settlement, and provide for early termination if the corporation can demonstrate 'a change in circumstances sufficient to eliminate the need for a monitor.'[72] For example, after Credit Suisse admitted to aiding US tax evasion, the Department of Financial Services appointed a monitor for what was anticipated to be a two-year monitorship. However, shortly after the monitorship began in October 2014, a tolling period was triggered because Credit Suisse could not produce information at the pace and volume required by the monitor.[73] It is now thought that Credit Suisse's monitorship may last three or more years.[74] In the United Kingdom, this ability to extend monitorships has been formally recognised in the Code, subject to the extended term of the monitorship not exceeding the length of the DPA itself.[75]

Hybrid monitorships – in which the monitor serves for approximately 18 months and the corporation self-reports for the following 18 – are also becoming increasingly common, especially in the context of FCPA investigations.[76] As a further nuance, the DOJ has, in some instances, agreed to defer to a pre-existing monitorship in lieu of establishing its own monitorship. As one example, the December 2015 settlement between Alstom and the DOJ, over Alstom's various FCPA violations, required that Alstom be subject to an independent monitor. However, Alstom was already subject to a monitor in connection with a 2012 settlement with the World Bank. Rather than implement a second monitor, the DOJ agreed to defer to the existing World Bank-appointed monitor, provided that,

70 Morford Memorandum, supra note 11, at 7–8.

71 Id. at 7.

72 Id. at 8 ('For example, if a corporation ceased operations in the area that was the subject of the agreement, a monitor may no longer be necessary. Similarly, if a corporation is purchased by or merges with another entity that has an effective ethics and compliance program, it may be prudent to terminate a monitorship.').

73 John Letzing, Credit Suisse's Tardiness Likely to Extend Monitor's Sojourn, The Wall Street J. (6 January 2016), www.wsj.com/articles/credit-suisses-tardiness-likely-to-extend-monitors-sojourn-1452084986.

74 Id. (Noting that the process has been delayed although '[a] group of more than 100 Credit Suisse employees and external contractors hired by the bank' have been assisting the monitor.).

75 See section 7.19 of the DPA Code of Practice.

76 FCPA Digest, Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act at 2, 6, Shearman & Sterling (6 January 2014), available at www.shearman.com/~/media/Files/Services/FCPA/2014/FCPADigestTPFCPA010614.pdf

inter alia, Alstom self-report to the DOJ 'at no less than twelve-month intervals during a three-year term.'[77]

Rolls-Royce reached a similar resolution in its January 2017 settlement with US, UK and Brazilian authorities over bribery and corruption charges (and, in the United States, FCPA charges). At the time, Rolls-Royce already had an independent monitor – Lord Gold – who was appointed to review the company's anti-bribery and corruption compliance in connection with a 2013 settlement with the SFO. Though the company's 2017 DPA with the SFO did not impose a second monitor, it did require Rolls-Royce, *inter alia*, to procure a further report from Lord Gold outlining recommendations for change and produce a written plan of how it would implement these recommendations.[78] Likewise, the company's DPA with the DOJ did not implement a further monitor, but did require the company to report to the DOJ at least once a year for the next three years and to produce a series of reports.[79]

Creating a work plan 32.5.3

Under the ABA Standards, the monitor should draft a detailed work plan at the outset of the monitorship, with input from the corporation and government.[80] This is also a requirement of the UK regime under the Code, which stipulates that a work plan should be prepared even before the monitor's appointment is finally approved.[81] The work plan will ordinarily include an overview of the monitor's role and objectives, a description of the corporation's policies and procedures to be evaluated, a list of documents the monitor seeks to review, and a list of persons the monitor seeks to interview. The work plan should also include a proposed timeline for reaching certain milestones, such as a review of documents concerning the corporation's compliance programme; interviews with senior management, the board of directors, and audit committee; and deadlines for reporting of the monitor's findings.[82] In the UK, the work plan is required to set out provisions

77 Dylan Tokar, With Alstom Monitor Agreement, DOJ Tries Something New, Global Investigations Rev. (4 February 2015), available at http://globalinvestigationsreview.com/article/1023537/with-alstom -monitor-agreement-doj-tries-something-new.

78 Deferred Prosecution Agreement between the SFO and Rolls-Royce, paras. 25–34, available at http://iaicm.org/wp-content/uploads/formidable/9/Rolls-Royce-SFO-DPA-17Jan2017.pdf.

79 Deferred Prosecution Agreement at 4–5, D-1, *United States v. Rolls-Royce PLC*, No. 16-0247 (S) (S.D. Ohio 20 December 2016) ('Based on the Company's remediation and the state of its compliance program, and the Company's agreement to report to the Fraud Section and the Office as set forth in Attachment D to this Agreement, the Fraud Section and the Office determined that an independent compliance monitor was unnecessary[.]').

80 If disclosing the work plan to the company would limit the monitor's effectiveness, however, the parties should consider an alternative arrangement. See ABA Standards for Monitors § 24-3.3(3).

81 See section 7.18 of the DPA Code of Practice.

82 Jason T. Wright, The Corporate Compliance Monitor's Role in Regulatory Settlement Agreements, SRR (Spring 2014), www.srr.com/article/corporate-compliance-monitors-role-regulatory-settlement-agreements.

for costs and even to state with what frequency the monitor intends to report to the prosecutor.[83]

Not only does a detailed work plan help control costs and increase transparency, but it also helps prepare all parties for the monitorship.[84] Accordingly, the corporation will have a better understanding of what can be expected, and the act of preparing the work plan helps the monitor become familiar with the company's culture and risk tolerance. Further, a detailed work plan helps ensure that the monitor's expectations for the corporation are reasonable and that the government is comfortable with the monitor's approach.[85]

32.5.4 Reviewing documents and interviewing witnesses

To serve as an effective monitor and issue tailored recommendations to the corporation, the monitor must understand the corporation and its business. To develop this understanding, the monitor must have wide access to the documents and information deemed reasonably necessary to carry out the monitorship.[86] A recurring problem, however, is that given the monitor's independence, corporations are hesitant to disclose sensitive information. Under the ABA Standards, the corporation is not required to provide documents covered by the attorney–client or work-product privilege, or documents for which disclosure would be 'inconsistent with applicable law.'[87] A similar approach is adopted under the UK Code, which requires the company to grant the monitor 'complete access to all relevant aspects of its business during the course of the monitoring period', but does not affect the company's right to assert legal professional privilege over relevant documents.[88]

See Chapters 35 and 36 on privilege

It may also be necessary for the monitor to interview personnel, from low-level employees to senior management. The monitorship agreement should ordinarily address issues of employee rights that could arise during the monitorship, including privacy rights and the right to counsel – issues that take on added complexity

83 See section 7.18 of the DPA Code of Practice.

84 See Warin, supra note 67, at 360 (noting that the work plan also serves as a 'gloss on the settlement agreement to be applied in subsequent years of the monitorship').

85 Jason T. Wright, The Corporate Compliance Monitor's Role in Regulatory Settlement Agreements, SRR (Spring 2014), www.srr.com/article/corporate-compliance-monitors-role-regulatory-settlement-agreements.

86 See Rachel Louise Ensign & Max Colchester, Meet the Private Watchdogs Who Police Financial Institutions, The Wall Street J. (30 August 2015), www.wsj.com/articles/meet-the-private-watchdogs-who-police-financial-institutions-1440983917 (noting that the monitorship involved over 3,500 meetings with HSBC staffers, 11,500 document requests, and over 2 million pages of documents).

87 ABA Standards for Monitors § 24-4.2(1)(a)–(2)(a). Despite the monitor's independence, the monitor still has a duty to the corporation by nature of the appointment. Thus, the monitor cannot use proprietary or confidential information obtained during the monitorship for any purpose other than in furtherance of the monitorship. Where proprietary information is disclosed, the monitor and corporation should work together to ensure this information remains confidential. The parties should also stipulate how the monitor is to return any confidential or proprietary documents upon completion of the monitorship.

88 See Section 7.14 of the Code.

where the monitor's review is cross-border. Ordinarily, the monitor should inform interviewees of his or her identity and explain why information is being collected. The monitor should also inform interviewees whether they are the target of the monitor's investigation and of their right to have counsel present during the interview. Where an employee chooses to exercise the right to counsel, the monitor must respect that decision.[89]

See Chapters 5–6, beginning an internal investigation; 7–8, witness interviews; 13–14, employee rights

The monitor may find it advisable to inform interviewees of the degree to which the information being provided will remain confidential and what, if anything, the monitor is required to do with that information. In some circumstances, such as when information would otherwise be hard to extract, it may be appropriate for the monitor to have the authority to collect information confidentiality to protect its sources.[90]

Issuing recommendations and reports 32.5.5

During the course of the monitorship, the corporation and monitor should work together to develop recommendations for improvement of the corporation's compliance programme and to prevent recidivism of corporate misconduct. Depending on the scope and duration of the monitorship, the monitor may summarise his or her findings and recommendations in periodic reports to the government or court, or issue a single report at the end of the monitorship.[91] As negative findings in the report have the potential to significantly harm the corporation, in some circumstances the monitor may provide the corporation with a preliminary draft and invite comments.[92] Ultimately, however, the report is issued by the monitor alone, and must reflect the monitor's honest conclusions and recommendations.

Where the corporation disagrees with one of the monitor's recommendations, the corporation may reject it within a reasonable time, provided the government is informed. The government may consider this rejection when evaluating whether the corporation has fulfilled its obligations under the settlement.[93] Under the Grindler Memorandum, where a corporation rejects a monitor's recommendation on the basis of cost, it should provide a written proposal of 'an alternative policy, procedure, or system designed to achieve the same objective or purpose.'[94]

89 Except in limited circumstances, a company is not required to provide counsel or pay for counsel for employees being interviewed.

90 ABA Standards for Monitors § 24-4.2(4)(d).

91 Morford Memorandum, supra note 11, at 6.

92 ABA Standards for Monitors § 24-4.3(1)(d). Giving the corporation the opportunity to review a draft report may improve the quality of the report, as the corporation can correct any errors and, where applicable, provide evidence to rebut the monitor's negative findings.

93 Morford Memorandum, supra note 11, at 6. For example, after Standard Charter settled charges that it disguised transactions that could have violated US sanctions, two monitors were appointed as well as one 'independent consultant.' The monitors' findings that inadequate controls were used led to an additional $300 million fine. Rachel Louise Ensign & Max Colchester, Meet the Private Watchdogs Who Police Financial Institutions, The Wall Street J. (30 August 2015), www.wsj.com/articles/meet-the-private-watchdogs-who-police-financial-institutions-1440983917.

94 Grindler Memorandum, supra note 13, § II.

In the United Kingdom, the confidentiality of a monitor's reports and correspondence is expressly recognised in the Code, and its disclosure is restricted to the company, the prosecuting authority and the court (except as otherwise permitted by law).[95] Similarly in the United States, the government routinely denies Freedom of Information Act (FOIA) requests filed by news outlets for the production of monitor reports.[96] However, the public's right of access to such reports was recently litigated in relation to the deferred prosecution agreement between the DOJ and HSBC.[97]

By way of background, in 2012, HSBC reached a US$1.9 billion settlement with the government and secured a five-year DPA for HSBC's failure to comply with anti-money laundering laws and US sanctions. In an unusual turn of events, the court approved the DPA on the condition that the court could continue to exercise 'supervisory' control over the case.[98] A monitor was appointed as part of the settlement and issued a 1,000-page report in January 2015, a copy of which was filed under seal with the court. Thereafter, an HSBC mortgage customer asked the court to unseal the report so he could determine whether HSBC continued to engage in 'unsafe and unsound business practices.'[99] The lower court held that the report qualified as a 'judicial record' that should be filed publicly, and that 'the public has a First Amendment right to see the Report,' though HSBC and the government could suggest redactions and parts to remain under seal.[100] HSBC and the government opposed the unsealing, claiming it 'could provide a "road map" for criminals seeking to launder money.'[101] HSBC's lawyer said the court's order also called into question assurances given to foreign regulators who had provided information to the monitor on condition the report be kept secret.[102] On

95 See section 7.20 of the DPA Code of Practice.

96 Rachel Louise Ensign & Max Colchester, Meet the Private Watchdogs Who Police Financial Institutions, The Wall Street J. (30 August 2015), www.wsj.com/articles/meet-the-private-watchdogs-who-police-financial-institutions-1440983917.

97 The HSBC matter represents the most public instance of a party seeking access to a monitor's report, however, it is not the only such example. See *In re Depuy Orthopaedics, Inc. Pinnacle Hip Implant Prod. Liab. Litig.,* No. 11 MD 2244, 2013 WL 2091715 (N.D. Tex. 15 May 2013) (ordering disclosure of monitor's report in a product liability matter).

98 See Christie Smythe, Judge Lets Sun Shine on Secret HSBC Money Laundering Report, Bloomberg (29 January 2016), www.bloomberg.com/news/articles/2016-01-29/judge-lets-sun-shine-on-secret-hsbc-report-on-money-laundering.

99 Nate Raymond, HSBC Money Laundering Report's Release Likely Delayed: US Judge, Reuters (10 February 2016), www.reuters.com/article/us-hsbc-moneylaundering-idUSKCN0VI28H. See *United States v. HSBC Bank USA NA*, No. 12 CR 763 (JG), 2016 WL 347670, at *1, *6 (E.D.N.Y. 28 January 2016), motion to certify *appeal denied*, No. 12-0763, 2016 WL 2593925 (EDNY 4 May 2016) (inviting the parties to suggest further redactions to the report).

100 *HSBC Bank USA NA*, 2016 WL 34760, at *1, *6. ZTE's monitor reports may be particularly susceptible to this type of argument, given that the plea agreement as amended by Judge Kinkeade refers to the monitor as a 'judicial adjunct' and provides that all monitor reports be filed with the court, albeit under seal and subject to in-camera review. See supra note 49 and accompanying text.

101 Nate Raymond, HSBC Money Laundering Report's Release Likely Delayed: US Judge, Reuters (10 February 2016), www.reuters.com/article/us-hsbc-moneylaundering-idUSKCN0VI28H.

102 Id.

12 July 2017, the United States Court of Appeals for the Second Circuit reversed the lower court's decision noting that 'a district court's role vis-à-vis a DPA is limited to arraigning the defendant, granting a speedy trial waiver if the DPA does not represent an improper attempt to circumvent the speedy trial clock, and adjudicating motions or disputes as they arise.'[103] Given the limited supervisory role of courts in the DPA context, the Second Circuit went on to hold that a monitor's report is not a judicial record because it is not 'relevant to the performance of the judicial function'.[104] The holding, which relies upon and is consistent with the DC Circuit Court of Appeals' decision in *United States v. Fokker Services BV*, limits both a district court's initial judicial review of a DPA and its subsequent oversight of the DPA's execution.[105]

The District Court for the District of Columbia made a similar ruling in *100Reporters LLC v. Department of Justice*, concerning monitor reports issued in the wake of Siemens' 2008 settlement with US and Germany. There, reporters sued to obtain the reports under FOIA. In a March 2017 decision, the court acknowledged that significant portions of the report may be exempt from production under FOIA – for example, because they contain 'classic attorney work-product' and 'information [that] cuts to the core of Siemens' business,' on which a competitor could rely to Siemens' detriment – but the court was not prepared to find that all information should be so shielded.[106]

Owing to the remaining uncertainty over the confidentiality of the monitor's report, it has become best practice – as confirmed by ABA Standard 24-4.3(4) – for the government and corporation to determine whether reports will be made public when negotiating the settlement agreement:

> *To perform its duties, the monitor needs access to unprivileged, confidential and proprietary business information of the corporation and communications among the corporation, the monitor and the government need to be candid and complete over an extended period.*
>
> *Recognising that corporate information included in monitor reports may be used unfairly by competitors and others to disadvantage the corporation, DPAs and NPAs typically reflect the parties' intentions to maintain the confidentiality of monitor reports.*[107]

103 *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 129 (2d Cir. 2017).

104 Id. at 137.

105 See *United States v. Fokker Services B.V.*, 818 F.3d 733 (D.D.C. 2016).

106 *100Reporters LLC v. Department of Justice*, No. 14-1264-RC, at 3, 32, 58 (D.D.C. 31 March 2017) (finding that the DOJ had justified withholding portions of the report under certain exemptions to FOIA, but had not justified the withholding of all portions of the report or demonstrated that the report could not be segregated for purposes of partial production).

107 Karen F. Green and Timothy D. Saunders, Minding the Monitor: Disclosure of Corporate Monitor Reports to Third Parties, Bloomberg BNA (2014), available at https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/green-saunders-minding-the-monitor.pdf.

Where a proposed settlement agreement instituting a monitorship lacks such explicit proviso for confidentiality, counsel should seek to revise and include it.

32.6 Costs and other considerations

Monitorships can be extremely expensive, with monitors collecting multimillion-dollar fees, to be paid for by the corporation (and ultimately its shareholders).[108] Critics note that the rise in monitorships has created 'a lucrative cottage industry made up of former prosecutors and small consulting firms,' some of which even offer expertise in assisting corporations monitor their monitors.[109] Others argue that the cost of the monitorship will be offset against the fines levied on the corporation and that the imposition of a monitor may help sway the government in favour of reduced fines.[110]

The ultimate cost of the monitorship will largely depend on the scope and duration of the monitorship. Cost will also be influenced by the complexity of the settlement agreement; the state of the corporation's existing compliance programme; and the geographic markets and industries in which the corporation operates. The monitor should take these various factors into consideration when providing the corporation with a projected budget. The monitor and the corporation should also consider and agree on an hourly rate or a fixed rate, any applicable rate adjustments and a potential fee cap. Further, to increase transparency and mitigate the risk of conflicts, the monitor should provide regular updates on the costs being incurred and expected to be incurred.[111]

For example, in a recent case Apple moved to disqualify its antitrust monitor for what it viewed as excessive billing and unprofessional conduct where the

108 Both the Morford Memorandum and the Grindler Memorandum counsel the need for prosecutors to be mindful of the costs of monitors and their potential impact on the corporation when negotiating settlements. Grindler Memorandum, supra note 13, § II (noting that the government 'should help to instill public confidence in the Department's use of monitors, including the Department's mindfulness of the costs of a monitor and their impact on a corporation's operations'); Morford Memorandum, supra note 11, at 2 (noting that prosecutors must be mindful of 'the cost of a monitor and impact on the operations of a corporation').

109 Rachel Louise Ensign, Judge Rules HSBC's Outside Monitor's Secret Report Should be Made Public, The Wall Street J. (29 January 2016), www.wsj.com/articles/judge-rules-hsbcs-outside-monitors-secret-report-should-be-made-public-1454086003; see also Rachel Louise Ensign & Max Colchester, Meet the Private Watchdogs Who Police Financial Institutions, The Wall Street J. (30 August 2015), www.wsj.com/articles/meet-the-private-watchdogs-who-police-financial-institutions-1440983917.

110 Whereas fines are usually due in one lump sum, payments for monitors are commonly billed monthly. See Jason T. Wright, The Corporate Compliance Monitor's Role in Regulatory Settlement Agreements, SRR (Spring 2014), www.srr.com/article/corporate-complianc e-monitors-role-regulatory-settlement-agreements ('More often than not, however, this cost is far less than what the company would otherwise pay in fines, possible debarment, or legal fees in defending an enforcement action through trial.'); Patricia M. Sulzbach, Independent Corporate Monitors: A Company's Friend or Foe?, ABA White Collar Crime Comm. Newsletter (18 April 2013), available at https://www.americanbar.org/content/dam/aba/publications/criminaljustice/sulzbach.authcheckdam.pdf.

111 See also ABA Standards for Monitors § 24-3.4.

monitor, *inter alia*, had charged a rate of US$1,000 per hour in fees. The motion was denied by the Southern District of New York and affirmed by the Second Circuit, but the Second Circuit noted that the issues raised had 'considerable resonance because the fairness and integrity of the courts can be compromised by inadequate constraint on a monitor's aggressive use of judicial power.'[112]

Conclusion 32.7

Since first widespread application in the 1990s, the use of monitors has rapidly expanded across industries and offences: banks, energy companies, unions, car manufacturers and fire departments have all been (or currently are) subject to oversight by monitors. Implemented to address a myriad of wrongs ranging from fraud and racketeering to discriminatory hiring practices, monitorships were in many ways viewed as panaceas.

Today, rising costs and increasing concerns about their efficacy have resulted in far greater scrutiny of all proposed monitorships. Where the past two decades represent an expansion in the breadth of cases where monitors were contemplated, the next two are likely to focus on and refine the scope. The ongoing debates over whether monitors' reports should be public, the degree to which monitors are truly independent, and how monitors should be selected will result not only in additional litigation, but will also force an evolution in how monitorships are used as settlement tools. The issues identified throughout this chapter are live controversies, each likely to distil and develop the body of case law governing monitorships, ultimately resulting in a body of jurisprudence that imposes default standards of disclosure, transparency, control and authority on monitors, the government and defendants alike.

112 *United States v. Apple, Inc.*, 787 F.3d 131, 133–34 (2d Cir. 2015).

33

Parallel Civil Litigation: The UK Perspective

Michelle de Kluyver and Edward McCullagh[1]

33.1 Introduction

The conduct under scrutiny in investigations can generate a large range of parallel proceedings. These can precede the investigation, follow on from the investigation findings, or, frequently, arise in the course of an investigation. It can be a particular challenge to manage parallel proceedings, which engage their own procedural rules and can force the pace of investigations or create other tensions with the investigative process. This chapter deals with the types of issues and parallel proceedings most likely to arise in complex investigations.

33.2 Stay of proceedings

Where a company subject to investigation is also involved in ongoing civil proceedings (before the courts or an arbitral tribunal) that relate to the conduct under investigation, the parties may seek to stay those proceedings pending the outcome of the investigation. This would often be an ideal solution to managing the tensions they introduce but obtaining a stay can be difficult and is not automatic.

33.2.1 Civil litigation

There are various bases on which the civil courts may stay proceedings. Under the Civil Procedure Rules (CPR), the court may use its case management powers to stay the whole or part of any proceedings or judgment either generally or until a specified date or event.[2] The court may also stay proceedings under its inherent jurisdiction. In addition, the court may stay proceedings in specific circumstances

1 Michelle de Kluyver is a partner at Addleshaw Goddard LLP and Edward McCullagh is an associate at Allen & Overy LLP.

2 CPR, Part 3.1(2)(f).

pursuant to certain other statutes.[3] There are many reasons why a court may stay proceedings, for instance to allow for arbitration, or for the dispute to be tried in another jurisdiction; or for case management purposes (for example, to allow for settlement negotiations, for procedural reasons, or pending the outcome of another case in which a ruling is expected on a relevant issue).

In circumstances where there are related criminal proceedings, the following principles (among others) will apply to the exercise of the court's discretion to stay civil proceedings:[4]

- the court will only consider staying the civil proceedings if there is a real risk of serious prejudice which may lead to injustice;[5]
- the court will exercise its discretion by reference to the competing considerations between the parties – the court has to balance justice between the parties;[6]
- the fact that a defendant, by serving a defence in civil proceedings, would be giving advance notice of their defence in criminal proceedings, carries little weight in the context of an application for a stay of civil proceedings;
- it is not enough that both the civil and criminal proceedings arise from the same facts, or that the defence of the civil proceedings may involve a defendant taking procedural steps (such as exchanging witness statements, and providing disclosure of documents) which might not be imposed on them in the criminal proceedings;[7] and
- even if the court is satisfied that there is a real risk of serious prejudice leading to injustice if the civil proceedings continue, the proceedings should nevertheless not be stayed if safeguards can be imposed in respect of the civil proceedings which provide sufficient protection against the risk of injustice.

In the competition law context, the court may stay proceedings to avoid taking decisions that conflict with decisions contemplated by the European Commission.

The court may also impose a stay on the effects of an action, such as a stay of execution of orders of a lower court pending appeal.

A stay of proceedings puts a stop to their further conduct at the stage they have reached, apart from the taking of any steps allowed by the CPR or the terms of the stay. Proceedings can be continued if the stay is lifted.

Arbitral proceedings 33.2.2

Procedural matters in arbitration are governed by the arbitration agreement, the law governing the arbitration and, where relevant, the institutional rules that the parties have chosen.

Arbitral tribunals generally have a broad power to make procedural orders. For example, the Arbitration Act 1996 (which applies where the arbitral seat is in

3 For example, section 9 of the Arbitration Act 1996.

4 See *Akcine Bendrove Bankas Snoras (in bankruptcy) v. Antonov* [2013] EWHC 131 (Comm), [18].

5 *R v. Panel on Takeovers and Mergers, ex parte Fayed* [1992] BCC 524, 531.

6 *Panton and others v. Financial Institutions Services Ltd* [2003] UKPC 95, [11].

7 *FSA v. Anderson* [2010] EWHC 308 (Ch), [19].

England and Wales or Northern Ireland) provides that an arbitral tribunal may decide all procedural matters, subject to the parties' right to agree any matter. Further, although any relevant institutional rules may set out a framework for the arbitral procedure, they tend to leave detailed procedural matters to be determined in individual cases.

An arbitral tribunal may decide to stay the proceedings before it (for instance, for case management purposes, to avoid the risk of inconsistent decisions or to ensure the enforceability of an award) if parallel court proceedings are ongoing, particularly where the proceedings are before a court of the jurisdiction of the arbitral seat. If parallel regulatory proceedings are ongoing, a tribunal may stay arbitral proceedings for similar reasons (although this decision may depend on the identity of the regulator).

However, an arbitral tribunal has a range of duties to consider when contemplating staying arbitral proceedings. The primary duty of an arbitral tribunal is to resolve the dispute between the parties in an adjudicatory manner. For instance, the Arbitration Act 1996 obliges an arbitral tribunal, when reaching decisions on matters of procedure (as well as more generally), to act fairly and impartially as between the parties, and to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense so as to provide a fair means for its resolution. Institutional rules can also impose general duties on the tribunal, as well as more specific obligations, such as to make an award within an established time frame. In addition, the parties can impose specific duties on an arbitral tribunal in their arbitration agreement or in the arbitrators' terms of appointment, which could preclude the use of certain procedural orders or require resolution of the dispute within a certain time period.

33.3 Multi-party litigation[8]

In the United Kingdom, class actions do not feature as part of the parallel litigation landscape to the extent that they do in the United States (in particular, securities litigation). Nonetheless, companies may face civil actions brought by multiple parties in a variety of ways and we describe them for completeness. The two main procedural mechanisms for multi-party litigation envisaged by the CPR are representative actions and group litigation orders. Additionally, a new form of collective proceedings has recently been introduced in the competition law context.

33.3.1 Representative actions

Representative actions allow persons, in certain circumstances, to represent others in legal proceedings (the represented persons are not joined to the action as parties). The CPR provide that such actions may be brought where more than one person has the same interest in a claim.[9] Judgments or orders given in representative

8 See further *Zuckerman on Civil Procedure: Principles of Practice*, Adrian Zuckerman, 3rd ed. (2013); *Improving Access to Justice through Collective Actions*, Civil Justice Council (2008).

9 Representative actions may also be brought in more limited circumstances pursuant to CPR, Part 19.7.

actions are normally binding on all persons represented in the claim, but may only be enforced by or against non-parties with the court's permission.

Representative actions are not extensively used. The provisions of the CPR relating to such actions are restrictive; in particular, the 'same interest' requirement. A further potential deterrent is that represented persons are not liable for the costs of representative actions, although the court does have jurisdiction to order that costs be paid by a non-party in exceptional circumstances.

Group litigation orders 33.3.2

Where claims give rise to common or related issues of fact or law, the court may make a group litigation order (GLO), which provides for the case management of claims covered by the order.

The GLO will contain directions about the establishment of a group register on which the claims to be managed under the GLO will be entered, and will specify the court that will manage the claims on the register. The GLO procedure is 'opt-in' in nature. Claims must be issued before they can be entered on a group register, and an application for details of a case to be entered on a group register may be made by any party to the case. The management court may set a cut-off date after which no further claims may be added to the group register without the court's permission.

The GLO will also specify the 'GLO issues', which will identify the claims to be managed as a group under the GLO. Judgments or orders given or made in a claim on the group register in relation to the GLO issues are binding on the parties to all other claims on the group register. The court may direct that certain claims on the group register should proceed as test cases.

GLOs have been utilised in a range of different types of dispute, but are not particularly widely used and have been subject to criticism.

Joint claims 33.3.3

Multiple parties can also be joined to the same claim. The CPR give the court a range of powers to add or substitute parties to proceedings.[10] Any number of claimants or defendants may be joined as parties to a claim, and any number of claims may be covered by one claim form (provided those claims can be conveniently disposed of in the same proceedings). However, if a large number of parties are joined, this can lead to practical difficulties.

Test cases 33.3.4

There is no formal and generally applicable test case procedure before the English courts. However, when faced with large numbers of claims that raise common issues, the courts may use their case management powers to allow certain representative claims (usually selected by the parties) to proceed to determination and

10 CPR, Parts 19.1 and 7.3.

stay the remainder. While decisions in test cases have value as precedent, they are not determinative of other cases that raise common issues.

Test case procedures have, however, been introduced in certain specific contexts, for example:

See Section 33.3.2

- In appropriate circumstances claims subject to a GLO may proceed as test cases.
- A pilot scheme has also been introduced (as part of the implementation of the new Financial List) which enables claims started in the Financial List that raise issues of general importance to the financial markets, and in relation to which immediately relevant authoritative English law guidance is needed, to be determined as test cases, without the need for a present cause of action between the parties to the proceedings.

33.3.5 Competition law claims

Recent reform has resulted in the introduction of specialised collective proceedings in the realm of competition law claims.

Such proceedings may be brought before the Competition Appeal Tribunal (CAT) on a stand-alone basis (in which case, a complainant must prove an infringement of certain competition law rules) or on a follow-on basis (which requires an existing infringement decision from the Competition and Markets Authority (CMA), the CAT on an appeal from a decision of the CMA or the European Commission).

Claims will only be eligible for inclusion in collective proceedings if the CAT considers that they raise the same, similar or related issues of fact and law, and are suitable to be brought in collective proceedings.

Collective proceedings must be commenced by a person who proposes to be the representative in those proceedings, but they can only be continued if the CAT certifies them by making a collective proceedings order. The CAT may only make such an order (1) if it considers that it is just and reasonable for that person to act as a representative in the proceedings; and (2) in respect of claims eligible for inclusion in collective proceedings.

The collective proceedings may be:

- 'opt-in' (brought on behalf of those class members who opt in); or
- 'opt-out' (brought on behalf of all class members, except for those who (1) opt out; or (2) are not domiciled in the United Kingdom at a specified time, and do not opt in).

Class members can opt in or opt out by notifying the representative.

Judgments or orders of the CAT in collective proceedings are binding on all represented persons, except as otherwise specified. The CAT may not award exemplary damages in collective proceedings, and damages-based fee agreements for legal representatives are unenforceable if they relate to such proceedings.

As regards costs, the general rule in proceedings before the English courts is that the unsuccessful party will be ordered to pay the costs of the successful party. The CAT, however, has a broader discretion to make any order (at any stage of

the proceedings) it thinks fit in relation to the payment of costs, and it may take account of (among other things) the conduct of all parties in relation to the proceedings. Costs will not normally be awarded against represented persons who are not the class representative, except in certain particular circumstances.

Settlement of opt-out (but not opt-in) collective proceedings is regulated by statute and overseen by the CAT (which must approve the terms of any settlement reached). In certain circumstances, collective settlements can also be reached in respect of claims even if a collective proceedings order has not been issued.

Collective redress schemes 33.3.6

The Financial Conduct Authority (FCA) may make rules (under section 404 and sections 404A to 404G of the Financial Services and Markets Act 2000 (FSMA) requiring certain firms to establish and operate a consumer redress scheme in relation to a widespread or regular failure by such firms to comply with requirements applicable to the carrying on by them of any activity. The relevant requirements include both FCA rules and the general law. The power can be used if it appears to the FCA that, as a result of the failure, consumers have suffered (or may suffer) loss or damage in respect of which a remedy or relief would be available in legal proceedings, and the FCA considers that it is desirable to make rules to secure redress for consumers in respect of the failure. In addition, pursuant to section 404F(7) of FSMA the FCA may vary the permission or authorisation of a firm to require it to establish and operate a scheme that corresponds to, or is similar to, a consumer redress scheme.

Statutory voluntary redress schemes have also been introduced in the competition law context, under which compensation may be offered by businesses as a result of infringement decisions made in respect of them. Such schemes are subject to the approval of the CMA.

Derivative claims and unfair prejudice petitions[11] 33.4

Law and procedure 33.4.1

Derivative claims 33.4.1.1

Members of a company can bring a derivative claim (pursuant to Part 11, Chapter 1 of the Companies Act 2006 (CA 2006)) in respect of a cause of action vested in the company, and seeking relief on behalf of the company. Such claims may only be brought in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company, and the cause of action may be against the director or another person (or both).

A member who brings such a derivative claim must apply for permission to continue it, and the CPR envisage a two-stage procedure for dealing with applications for permission to continue derivative claims (the company, and any other

11 See further *Minority Shareholders: Law, Practice and Procedure*, Victor Joffe QC, David Drake, Giles Richardson, Daniel Lightman and Timothy Collingwood, 5th ed. (2015).

appropriate parties, are made respondents to the permission application at the second stage).

The court must take into account a number of particular factors when considering whether to grant permission, including the importance that a person acting in accordance with section 172 of the CA 2006 (duty to promote the success of the company) would attach to continuing the claim, and any evidence as to the views of members of the company who have no personal interest (direct or indirect) in the matter. However, permission must be refused in certain circumstances (for example, if the act or omission giving rise to the cause of action has been authorised or ratified).

Part 11 of the CA 2006 also includes a mechanism for members to apply (in appropriate circumstances) for permission (1) to continue as derivative claims certain claims brought by the company; or (2) to continue derivative claims brought by other members of the company.

33.4.1.2 Unfair prejudice petitions

A member of a company may also apply to the court for an order under Part 30 of CA 2006 on the grounds that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally, or of some part of its members (including at least the applicant), or that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

The courts take a wide view of prejudice suffered by a shareholder, which need not be financial. The courts also have a very wide discretion in respect of what constitutes unfairness, although they do 'not sit under a palm tree'[12] – typically, a member will not be entitled to complain of unfairness unless there has been some breach of the terms on which the member agreed that the company's affairs should be conducted, although there will be cases in which equitable considerations will make it unfair for those conducting the company's affairs to rely on their strict legal powers.

The court has a wide discretion to make such order as it thinks fit for giving relief in respect of the matters complained of in an unfair prejudice petition. The most common order in practice is for the shares of the petitioner to be bought by the respondent at a price to be fixed by the court.

As unfair prejudice petitions generally raise numerous factual issues entailing examination of events over a considerable period of time, a high degree of case management is required. In circumstances where a buy-out order is sought, the court will normally determine issues necessary to decide whether a buy-out order should be made at a liability hearing, and only proceed to a quantum hearing if it has been determined that a buy-out order should be made.

12 *In re J. E. Cade & Son Ltd.* [1992] B.C.L.C. 213, 227.

Practical considerations 33.4.2

Typically derivative claims and unfair prejudice petitions are brought by minority shareholders. There are a number of practical advantages for such shareholders to bringing an unfair prejudice petition instead of a derivative claim (for example, the broad grounds for relief, the flexible nature of the relief that may be sought, and the fact that there are fewer procedural hurdles to overcome), and there may be significant disadvantages in bringing a derivative claim (the initial procedural phases can be costly, and relief must be sought on behalf of the company). However, in certain circumstances a derivative claim may still be the most appropriate route for shareholders (for example, in the context of public companies, where a finding of unfair prejudice may be less likely).

In a derivative action, the court may order the company, for whose benefit the action was brought, to indemnify the claimant against the costs it reasonably incurs. By contrast, in unfair prejudice proceedings, the company is not usually ordered to pay any costs.

The company may be required to give disclosure in the context of derivative claims and unfair prejudice petitions. A shareholder will be entitled to disclosure of documents obtained by the company in the course of the company's administration, including advice by solicitors to the company about its affairs, but not where that advice relates to hostile proceedings between the company and its shareholders.

Securities litigation[13] 33.5

As stated above, securities litigation in England and Wales is relatively under-developed in comparison with the position in the United States. However, there are a number of ways in which investors in securities can seek relief before the English courts.

FSMA sets out the framework for financial services regulation in England and Wales. Provisions in FSMA impose liability on issuers and other specified persons (such as, in some cases, the directors of a corporate issuer) where untrue or misleading statements are made in certain published documents (for instance, in a prospectus or listing particulars) that relate to particular types of securities, or where required information is omitted from such documents (or where they are not published at all), and loss is suffered by investors in respect of those securities as a result.[14] A number of exemptions from such liability are set out in Schedule 10 of FSMA (for instance, where the defendant reasonably believed that the particular statement was true and not misleading, and continued in this belief until the relevant securities were acquired). In addition, section 138D of FSMA provides a right of action for private persons who suffer loss as a result of a contravention by an authorised person of certain rules made by the FCA. Rules made by the Prudential Regulation Authority may also provide that private parties have a

13 See further *The Securities Litigation Review*, ed. William Savitt, (2015).

14 Sections 90 and 90A, FSMA.

similar right of action. Further, a number of other provisions in FSMA (for example, sections 26, 27 and 30) render agreements or transactions unenforceable, and give rights to recover money (or other property) and to obtain compensation, where the circumstances in which those agreements or transactions were entered into contravene certain rules in FSMA (for instance, if necessary authorisation from the FCA has not been obtained).

Aggrieved investors may also have other options, in addition to reliance on FSMA. Misrepresentation claims pursuant to section 2(1) of the Misrepresentation Act 1967 may be available to investors in circumstances where the investor enters into a contract in reliance on a misrepresentation made to them by another party to the contract, which causes loss, and where the representor did not have a reasonable belief at the time the contract was made that the facts represented were true. Investors may also be able to bring a negligent misstatement claim (in circumstances were a duty of care is owed to the investor, that duty has been breached and that breach causes the investor to suffer recoverable loss), or a claim based on the tort of deceit (which requires, among other things, proof that the defendant knowingly or recklessly made a false representation).

33.6 Other private litigation

33.6.1 'Tainted' contracts

Conduct which is illegal or contrary to public policy (and which may well be the subject of an investigation) may 'taint' contracts entered into by a company.

The common law doctrine of illegality may prevent a party to a contract tainted by illegal conduct from enforcing their contractual rights and remedies in certain circumstances. Historically the law in this area has been complicated and unclear, but it was recently reconsidered by nine Supreme Court justices in the case of *Patel v. Mirza*.[15] The majority held that the essential rationale underpinning the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would harm the integrity of the legal system. They identified the following three factors which must be taken into account when considering whether to allow a claim which is in some way tainted by illegality:

- the underlying purpose of the prohibition that has been transgressed, and whether that purpose would be enhanced by denial of the claim;
- any other relevant public policy on which the denial of the claim may have an impact; and
- whether denial of the claim would be a proportionate response to the illegality. When considering proportionality, the majority held that (among other things) the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was a marked disparity in the parties' respective culpability may potentially be relevant.

15 [2016] UKSC 42.

This approach was, however, criticised by the minority on the basis that it was too vague and too wide, converting a legal principle into the exercise of judicial discretion. It remains to be seen how the doctrine will develop in light of this important decision.

Civil law bribery[16]

If bribery has occurred, then a number of particular civil law consequences may also follow.

Civil law bribery arises in the context of agency relationships, where an agent receives a benefit which puts them in a position where their duty (to their principal) and their (personal) interest conflict. The benefit does not necessarily have to be monetary, or provided directly to the agent, and there is no need to prove motive, inducement or loss up to the amount of the bribe. The bribe need not be linked to a particular transaction (provided the agent is tainted by bribery at the time of the relevant transaction between the briber and the principal), and it may taint subsequent transactions. An arrangement will not constitute a bribe in the absence of secrecy, although it may still amount to a breach of fiduciary duty on the part of the agent if the principal's fully informed consent is not obtained.

A variety of alternative remedies are available to a principal faced with civil law bribery.

As against the bribed agent

- If the bribe has been paid to the agent, the principal is entitled to recover the amount of the bribe (at common law, in an action for money had and received), regardless of whether the principal elects to rescind any 'tainted' contracts. The proceeds of bribe-taking (which comprise money or other property) will also be held on trust for the principal, and the principal will have a proprietary remedy in respect of them.
- In the alternative, the principal can claim damages in tort in respect of loss sustained by the principal in consequence of entering into any 'tainted' contracts.
- There may also be other consequences for the agent (including in connection with their contractual relationship with the principal).

As against the briber

- The briber is jointly and severally liable with the bribed agent in respect of the amount of the bribe, which the principal can claim in a common law action for money had and received.
- In the alternative, the briber is also jointly and severally liable with the bribed agent to the principal for damages in tort (see above).
- The principal may have an action for dishonest assistance in a breach of fiduciary duty against the briber.

16 See further *Bowstead and Reynolds on Agency*, ed. Peter Watts QC, 20th ed. (2014).

- Other remedies may be available against the briber (or others) depending on the particular circumstances of the case.

Note that double recovery by the principal from the bribed agent and the briber will not be permitted.

If it can be established that bribery has occurred, then contracts 'tainted' by the bribery are voidable at the election of the principal, who will be entitled to rescission. If the principal elects to rescind a 'tainted' contract, they remain entitled to recover the bribe, and they are not bound to give credit in the rescission for the amount of any bribe recovered. If the agent is bribed during the course of performance of a contract (i.e., after it has been entered into), then the principal may bring it to an end as from the moment of discovery (i.e., for the future); and the same will apply if bribery was effected at the time a 'tainted' contract was entered into, but (for some reason) rescission *ab initio* is impossible. Where an arrangement would have constituted bribery, but the principal is aware of it (so there is no secrecy) although the principal's fully informed consent has not been obtained, then the court may award rescission of 'tainted' contracts as a discretionary remedy, if it is just and proportionate to do so.

Where bribes have been paid to the detriment of a third-party competitor, it has been suggested that both the briber and the company that awards the contract to the briber could be liable to the unsuccessful competitor. Further, if the contract involves a public authority, the unsuccessful competitor may have an action for misfeasance in public office.

A contract to commit bribery (as opposed to a contract procured by bribery) is 'tainted' by illegality, in the sense that it is illegal in performance, and is unenforceable.

33.6.2 Specific provisions in commercial contracts

Parties often include specific provisions in their commercial contracts (including finance documents) aimed at preventing, or providing contractual protection in relation to, illegal behaviour (in particular, corruption) involving a party to the agreement. Accordingly, the fact of an investigation (or related proceedings), or conduct which is the subject of an investigation, may have adverse contractual consequences for a company. These will naturally depend on the nature of both the investigation itself and the specific conduct under investigation, as well as the provisions of the contractual documentation. However, by way of illustration, many commercial contracts contain:

- obligations:
  - to comply with certain applicable laws and regulations;
  - to have in place and comply with specified policies (such as data protection, slavery and human trafficking or anti-bribery and corruption policies);
  - to maintain accurate records of payments made in relation to the contract;
  - relating to data protection (for example, to prevent damage, or unauthorised or unlawful access, to relevant data);

  - in relation to subcontractors (for instance, to ensure that subcontractors comply with requirements equivalent to those imposed on the company), and that may impose responsibility on the company for any non-compliance by a subcontractor with such requirements;
  - to report generally on compliance to contractual counterparties on an ongoing basis, which could include requiring the provision of a confirmation signed by an officer of the company. Audit rights may also be granted to contractual counterparties; and
  - to report the occurrence of certain events to contractual counterparties. These could include dealing with a public official in connection with the performance of the contract, receiving a request for a payment (or other advantage) in connection with the performance of the contract, or the commencement (or threat) of an investigation into the activities of the company,
- representations (given by the company, and which may be repeated) that it has not been investigated for or convicted of certain offences (and that no proceedings or investigations are pending or threatened), or which relate to the accuracy and completeness of information provided to contractual counterparties;
- termination rights for contractual counterparties if the company breaches (or, potentially, if the contractual counterparty reasonably suspects a breach of) certain obligations, or if the company makes a false representation or is convicted of certain offences; and
- indemnities (for the benefit of contractual counterparties) in respect of loss suffered as a result of a certain breaches of the contract by the company.[17]

A company may face parallel litigation brought by its contractual counterparties in reliance on such provisions. A company may also be able to invoke such provisions against its contractual counterparties, although where a company is under investigation it may not wish to take the position in civil proceedings that its counterparty has engaged in illegal activity if the company is also exposed for its counterparty's conduct.

Mergers, acquisitions and investments[18] 33.6.3

Mergers, acquisitions and investments can present particular risks for companies. Illegal behaviour in the target (or its subsidiaries, or other related companies and persons) may have various negative consequences for an acquiring entity, which can include (1) financial consequences (for example, the target may have been over-valued); (2) legal consequences (both civil and criminal) for the target, the acquiring entity and relevant individuals (including officers of both entities),

17 An indemnity against a criminal liability may, however, be unenforceable for public policy reasons.

18 See further *Anti-Bribery Due Diligence for Transactions: Guidance for Anti-Bribery Due Diligence in Mergers, Acquisitions and Investments*, Transparency International UK (2012).

along with associated legal costs; and (3) other practical consequences (for example, reputational damage, which may have a consequent effect on business).[19]

As a result, acquiring entities will often take precautions to minimise these risks. Typically, these include:

- conducting proportionate pre- and post-acquisition due diligence of the target and its business;
- implementing compliance programmes; and
- including appropriate protections in the relevant contractual documentation.

In relation to the latter, warranties, representations and indemnities[20] designed to provide such protection are frequently included in share purchase agreements (SPAs). The scope of protection will depend on the particular provisions negotiated, but they can be widely drafted, such that they encompass the conduct of, for example:

- the target and its subsidiaries;
- directors, officers, employees, significant shareholders, affiliates, agents, and distributors of the target and its subsidiaries;
- those associated with or acting on behalf of the target and its subsidiaries; and
- those who perform services for or on behalf of the target and its subsidiaries,

and may cover areas such as:

- compliance with laws generally;
- compliance with anti-money laundering laws and standards;
- compliance with anti-bribery and corruption laws and standards;
- debarment from public contracts;
- sanctions (including whether such persons are, have been, or are likely to become, subject to sanctions); and
- whether such persons are (or have been) subject to an investigation or any proceedings, or whether an investigation or any proceedings in respect of such persons are pending, threatened, contemplated, or even likely.

Accordingly, the fact of an investigation (or related proceedings), or conduct which is the subject of an investigation, may give the acquiring entity contractual rights which it can seek to enforce (including through litigation or arbitration). Again, however, care may need to be taken in doing so, for the reasons given in Section 33.6.2.

19 Companies should also be aware of the risk that illegal behaviour (for example, bribery) may occur during the merger, acquisition or investment transaction.

20 However, see footnote 17 above in relation to indemnities against criminal liability.

Defamation proceedings[21] 33.6.4

A company may face defamation actions brought by individuals arising from internal investigations carried out by the company. In particular, issues may arise if it becomes necessary to negotiate an exit from the organisation for individuals involved or implicated in conduct which was the subject of an investigation.

The law of defamation is concerned with the protection of reputation. It covers the torts of libel (which concerns more permanent forms of publication) and slander (which concerns more transient forms of publication, such as speech, and generally is actionable only if special damage can be shown).

Broadly speaking, a defamatory statement is one whose publication has caused, or is likely to cause, serious harm to the claimant's reputation, although a number of different tests have been utilised by the courts when determining whether a statement is defamatory. The statement must have been published (communicated) to a third party, and each publication will amount to a separate cause of action. Liability for publication extends to those who participate in or authorise publication, and those who re-publish or repeat the relevant statement are liable as if the statement originated from them. However, defences are available in certain circumstances to persons who publish statements and who are not the author, editor or publisher (in the sense of being a commercial publisher) of the relevant statement; as well as to website operators, if they can show that the relevant statement was posted on the website by another.

A number of defences may be available to a company facing a defamation action. For example, it may be able to rely on absolute privilege, which will exist where a statement or conduct can fairly be said to be part of the process of investigating a crime (or a possible crime) with a view to a prosecution (or a possible prosecution) in respect of the matter being investigated. This applies to statements made by persons assisting an inquiry to investigators, and by investigators to those persons or to each other. Absolute privilege will also extend beyond the criminal context, to certain enquiries made in connection with proceedings before a tribunal, the proceedings of which are protected by absolute privilege (i.e., tribunals acting in a manner similar to that in which a court of justice acts). Accordingly, the provision of information by a company to the authorities in connection with an investigation is unlikely to expose that company to the risk of a defamation action. The defence of qualified privilege will also be available in circumstances where the maker of a statement has a legitimate interest or duty in making it to the recipient, and the recipient has a corresponding interest or duty in receiving it, provided the maker is not motivated by malice. This may apply to certain communications between an employer and their employees, or between employees, that relate to the employer's business.

A company may also be in a position to bring a defamation action against a whistleblower, given that the act of blowing the whistle will typically involve

21 See further *Gatley on Libel and Slander*, eds. Alastair Mullis and Richard Parkes QC, 12th ed. (2013).

the publication of a statement that causes harm to reputation. Whistleblowers may, however, be able to make out one or more possible defences to such a claim. In particular:

- if the whistleblower can show that the statement was substantially true, this will generally constitute a defence to a defamation action; and
- whistleblowers may also benefit from the defence of qualified privilege, provided that they are not motivated by malice. It is notable, however, that the Public Interest Disclosure Act 1998 does not provide protection from a defamation action for a whistleblower, although if such an action were brought by an employer this could amount to a 'detriment' for the purposes of section 47B of Part v. of the Employment Rights Act 1996.[22]

In addition, a company may be in a position to bring a defamation action in relation to press comment although litigation could have the effect of drawing attention to the allegation, which is seldom beneficial.

The primary remedy in defamation actions is the award of damages, and claimants may also seek an injunction against repetition of the publication complained of. In addition, the court may order the defendant to publish a summary of the court's judgment, and may also order others to stop distributing, selling or exhibiting material containing the relevant statement, or to remove the relevant statement from a website on which it is posted. Particular remedies are available where the claimant is granted summary relief.

Although in the past trial by jury was typical in defamation actions, the right to jury trial has recently been abolished in this context, and trial will now be by judge save in exceptional circumstances.

33.6.5 Arbitration[23]

Unlawful behaviour (or behaviour which is contrary to public policy) may have a significant impact in the context of international arbitration, both before an arbitral tribunal and at the recognition or enforcement phase. The consequences of such behaviour will depend on whether the arbitration is 'commercial' or 'investment treaty' in nature.

In the commercial context, if allegations of behaviour which is unlawful (or contrary to public policy) are raised before the arbitral tribunal, it will have to consider the consequences under the applicable law, and may also be required to have regard to the potential impact of the mandatory law and public policy of the arbitral seat and the place of performance of any relevant agreement, as well as transnational public policy. In addition, issues can arise at the recognition or enforcement phase: there is a risk that national courts may re-open aspects of the tribunal's findings, or consider setting aside or refusing to enforce an award on the basis that it contravenes public policy.

22 See further *Whistleblowing: Law and Practice*, John Bowers QC, Martin Fodder, Jeremy Lewis and Jack Mitchell, 2nd ed. (2012).

23 See further *International Commercial Arbitration*, Gary Born, 2nd ed. (2014).

In the investment treaty context, if investments have been tainted by illegality or behaviour contrary to transnational public policy (for instance, corruption), investment treaty protection may not be available to an investor, either on the basis that the arbitral tribunal lacks jurisdiction or that any claim is inadmissible (although there is debate as to whether this is the correct position). Further, investment treaty arbitral tribunals in particular may face difficult questions about the correct evidential burden and standard of proof to apply, especially in relation to corruption allegations. Enforcement issues are, however, less likely to arise in relation to investment treaty disputes arbitrated under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention), which does not provide for the challenge of ICSID awards before national courts on traditional New York Convention grounds (which include public policy).

Employment law and whistleblowing 33.6.6

Investigations can have employment law consequences for a company. Employees may seek to bring claims against their employers arising out of the subject matter of an investigation, or how the investigation is handled; conversely, an employer may wish to take action against an employee implicated in the conduct under investigation.

See Chapter 13 on employee rights

In addition, to the extent that allegations have been made by whistleblowers, companies under investigation or conducting investigations should be careful to respect whistleblower rights to avoid claims for breach of the protections afforded to whistleblowers.

See Chapter 19 on whistleblowers

Evidentiary issues 33.7

Reliance by the court on findings made by the authorities 33.7.1

Parties may seek to rely on findings made by the authorities in an investigation (such as a final notice from the FCA) in subsequent civil litigation. Objections may be raised to such reliance on the grounds of admissibility – as a matter of evidence, findings made in other proceedings are ordinarily inadmissible and excluded under what is known as the rule in *Hollington v. Hewthorn*[24] (although this controversial rule is subject to exceptions). However, a court may allow documents containing other relevant evidence, in addition to inadmissible findings, to be put before the court, with the judge taking into account that which is admissible and ignoring that which is inadmissible.

Some investigations may result in criminal prosecutions and, potentially, convictions. In any subsequent civil proceedings, the fact of a conviction will be admissible in evidence for the purpose of proving, where relevant, that the convicted person committed the offence, and the information, complaint, indictment or charge-sheet on which the person in question was convicted are admissible for the purpose of identifying the facts on which the conviction is based. Where

24 *Hollington v. F Hewthorn & Co Ltd* [1943] KB 587.

criminal proceedings follow civil proceedings, ordinarily findings of a civil court on the matters in issue in the criminal case will not be admissible in those subsequent criminal proceedings, although in some circumstances civil judgments may be admissible pursuant to the rules concerning evidence of bad character.

In addition, if a company enters into a deferred prosecution agreement (DPA) with a prosecutor, this must contain a statement of facts relating to the alleged offence and the company will be required to admit the contents and meaning of key documents referred to in the statement of facts. Parties which bring civil litigation against the company may seek to rely on the contents of a DPA statement of facts as having the status of admissions by the company and may also seek disclosure of any underlying documents.

Certain specific rules apply in the competition law context. Pursuant to EU law, national courts may not make determinations which conflict with European Commission decisions on certain EU competition law issues. Where no risk of direct conflict arises, but a decision of the European Commission addresses similar subject matter to that before the national court, the European Commission decision may simply be admissible as evidence before the national court (although, given the expertise of the European Commission, it might well be regarded by that court as highly persuasive). The Damages Directive, which was implemented in the United Kingdom in March 2017, provides that final decisions of national competition authorities (or review courts) in other member states may be presented before national courts as at least *prima facie* evidence that an infringement of competition law has occurred. In addition, the Competition Act 1998 (as amended) provides that findings of fact made by the CMA during the course of an investigation (which have not been appealed, or which have been confirmed on appeal) which are relevant to an issue arising in certain competition law proceedings before the High Court (or the CAT) are binding on the parties to those proceedings, unless the court (or the CAT) orders otherwise. Further, where a claim is brought before the High Court (or the CAT) in respect of an infringement decision (from the CMA, the CAT on an appeal from a decision of the CMA or the European Commission), the court (or the CAT) is bound by that infringement decision once it has become final.

33.7.2 Reliance by an authority on court findings

Matters which come to light during the course of civil litigation can have repercussions beyond the immediate context of those proceedings. They may draw the attention of the authorities, and there have been cases where authorities have relied on the findings of civil courts as grounds for taking action. For example, the FCA has previously prohibited individuals from carrying on regulated activities on the basis of findings in High Court judgments (in one instance, without conducting a separate investigation).[25] Accordingly, these risks may be relevant

25 FCA Final Notice to Mr Anthony Verrier, dated 27 January 2014; FCA Final Notice to Mr Stephen Robert Allen, dated 14 April 2015; *Stephen Robert Allen v. The Financial Conduct Authority* [2014] UKUT 0348 (TCC).

considerations for a company when considering and implementing its litigation strategy in civil proceedings. In addition, conflict and privilege issues may arise if the interests of the company and its employees are not aligned.

Collateral use of disclosed documents 33.7.3

English law can impose onerous disclosure obligations on parties to civil proceedings – typically, parties are required to disclose documents on which they rely, and documents which adversely affect their case, adversely affect another party's case or which support another party's case (although the court may make an alternative order in relation to disclosure). In certain circumstances, parties may protect documents from inspection (for instance, on the grounds of privilege or the public interest). However, the confidentiality of a relevant document is not, of itself, a justification for refusing to disclose it, although it may be relevant to the exercise of the court's discretion to order disclosure. Further, recent decisions of the English courts concerning the law of privilege (for instance, in relation to the identity of the client (for the purposes of legal advice privilege),[26] and when litigation is reasonably in contemplation (for the purposes of litigation privilege, in the context of a criminal investigation)[27] point towards a more restrictive interpretation of the scope of the protection that it offers.[28]

As a result, a company involved in civil proceedings may be required to disclose sensitive documents to an opponent, including documents relevant to an investigation or even unprivileged investigation material (such as interview notes).

The impact of the invasion of a litigant's right to privacy and confidentiality which the obligation to give disclosure constitutes is mitigated to some extent by CPR Part 31.22, which provides that where a document has been disclosed to a party, that party may only use the document for the purpose of the proceedings in which it is disclosed, except where:

- the document has been read to or by the court, or referred to, at a hearing held in public (although the court may make an order restricting or prohibiting the use of such a document);
- the court gives permission; or
- the party who disclosed the document and the person to whom the document belongs agree.[29]

26 *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

27 *Director of the Serious Fraud Office v. Eurasian Natural Resources Corp Ltd* [2017] EWHC 1017, permission to appeal to the Court of Appeal granted 2 October 2017, Case No. A2/2017/1514/PTA.

28 However, in *Property Alliance Ltd v. Royal Bank of Scotland Plc*, factual non-privileged information communicated by a lawyer to the 'true client' (i.e., individuals within a corporate client entity authorised to obtain legal advice on that entity's behalf) to enable the client to take a fully informed decision as to what to do and what further advice to obtain, was considered privileged.

29 See *Tchenguiz v. Grant Thornton* [2017] EWHC 310 (Comm) for the broad interpretation of collateral 'use' in relation to CPR Part 31.22, which includes, for example, reviewing documents for relevance.

The court will only grant permission if there are special circumstances which constitute a cogent reason for permitting collateral use. Permission decisions are highly fact-sensitive – the proposed collateral use for the document will be relevant, and, depending on the proposed use, the court may carefully consider the particular documents in respect of which permission is sought.

If the court gives permission for collateral use, a party will be able to deploy the material outside the context of the civil proceedings. The court may make an order that they could be used in separate proceedings (including abroad). Once documents are moved outside the jurisdiction of the United Kingdom, there is a risk that they may be seized or that the party in possession of them may be compelled under local laws to produce them to third parties. Similar concerns about losing control over documents may arise where documents have been provided to regulatory or enforcement authorities during the course of an investigation. Even where documents are shared with an authority on a conditional basis, the authority may share the documents with third parties if it believes it has a statutory duty to do so. There is also the risk that the authority will be required to disclose those documents if it becomes involved in civil proceedings.

33.8 Practical considerations

33.8.1 Coordination with internal investigations team

It is important that those within the company responsible for managing parallel civil litigation are in constant communication with the internal team responsible for dealing with investigations, to ensure that:

- a clear, holistic strategy is developed for managing the investigations and parallel civil proceedings, and anticipating areas of potential risk (e.g., possible civil claims which may arise but have not yet been commenced);
- both teams understand, and evaluate the risks of, new developments in both the criminal and civil spheres; and
- any proposed action by the company or associated persons, in the civil or criminal spheres, is carefully analysed to determine the potential repercussions for all other proceedings and investigations.

Issues can arise, for instance, where:

- an authority seeks disclosure of privileged documents from the company in circumstances where the company may wish to assert privilege over those documents in subsequent civil proceedings;

See Section 33.8.2

- witnesses, whose testimony may be important for the company's case in civil proceedings, are under investigation, or have been classified as suspects, by the authorities, and have concerns about self-incrimination. Depending on the circumstances, employment proceedings may also be ongoing in respect of such individuals;

See Chapter 7 on witness interviews

- pleading possible defences (such as illegality) in civil proceedings, which may strengthen the company's case in those proceedings but would undermine the position it has taken in relation to an investigation; or

See Section 33.6.2

- (as part of DPA negotiations) there is a risk that matters which an authority seeks to include in an agreed statement of facts could be relied upon against the company in parallel civil proceedings. See Section 33.9

In particular, close coordination is necessary between the company's criminal and civil legal advisers to ensure consistency of approach.

Privilege waivers and disclosure obligations 33.8.2

During the course of an investigation, documents which attract privilege may be shown or provided to relevant authorities, often to demonstrate co-operation. Doing so will not necessarily constitute a general waiver of any privilege in those documents for the purposes of subsequent civil proceedings (particularly if it is made clear that this is done on a limited basis), although it may lead to adverse consequences, as the company will lose a degree of control over the information in the documents. However, care should be taken in cases involving multiple jurisdictions, as the effect of showing or providing a potentially privileged document to the authorities may vary depending upon which law governs questions of privilege.

Concurrent settlements 33.9

Difficult issues can arise for companies when attempting to negotiate settlement of global investigations, which can involve a variety of regulatory and prosecuting authorities across a range of jurisdictions. Parallel existing (or potential) civil litigation or arbitration adds a further layer of complexity to the analysis. See Chapter 23 on negotiating global settlements

During settlement negotiations with the authorities, companies should be aware of the risk that the fact of a settlement, as well as any associated press coverage or documents (such as a statement of facts in a DPA), may raise awareness of potential civil claims, and in certain circumstances may even be relied upon to support such claims. This will be of particular concern in the competition law context, given the risk of follow-on actions. (Notably, the European Commission's settlement procedure for cartel cases requires parties to acknowledge liability for an infringement.) Accordingly, and to the extent possible, companies should avoid admitting liability as part of any negotiated settlement with the authorities; and, if an admission of liability is required, they should ensure that it is tightly circumscribed. See Section 33.7 See Chapter 23 on negotiating global settlements and Chapter 35 on privilege

In addition, there is a risk that communications with the authorities made during the course of settlement negotiations will be disclosable in subsequent civil proceedings, although they may be protected from inspection by a right analogous to the 'without prejudice' rule. See Chapter 23 on negotiating global settlements

Settlement of civil claims can also carry risks for a company under investigation. There is a risk that settlement agreements entered into by the company may be disclosable in subsequent proceedings, or requested by an authority as part of their investigations. Companies should avoid admitting liability as part of any negotiated civil settlement. In addition, authorities may perceive certain types of civil settlements (particularly those with witnesses for substantial sums) as suspicious.

In appropriate circumstances, it may be possible to settle civil claims on a multi-party basis. For instance, companies may try to reach collective settlements, which are available in respect of certain competition law claims (using the mechanism set out in the Competition Act 1998), or seek to utilise a collective redress scheme.

See Section 33.3.5
See Section 33.3.6

33.10 Concluding remarks

Cross-border investigations are complex and competing considerations need to be carefully weighed and managed. The prospect of parallel civil proceedings brings further complexity to an already difficult area. Such proceedings can present numerous and diverse challenges for a company subject to investigation – it may face a range of different types of action, on a number of fronts (for instance, involving shareholders, suppliers, customers or employees), which may impact an investigation, or be affected by an investigation, in a variety of ways. Companies will frequently be defendants in parallel proceedings and unable to exercise significant control over the existence or pace of the proceedings. They may at times be claimants out of necessity or to obtain a tactical advantage. It is important to give careful consideration at an early stage to potential parallel proceedings which may arise, and any effect they may have on an investigation (and *vice versa*), to enable possible tensions between investigations and parallel proceedings to be anticipated and managed effectively. There is no easy solution to the challenges presented by parallel civil proceedings. As noted above, it may be difficult to obtain a stay of them (without the consent of other parties to the proceedings), and settlements can give rise to their own particular complications.

34

Parallel Civil Litigation: The US Perspective

Eugene Ingoglia and Anthony M Mansfield[1]

Introduction 34.1

In the United States, criminal and regulatory investigations often generate parallel civil proceedings. Such proceedings often take the form of class actions, in which a lead plaintiff seeks to prosecute claims on behalf of a large number of similarly situated plaintiffs who allege damage resulting from the conduct under investigation. Plaintiffs may also attempt to bring suits against alleged wrongdoers, such as corporate officers and directors, derivatively on behalf of a company.

Civil proceedings that are generated in connection with an investigation can precede the investigation, follow on from investigative findings or, frequently, arise during the course of the investigation. Public disclosures by a company about the existence or results of a criminal or regulatory investigation and other similar publicly available corporate announcements frequently give rise to civil claims relating to the conduct at issue. Civil proceedings can also bring about investigations in circumstances, for example, where a civil suit challenges conduct that was unknown to the relevant authorities.

It can be challenging to manage parallel civil proceedings that are governed by their own procedural rules and can interfere with the pacing of an investigation or create other tensions with the investigative process. This chapter addresses issues in parallel proceedings that may arise in connection with complex investigations. Similar considerations may apply when dealing with a criminal investigation and parallel civil enforcement proceedings brought by regulatory agencies such as the Securities and Exchange Commission or the Commodity Futures Trading Commission.

1 Eugene Ingoglia and Anthony M Mansfield are partners at Allen & Overy LLP.

34.2 Stay of proceedings

When a company under investigation is also involved in ongoing civil proceedings (before a court or an arbitral tribunal) that relate to the conduct under investigation, a party or the government may seek to stay those proceedings pending the outcome of the investigation. While this is often desirable to avoid tension between a civil litigation and an investigation, it is difficult to achieve. A court's decision to grant a stay is, as a general matter, entirely discretionary.[2]

While courts in the US are sensitive to the potential prejudice to an individual or entity under investigation that is forced to proceed with civil litigation about the same conduct, and in particular the potential that an individual's constitutional right against self-incrimination may be compromised,[3] courts are nevertheless hesitant to stay civil cases simply because an investigation is pending. If a stay is granted, a court may impose conditions and limitations, including limitations on length. A stay of civil proceedings will freeze the proceedings until the stay expires or the court issues a further order. A party can apply to have a stay lifted at any time.

Note that in criminal investigations or proceedings, the government may seek a stay to protect the criminal process, including limiting a company's ability to use civil litigation to obtain broader discovery than is available in a criminal case. For instance, in a parallel civil case, putative or actual defendants in the related criminal proceedings can seek the deposition testimony in the civil case of key witnesses that the government intends to rely on in the criminal case, providing a significant advantage to defendants that would not otherwise exist in the absence of the civil case. Courts have discretion to impose full or partial stays of the civil proceedings.

34.3 Class actions

In the US, class actions are a centrepiece of complex civil litigation, in particular securities and antitrust litigation, as the misconduct alleged often impacts large markets and large numbers of entities and individuals. More often than not, a complex criminal or regulatory investigation will generate class action litigation.

34.3.1 Background

In the US, class actions may be brought on behalf of similarly situated claimants. There are many scenarios in which class actions may be certified, but class actions typically involve cases where there are a significant number of claimants and common legal issues predominate over any individualised issues, so that the litigation

2 See *Twenty First Century Corp. v. LaBianca*, 801 F. Supp. 1007, 1010 (E.D.N.Y. 1992) (citing *Kashi v. Gratsos*, 790 F.2d 1050, 1057 (2d Cir. 1986)). Courts balance a number of factors in determining whether to grant a stay, including '(1) the private interest of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendant; (3) the convenience to the courts; (4) the interest of persons not parties to the civil litigation; and (5) the public interest.' Id. (internal quotations and citation omitted).

3 Corporations do not enjoy the constitutional privilege against self-incrimination.

can fairly be prosecuted on a representative basis. A class action is litigated similarly to an individual action, except that the plaintiff must file a motion asking the court to certify the class, and there may be litigation about which plaintiff will be lead plaintiff in the action.[4] The defendant may oppose class certification on many grounds, including that too many individualised issues exist. Motions for class certification are moving to the later stage of cases, and, unless the motion for class certification is denied, the case will proceed on a class basis, with a representative plaintiff leading.

Class actions following release of reports, findings, etc. 34.3.2

In the US, class actions against a company arise frequently following the release of internal investigation reports, regulatory findings or entry into a deferred prosecution agreement with the government, as these documents can provide a roadmap for a civil plaintiff's claims and are frequently cited in class action complaints as support for the plaintiff's allegations. When such documents become available publicly, the risk is quite high that one or more civil class actions will follow. If a class action survives a motion to dismiss based on threshold legal infirmities or pleading deficiencies and proceeds to discovery, a class action plaintiff will frequently demand that the company produce all materials that have been provided to the government, in addition to other disclosure requests under broad US discovery requirements.

The release of such internal investigation reports, regulatory findings or a deferred prosecution or plea agreement may also cause potential class action plaintiffs to seek documents a company has provided to the government in connection with an investigation directly from the government through a Freedom of Information Act (FOIA) request.[5] Indeed, a FOIA claim could be pursued even before internal investigation reports, regulatory findings or a deferred prosecution agreement become public, provided a claimant has a basis to make a request.

As a general matter, FOIA allows members of the public to access records from any federal agency. Most states have equivalent laws.[6] FOIA is subject to a number of exemptions, which should be considered any time a FOIA request is directed to company information in the government's possession. These exemptions, while narrowly construed, include certain exemptions for records or information compiled for law enforcement purposes as well as exemptions for documents relating to reports prepared by, on behalf of or for the use of agencies that regulate financial institutions. It is therefore rare for FOIA requests to be granted during an investigation. Production of documents to government entities typically is accompanied

4 Fed. R. Civ. P. 23(c).

5 FOIA, which is codified at 5 U.S.C. § 552, is a law that allows members of the public to seek access to information in the possession of the government.

6 'State law' in this chapter refers to New York law unless otherwise noted. This chapter does not purport to address the potential variances in the laws of all 50 US states.

by a request for FOIA exemption.[7] In practice, prosecuting an FOIA claim can be a slow and cumbersome process.[8]

34.3.3 Process

Federal class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. Before a judgment in a class action can issue, a class must be certified. Because of the high standard for class certification and the evidentiary support required, class certification motions are typically filed at the conclusion of the discovery phase. Class certification is often hotly contested. To achieve certification, the proponent of class status must show that the class is so numerous that joinder of all members is impracticable, there are common questions of law or fact, the claims of the proposed representative of the class are typical of the claims of the class as a whole and the proposed representative will adequately represent the interests of the class.[9]

Once these criteria are satisfied, the action must fit into one of three categories: (1) suits where separate actions might cause a risk of inconsistent judgments or where assets available to pay claims are limited; (2) suits seeking injunctive relief where any monetary remedy would be only incidental to the injunctive relief; and (3) suits seeking money damages.[10] Most cases fall within the third category. For these cases, in addition to the criteria set forth above, the proponent of class status must show that the common questions of fact or law predominate, and that class treatment is the superior method for adjudication.[11]

Other than the certification phase, the case proceeds as would an ordinary civil litigation. Typically, this will involve a motion to dismiss at the pleadings stage seeking to end the case based on legal infirmities or at least narrow the claims and issues in dispute. If any claims survive, the parties will proceed to discovery, which involves the exchange of typically voluminous documents and the deposition testimony of witnesses under oath. Witnesses who may be implicated in misconduct may refuse to testify on the grounds that doing so would infringe their constitutional right against self-incrimination.[12]

---

7 See 17 C.F.R. § 200.83 for a description of confidential treatment procedures under FOIA.

8 Designation of information as confidential under FOIA does not necessarily render the information unavailable for purposes of discovery in civil litigation. See, e.g., F*riedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1344 (D.C. Cir. 2009) ('[I]nformation unavailable under the FOIA is not necessarily unavailable through discovery.'); see also *In re Subpoena Duces Tecum*, 439 F.3d 740, 753-54 (D.C. Cir. 2006) ('FOIA's exceptions to disclosure limit only the right to information conveyed pursuant to that statute and other limitations on the Commission's authority to publish information . . . do not alter the Commission's duty to comply with lawful subpoenas after notice to the party whose information is sought.') (citations omitted).

9 Fed. R. Civ. P. 23(a).

10 Fed. R. Civ. P. 23(b).

11 Id.

12 U.S. Const. amend. V.

Discovery is typically followed by motions for summary judgment based on a lack of material facts in dispute.[13] If the motion for summary judgment fails, the case proceeds to trial. Settlement of federal class actions must be approved by the court, and must be on notice to all potential class members, who are given the opportunity to opt out of the settlement. If a class was not certified prior to settlement, a streamlined class certification motion is filed in connection with seeking approval of the settlement. Settlement agreements often provide a settling defendant the right to back out if too many class members opt out of the class.

Class Action Fairness Act of 2005 34.3.4

The Class Action Fairness Act of 2005 (CAFA) greatly expanded the federal courts' jurisdiction over class actions by relaxing the requirements for federal subject matter jurisdiction.[14] This allows defendants to remove class actions from state courts to federal courts, and avoid multiple state court class actions by removing the actions to federal court and seeking consolidation. As federal courts generally have more experience administering class actions than state courts, this outcome is often seen as desirable.

CAFA requires courts to scrutinise class action settlements involving corporations more closely. CAFA also requires notice of settlements to be provided to state attorneys general so they may intervene to protect citizens who are class members.

Securities class actions: PSLRA & SLUSA 34.3.5

There are two statutory schemes applicable in securities class actions aimed at curtailing frivolous securities lawsuits: the Private Securities Litigation Reform Act of 1995 (PSLRA)[15] and the Securities Litigation Uniform Standards Act of 1998 (SLUSA).[16]

Among other changes to the securities litigation landscape, the PSLRA makes it more difficult for a plaintiff to plead securities fraud by requiring the plaintiff to plead false statements with particularity, establish a strong inference that each defendant knew the statements alleged were false when made, and allege loss causation. In addition, and importantly from a defendant's perspective, the PSLRA stays discovery until the court has determined, usually following a motion to dismiss, whether a claim for securities fraud has been adequately stated.

SLUSA was enacted to combat efforts by plaintiffs to avoid the strictures of the PSLRA by pursuing state law claims, such as common law fraud, through class actions in state courts. Broadly speaking, SLUSA bars claims, whether filed in state or federal court, that allege fraud under state law in connection with the purchase or sale of securities from being pursued in a class action. SLUSA can

13 Fed. R. Civ. P. 56(a) ('The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.').

14 28 U.S.C. §§ 1332(d) et seq.

15 15 U.S.C. §§ 78u-4, 78u-5 et seq.

16 15 U.S.C. §§ 77p, 78bb et seq.

be a powerful tool in limiting the scope of claims in a securities class action at the outset.

34.3.6 Other considerations: class action waivers in arbitration agreements

In recent years, the United States Supreme Court has held that class action waivers in arbitration agreements are enforceable under the Federal Arbitration Act (FAA).[17] Thus, companies should consider subjecting claims by counterparties or customers to arbitration and should include class action waivers in the arbitration agreement. Arbitration agreements typically provide that proceedings will be confidential, and in the absence of access to the class action device, a claimant with meritless claims or claims with low monetary value may be less inclined to pursue them.

34.4 Derivative actions

34.4.1 Law and procedure

In general, under state law, members or shareholders of a company can bring a derivative claim alleging harm to a company and seeking relief on its behalf.[18] Before bringing a claim, a plaintiff must generally show that it has made a demand on the company to bring the claim in its own name and the company has refused to do so, or that making such a demand would be futile.[19] The plaintiff must name the company as a nominal defendant in the suit, and the company will thereby have the right to participate. Recovery in a derivative action flows to the company.

34.4.2 Practical considerations: indemnification of officers and directors

Typically derivative claims are brought by minority shareholders against majority shareholders or corporate officers and directors. Corporate officers and directors are often entitled to indemnification by the company for such suits pursuant to a company's by-laws, subject to any requirements or restrictions that may be imposed by state law,[20] and this is therefore an important consideration at the outset of any derivative suit. Ordinarily, officers and directors cannot claim indemnification for bad faith conduct, so where a company's board of directors determines that bad faith conduct has occurred – which determination is highly likely if criminal acts or regulatory misconduct are admitted by officers and directors, such as through a guilty plea – the question of indemnification becomes

17 See *DirecTV v. Imburgia*, 136 S. Ct. 463 (2015); see also *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011). The FAA is codified at 9 U.S.C. §§ 1 et seq.

18 See, e.g., N.Y. Bus. Corp. L. § 626 (authorising shareholder derivative suits).

19 When such a demand is made, companies sometimes form a 'special litigation committee' or 'demand review committee' consisting of disinterested and independent directors to determine whether pursuing the claim proposed by the shareholder is in the company's best interests. A special litigation committee's determination that such a claim should not be brought can provide a strong defence to defendants in a shareholder derivative action.

20 See, e.g., N.Y. Bus. Corp. L. § 722 (authorising indemnification of corporate officers and directors); 8 Del. C. § 145 (same).

complicated and often requires careful parsing of whether the amounts claimed are subject to indemnification notwithstanding admission of unlawful acts. The outcome will depend both on the statutory scheme in the state whose laws govern the relationship between the director or officer and the company, as well as the breadth of corporate reimbursement provisions of the relevant insurance policy. Where a determination of whether the conduct at issue rose to the level of bad faith has not yet been reached, officers and directors often have the right to have their legal costs advanced by the company, pending such determination.

Other private litigation 34.5

Opt-out claims 34.5.1

Individuals who may be class members in a class action may opt out of participation in the class and pursue claims individually, which can result in a company having to litigate duplicative claims in multiple jurisdictions. To avoid a significant number of opt-outs, a company can attempt to achieve a class action settlement with terms attractive to class members.

Purchaser claims 34.5.2

Purchasers of securities of a company under investigation may, once the investigation comes to light, claim that they were defrauded into purchasing securities by material misstatements made by the company while it knew the investigation was pending. Such claims can be brought on an individual or class basis, subject to the limitations of the PSLRA and SLUSA. See Section 34.3.5

Negative impact on contract enforcement rights 34.5.3

Conduct that is illegal or contrary to public policy (and which may, therefore, also be the subject of an investigation or litigation) may render related contracts entered into by a company void or voidable.

The common law doctrine of illegality prevents a party to a contract tainted by conduct that is illegal, or contrary to public policy, from enforcing its contractual rights and remedies in certain circumstances (some contracts may also be rendered unenforceable by statute). The law in this area is highly dependent on facts and circumstances, and courts weigh a variety of factors in determining whether to enforce the provisions of an illegal contract.[21]

Specific provisions in commercial contracts 34.5.4

Parties often include specific provisions in their commercial contracts (including finance documents) aimed at preventing, or providing contractual protection in relation to, illegal behaviour (e.g., corruption) involving a party to the agreement. Accordingly, the fact of an investigation (or related proceedings), or conduct that is the subject of an investigation, may have adverse contractual consequences for

21 See, e.g., *Denburg v. Parker Chapin Flattau & Kimpl*, 82 N.Y.2d 375, 385 (1993).

a company. Such consequences will depend on both the investigation and the specific conduct under investigation, as well as the contractual provisions. Such provisions may include:

- obligations:
  - to comply with certain applicable laws and regulations;
  - to have in place and comply with specified policies (such as anti-bribery and corruption policies);
  - to maintain accurate records of payments made in relation to the contract;
  - in relation to subcontractors (for instance, to ensure that subcontractors comply with requirements equivalent to those imposed on the company), and that may impose responsibility on the company for any non-compliance by a subcontractor with such requirements;
  - to report generally on compliance to counterparties on an ongoing basis, which could include requiring the provision of a confirmation signed by an officer of the company or audit rights; and
  - to report the occurrence of certain events to counterparties. These could include dealing with a public official in connection with the performance of the contract, receiving a request for a payment (or other advantage) in connection with the performance of the contract, or the commencement (or threat) of an investigation into the activities of the company;
- representations (given by the company, and which may be repeated) that it has not been investigated for or convicted of certain offences (and that no proceedings or investigations are pending or threatened), or which relate to the accuracy and completeness of information provided to contractual counterparties;
- termination rights for counterparties if the company breaches (or, potentially, if the counterparty reasonably suspects a breach of) certain obligations, or if the company makes a false representation or is convicted of certain offences; and
- indemnities (for the benefit of counterparties) in respect of loss suffered as a result of a certain breaches of the contract by the company.[22]

A company may face parallel litigation brought by its contractual counterparties in reliance on such provisions. A company may also be able to invoke such provisions against its counterparties, although where a company is under investigation, it may be barred from taking the position in civil proceedings that its counterparty has engaged in illegal activity if the company is also exposed for its counterparty's conduct, as the company would be *in pari delicto* or, in other words, equally guilty such that the court will refuse to intercede in a dispute between them.[23]

34.5.5 Mergers, acquisitions and investments

Mergers, acquisitions and investments can present particular risks for companies. Illegal behaviour in the target company (or its subsidiaries, or other related

22 An indemnity against a criminal liability may, however, be unenforceable for public policy reasons.

23 See *Kirschner v. KPMG LLC*, 15 N.Y.3d 446 (2010).

companies and persons) may have various negative consequences for an acquiring entity, which can include financial consequences (for example, the target may have been overvalued); legal consequences (both civil and criminal) for the target, the acquiring entity and relevant individuals (including officers of both entities),[24] along with associated legal costs; and other practical consequences (for example, reputational damage, which may have a consequent effect on business).[25]

As a result, acquiring entities will often take precautions to minimise these risks. Typically, these include conducting proportionate pre- and post-acquisition due diligence of the target and its business, including without limitation review of all of the target's business dealings and third-party contracts; implementing compliance programmes; and including appropriate protections in the relevant contractual documentation.

In relation to the latter, warranties, representations and indemnities[26] designed to provide such protection are frequently included in share purchase agreements. The scope of protection will depend on the particular provisions negotiated, but they can be widely drafted, such that they encompass the conduct of, for example:

- the target and its subsidiaries;
- directors, officers, employees, significant shareholders, affiliates, agents, and distributors of the target and its subsidiaries;
- those associated with or acting on behalf of the target and its subsidiaries; and
- those who perform services for or on behalf of the target and its subsidiaries,

and may cover areas such as:

- compliance with laws generally;
- compliance with anti-money laundering laws and standards;
- compliance with anti-bribery and corruption laws and standards;
- debarment from public contracts;
- sanctions (including whether such persons are, have been, or are likely to become, subject to sanctions); and

24 The Department of Justice (DOJ) recently issued an opinion addressing factors that may be relevant in determining whether and how the DOJ would seek to impose post-acquisition successor liability on an acquirer for pre-acquisition Foreign Corrupt Practices Act (FCPA) violations by its target. See US Department of Justice, Foreign Corrupt Practices Act Review, No. 14-02 (7 November 2014). The DOJ 'encourages companies engaging in mergers and acquisitions to (1) conduct thorough risk-based FCPA and anti-corruption due diligence; (2) implement the acquiring company's code of conduct and anti-corruption policies as quickly as practicable; (3) conduct FCPA and other relevant training for the acquired entity's directors and employees, as well as third-party agents and partners; (4) conduct an FCPA-specific audit of the acquired entity as quickly as practicable; and (5) disclose to the Department any corrupt payments discovered during the due diligence process.' Id. at 3-4.

25 Companies should also be aware of the risk that illegal behaviour (for example, bribery) may occur during the merger, acquisition or investment transaction.

26 However, see footnote 22 above in relation to indemnities against criminal liability.

- whether such persons are (or have been) subject to an investigation or any proceedings, or whether an investigation or any proceedings in respect of such persons are pending, threatened, contemplated or even likely.

Accordingly, the fact of an investigation (or related proceedings), or conduct which is the subject of an investigation, may give the acquiring entity contractual rights it can seek to enforce (including through litigation or arbitration). The acquiring entity should, therefore, review all of the target's business dealings and third-party contracts for potential exposure, which may include consideration of the target's inside and outside legal advice relating to such dealings and contracts.[27] Again, however, care may need to be taken in doing so for the reasons given at Section 34.5.4.

34.5.6 Employment law, defamation and whistleblowing

Investigations can have employment law consequences for a company. Employees may seek to bring claims against their employers arising out of the subject matter of an investigation, or how the investigation is handled; conversely, an employer may wish to take action against an employee implicated in the conduct under investigation. Employees may also pursue claims for defamation based on statements a company may make about their conduct either internally or to the government.[28]

See Chapter 14 on employee rights

In addition, to the extent that allegations have been made by whistleblowers, companies under investigation or conducting investigations should be careful to respect whistleblower rights to avoid claims for breach of the protections afforded to whistleblowers.

See Chapter 20 on whistleblowers

34.6 Evidentiary issues

34.6.1 Reliance by the court on statements of facts in authority findings

Parties will often seek to rely on findings made by the government as the result of an investigation in subsequent civil litigation. To the extent facts are admitted in, for example, a deferred prosecution agreement or a guilty plea, those facts will generally be admitted into evidence as party admissions under US evidentiary

27 An acquiring company should be conscious, however, of the potential for a privilege waiver by the target company if such legal advice is shared outside the context of litigation. The law on this subject varies from state to state, but in New York, for example, pre-closing communications between counsel for a target company and its acquiror are not privileged unless they relate to pending or anticipated litigation. See *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616 (2016).

28 See, e.g., *Mott v. Anheuser-Busch, Inc.*, 910 F. Supp. 868, 874-78 (N.D.N.Y. 1995) (granting summary judgment in favour of employer on employee defamation claim stemming from employer's investigation and subsequent reporting of employee's illegal conduct, and finding that the investigation was conducted in a 'thorough and responsible manner' because it was initiated immediately following reports of wrongdoing, included interviews with all relevant parties and an extensive review of books and records, and was undertaken by a team including both inside and outside counsel).

rules.[29] Deferred prosecution agreements may also specifically prohibit a company from denying certain facts. In addition, to the extent a party discloses otherwise privileged information to the government in connection with a deferred prosecution or plea agreement, there may be a privilege waiver by that party in any related civil litigation.

Reliance by the authority on findings of a court 34.6.2

Conversely, facts discovered during the course of civil litigation may draw the attention of the government, and the government may rely on the findings in a civil case as grounds for opening an investigation or taking some other enforcement action. Accordingly, these risks may be relevant considerations for a company when considering and implementing its litigation strategy in civil proceedings. In addition, conflicted representation and privilege issues may arise if the interests of the company and its employees are not aligned. For example, company counsel may represent a key employee witness at deposition in a civil case, but in the context of a subsequent criminal investigation may be conflicted from continuing the representation should the employee's interests diverge from the company's interests,[30] such as where the company wishes to disclose misconduct to the government but the employee wishes to invoke his or her Fifth Amendment privilege against self-incrimination.

Collateral use of disclosed documents 34.6.3

In the US, the scope of discovery in civil cases is very broad, and parties in federal civil litigation must typically disclose all potentially relevant non-privileged evidence.[31] Confidentiality of a relevant document is not a justification for refusing to disclose it, though confidential documents are often protected from public disclosure by protective orders.

As a result, a company involved in civil proceedings may be required to disclose sensitive documents to an opponent, including documents relevant to an

29 A settlement with a civil regulator may be reached without the company (or the individual) admitting or denying the regulator's findings set forth in the settlement order. In this circumstance, the regulator's findings are generally inadmissible in subsequent civil litigation. See, e.g., *Wilson v. Parisi*, 2009 U.S. Dist. LEXIS 3970, at *6-7 (M.D. Pa. 21 January 2009) (excluding consent decrees under Federal Rule of Evidence 408); see also *Bowers v. NCAA*, 563 F. Supp. 2d 508, 536 (D.N.J. 2008) (holding Rule 408 'plainly applicable' to the consent decree at issue and refusing to allow the plaintiff to use a consent decree between the defendant and the Department of Justice as evidence of the defendant's liability for the conduct underlying the plaintiff's claim); *Carpenters Health & Welfare Fund v. Coca-Cola Co.*, 2008 U.S. Dist. LEXIS 112503, at *22 (N.D. Ga. 23 April 2008) (granting motion to exclude SEC civil consent order from evidence); *In re Blech Sec. Litig.*, 2003 U.S. Dist. LEXIS 4650, at *25-30 (S.D.N.Y. 26 March 2003) (finding SEC consent judgments inadmissible under Rule 408); *Safford v. St. Tammany Parish Fire Prot. Dist. No. 1*, 2003 U.S. Dist. LEXIS 6513, at *16 (E.D. La. 11 April 2003) (holding that consent decree cannot be used as evidence of prior liability).

30 See, e.g., N.Y. Unified Court System, Rules of Professional Conduct, Rule 1.7(a)(1) (a lawyer cannot concurrently represent two clients with differing interests).

31 Fed. R. Civ. P. 26(b)(1).

investigation or even unprivileged investigation material. Where an adversary is aware of an investigation, it will typically demand production of any document that has been given to the government, and in practice, apart from privileged documents, such documents are produced. In making a production to an adversary, a company should seek a protective order that requires the adversary to maintain the information as confidential, refrain from using the information for any purpose other than litigation, seek to have the information filed under seal when reference to the information is made in court filings, and destroy the information at the conclusion of litigation.

34.7 Practical considerations

34.7.1 Coordination with internal investigations team

It is important that those within the company responsible for managing parallel civil litigation are in constant communication with the internal team responsible for dealing with investigations, to ensure that:

- a clear, holistic strategy is developed for managing the investigations and parallel civil proceedings, and anticipating areas of potential risk (e.g., civil claims that may arise, but have not yet been commenced);
- both teams understand, and evaluate the risks of, new developments in both the criminal and civil context; and
- any proposed action by the company or associated persons, in the civil or criminal context, is carefully analysed to determine the potential repercussions for all other proceedings and investigations.

Issues can arise, for instance, where:

- factual admissions are made in civil proceedings (such as in an answer or in interrogatory responses) that may undermine the defence of the criminal case;
- an authority seeks disclosure of privileged documents from the company in circumstances where the company may wish to assert privilege over those documents in subsequent civil proceedings;

See Section 34.7.2

- witnesses, whose testimony may be important for the company's case in civil proceedings, are under investigation, or have been classified as suspects, by the authorities, and have concerns about self-incrimination. Depending on the circumstances, employment proceedings may also be ongoing in respect of such individuals;

See Chapter 8 on witness interviews

- pleading possible defences (such as illegality) in civil proceedings, which may strengthen the company's case in those proceedings but would undermine the position it has taken in relation to an investigation; or

See Section 34.5.4

- as part of deferred prosecution agreement negotiations there is a risk that matters an authority seeks to include in an agreed statement of facts could be relied on against the company in parallel civil proceedings.

See Sections 34.6.1 and 34.8

In particular, close coordination is necessary between the company's criminal and civil legal advisers to ensure consistency of approach.

Privilege waiver and disclosure obligations 34.7.2

During an investigation, documents entitled to privilege or work-product protection may be shown or provided to relevant authorities, often to demonstrate co-operation. These include not only privileged communications between attorney and client but also documents, such as witness interview notes, generated by outside counsel. Depending on the applicable privilege law, which can vary widely from state to state and even among the federal circuit courts of appeal, sharing such information will not necessarily constitute a general privilege waiver for the purposes of subsequent civil proceedings (particularly if it is made clear that this is done on a limited basis), although it may lead to adverse consequences, as the company will lose a degree of control over the information in the documents.[32] In cases involving multiple jurisdictions, it is critical for a company to obtain advice on all potentially applicable privilege laws prior to showing potentially privileged documents to the government, as the effect of showing or providing a potentially privileged document to the authorities may vary depending on which law governs questions of privilege.

Concurrent settlements 34.8

Difficult issues can arise for companies when attempting to negotiate settlement of global investigations, which can involve a variety of regulatory and prosecuting authorities across a range of different jurisdictions. Parallel existing (or potential) civil litigation or arbitration adds a further layer of complexity to the analysis.

See Chapter 24 on negotiating global settlements

During settlement negotiations with the authorities, companies should be aware of the risk that a settlement, as well as any associated press coverage or documents (such as a statement of facts in a deferred prosecution agreement), may raise awareness of potential civil claims, and in the class action context will likely be relied on to support claims. Documents pertaining to the negotiation of a settlement, including communications with the relevant authority and drafts of the settlement, may be discoverable by plaintiffs in any such civil action.[33] Accordingly, and to the extent possible, companies should avoid admitting liability as part of any negotiated settlement with the government; and, if an admission of liability is required, they should ensure that it is narrowly circumscribed. Companies should further consider what they convey during the course of settlement discussions and how they communicate such information.

See Section 34.3

See Chapter 24 on negotiating global settlements

32 As a condition for the disclosure of otherwise privileged information, a regulator may stipulate that it will not assert a waiver of applicable privilege in any subsequent enforcement action. However, a stipulation by a regulator does not bind third parties.

33 Federal Rule of Evidence 408 limits the admissibility of evidence pertaining to settlements and their negotiation. It does not, however, speak to the discoverability of such information. Numerous courts have addressed the availability of a 'settlement privilege' to limit discovery of settlement related documents, reaching different conclusions. Compare S*tockman v. Oakcrest Dental Center* P.C., 480 F.3d 791 (6th Cir. 2007) (applying settlement privilege), with *Morse/Diesel, Inc. v. Fidelity & Deposit Co. of Maryland*, 122 F.R.D. 447, 449 (S.D.N.Y. 1988) (declining to recognise settlement privilege).

Settlement of civil claims can also carry risks for a company under investigation, in particular class action settlements, which are public. Companies should avoid admitting liability as part of any negotiated civil settlement. In addition, the government may perceive certain types of civil settlements (particularly settlements with potential witnesses for substantial sums) as suspect.

35

Privilege: The UK Perspective

Bankim Thanki QC, Tamara Oppenheimer and Rebecca Loveridge[1]

Introduction 35.1

The law of privilege confers on persons the right to refuse to produce a document or to answer questions – including by a regulator or prosecuting authority. The two subcategories of legal professional privilege are (1) legal advice privilege and (2) litigation privilege. This chapter explains the basic principles applicable to these, having particular regard to the regulatory and investigatory context. It also addresses briefly two other types of privilege that may arise in the regulatory context, namely common interest privilege[2] and without prejudice privilege.

This chapter also discusses certain exceptions to privilege, and the circumstances in which privilege can be lost or 'waived', either intentionally or inadvertently. The final section of the chapter addresses some more practical issues of how to maintain privilege in the regulatory and investigatory context.

1 Bankim Thanki QC, Tamara Oppenheimer and Rebecca Loveridge are members of Fountain Court Chambers.

2 Common interest privilege (as with joint interest privilege) is traditionally analysed as a distinct category of privilege, although it depends on the existence of material to which either legal advice or litigation privilege applies.

35.2 Legal professional privilege: general principles

The relevant distinction between legal advice privilege and litigation privilege is as follows:[3]

- Legal advice privilege is concerned with communications between lawyer and client for the purpose of giving or receiving legal advice or assistance,[4] in both the litigation and the non-litigious context.
- Litigation privilege is concerned with communications between a client or his or her lawyer and third parties for the purposes of litigation (whether anticipated or commenced).

Notwithstanding frequent misconceptions to the contrary, litigation privilege has no application to communications between lawyer and client, even where litigation is anticipated or has actually commenced: such communications will always fall within the ambit of legal advice privilege.[5]

Before turning to consider these two aspects of legal professional privilege separately a number of general observations should be made.

35.2.1 The need for confidentiality

Privilege requires and protects the confidentiality of documents and exchanges. Confidentiality is therefore a necessary, but not a sufficient, condition for both limbs of legal professional privilege.[6] The question is whether a document has the necessary quality of confidence, such as to attract privilege. This is rarely problematic, as it can usually be inferred that communications between lawyers and their clients or with third parties in the context of actual or anticipated litigation have been impressed with confidence. Nevertheless, some communications may be regarded as lacking that character. Hence, in the context of legal advice privilege, the client's identity,[7] address[8] or the existence of the retainer[9] will not generally be deemed to be confidential (or, accordingly, privileged). While a lawyer will usually

3 *Waugh v. British Railways Board* [1980] AC 521, 541-542, HL (*per* Lord Edmund-Davies). The distinction set out in Lord Edmund-Davies' speech was applied by the Court of Appeal in *Re Highgrade Traders Ltd* [1984] BCLC 151, 164-165 (*per* Oliver LJ); and by the House of Lords in *In re L (a Minor) (Police Investigation: Privilege)* [1997] AC 16, 24-5 (*per* Lord Jauncey) and *Three Rivers District Council and others v. Governor and Company of the Bank of England (No. 6)* [2005] 1 AC 610, HL (*Three Rivers 6*), para. 65 (*per* Lord Carswell) and paras. 50-51 (*per* Lord Rodger).

4 See *Thanki* (ed.), *The Law of Privilege* (2nd edn.), para. 2.02.

5 See *Thanki*, paras. 1.09-1.12; Passmore, *Privilege* (3rd edn.), paras. 3.002-3.005.

6 *Three Rivers 6*, para. 24 (*per* Lord Scott).

7 *Bursill v. Tanner* (1885) 16 QBD 1, 4; *Pascall v. Galinski* [1970] 1 QB 38; *R (Miller Gardner) v. Minshull St Crown Court* [2002] EWHC 3077 (Admin); *R (Howe) v. South Durham Magistrates Court* [2005] RTR 4. See generally A Pugh-Thomas, 'Who is your client?' (1997) SJ 141(2) 44.

8 *Ex Parte Campbell* (1869-70) LR 5 Ch App 703, 705. However, in this case James LJ made clear that the position may be different if the client's residence has been told to the lawyer as a matter of professional confidence. These *dicta* were applied in *Re Arnott, ex p Chief Official Receiver* (1888) 60 LT 109.

9 *Levy v. Pope* (1829) M & M 410; *Gillard v. Bates* (1840) 6 M & W 547.

owe his or her client enforceable duties of confidence,[10] for the purposes of litigation privilege, communications between a lawyer or client and a third party do not have to be 'confidential' in the sense that the third party is bound by equitable (or contractual) duties of confidence not to reveal the communication to anyone else.[11] In the context of litigation privilege, the requirement of confidentiality is therefore perhaps best put in terms of the communication or other document being 'not properly available for use'.[12]

Legal professional privilege as a substantive right 35.2.2

Legal professional privilege is not merely an exclusionary rule of evidence, but is also a substantive right, which is afforded overriding importance within English law.[13] The House of Lords and the Supreme Court have repeatedly emphasised its importance and its role in the administration of justice. It has been characterised as both 'a fundamental human right'[14] and 'a fundamental condition on which the administration of justice as a whole rests'.[15]

If it were simply a rule of evidence, a client could only prevent disclosure in legal proceedings. There would be no guarantee that the same material could be kept from the police or some other agency, such as a financial regulator or prosecuting authority, with the power to compel the production of documents or information. Hence, legal professional privilege can now generally be asserted in answer to any demand for documents by a public or other authority; it is not limited to a right that may be asserted only in the context of civil or criminal proceedings.

It is, however, a rule relating to immunity rather than admissibility,[16] since even improperly obtained privileged material may be admissible in evidence.[17]

The privilege is absolute and can only be overridden in very exceptional circumstances.[18] Furthermore, in accordance with the aphorism 'once privileged,

10 Confidentiality in this context is properly understood in the broader sense of information that the lawyer is not at liberty to disclose and may include information about a client that is in fact in the public domain: see the decision of the House of Lords in *Hilton v. BBE* [2005] 1 WLR 567, para. 34.

11 *ISTIL Group Inc v. Zahoor* [2003] 2 All ER 252, para. 60 (*per* Lawrence Collins J).

12 See *Bourns Inc v. Raychem Corp* [1999] 3 All ER 154, 167-168, CA.

13 *R v. Derby Magistrates Court, ex p B* [1996] AC 487, 507-8, HL; *General Mediterranean Holdings SA v. Patel* [2000] 1 WLR 272; *R (Morgan Grenfell & Co Ltd) v. Special Commissioner of Income Tax* [2003] 1 AC 563, para. 7.

14 *R (Morgan Grenfell & Co Ltd) v. Special Commissioner of Income Tax* [2003] 1 AC 563, para. 7, HL (*per* Lord Hoffmann).

15 *R v. Derby Magistrates' Court, Ex p B* [1996] AC 487, 507 (*per* Lord Taylor CJ, with whom Lords Mustill and Lloyd agreed).

16 *McE v. Prison Service of Northern Ireland* [2009] 1 AC 908, para. 5, HL (*per* Lord Phillips).

17 *Calcraft v. Guest* [1898] 1 QB 759, CA; *R v. Tompkins* (1977) 67 Cr App R 181. The party to whom the privilege belongs might, of course, apply for an injunction to restrain its use: *Ashburton v. Pape* [1913] 2 Ch 469, CA; *Goddard v. Nationwide Building Society* [1987] QB 670, CA.

18 As Lord Scott stated in *Three Rivers 6* (para. 25): 'if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly

always privileged',[19] once a client's privilege has attached to a document or other privileged exchange, the privilege will persist, subject only to waiver or other types of loss, for the client's benefit and that of successors in title for all time and in all circumstances.[20]

35.2.3 Rationale

The rationales underlying legal advice and litigation privilege are distinct:

- The interest protected by legal advice privilege is the public concern to ensure the availability of appropriate legal advice and assistance.[21] To this end, English law recognises the need to promote absolute candour between client and lawyer, by providing that exchanges between them will not subsequently be divulged.[22]
- Litigation privilege has often been regarded as an aspect of the right to a fair trial in England and in other common law jurisdictions.[23] The courts have emphasised that fairness requires a private and confidential sphere of preparation for litigation.[24] In a classic statement of this principle James LJ emphasised that 'as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as materials for that brief.'[25] Litigation privilege has therefore been characterised by Steyn LJ as an auxiliary principle buttressing the constitutional right of access to justice.[26] In recent judgments, this rationale has been doubted, largely on the grounds that changes to English civil procedure (particularly the rules of pretrial disclosure) have introduced a culture of openness, which sits uneasily with any right to 'secrecy' in adversarial litigation.[27] However, litigation privilege remains

---

greater public interest. It can be waived by the person, the client, entitled to it, and it can be overridden by statute . . . but it is otherwise absolute. There is no balancing exercise that has to be carried out: see *B v. Auckland District Law Society* [2003] 2 AC 736, 756-759.'

19 For examples of its use see *Calcraft v. Guest* [1898] 1 QB 759, 761, CA; and *Pearce v. Foster* (1885) 15 QBD 114, 119, CA.

20 See *Thanki*, paras. 1.63-1.69.

21 See generally *Thanki*, paras. 1.17-1.22.

22 *Pearse v. Pearse* (1846) 1 De G & Sm 12, 28-9 (*per* James Knight Bruce V-C), (cited with approval by Lord Carswell in *Three Rivers 6*, para. 112). See also *Pearce v. Foster* (1885) 15 QBD 114, 119-120 (*per* Sir Baliol Brett MR); *Re L* [1997] AC 16, 32 (*per* Lord Nicholls), (also cited with approval in *Three Rivers 6*, para. 112).

23 *Re Saxton* [1962] 1 WLR 968, 972 (*per* Lord Denning); *Baker v. Campbell* (1983) 49 ALR 385, 427 (*per* Brennan J).

24 *Three Rivers 6*, para. 52 (*per* Lord Rodger); *Robert Hitchins Ltd v. ICL* (CA, 10 December 1996), *per* Simon Brown LJ; *Sumitomo Corporation v. Credit Lyonnais Rouse Ltd* [2002] 1 WLR 479, para. 46, CA (*per* Jonathan Parker LJ).

25 *Anderson v. Bank of British Columbia* (1876) 2 Ch D 644, 656. See to similar effect *Waugh v. British Railways Board* [1980] AC 521, 531 (*per* Lord Wilberforce).

26 *Oxfordshire CC v. M* [1994] Fam 151, 163, CA.

27 See *Secretary of State for Trade & Industry v. Baker* [1998] Ch 356, 371 (*per* Sir Richard Scott V-C); *Visx Inc v. Nidex* [1999] FSR 91; *Three Rivers 6*, paras. 29 (*per* Lord Scott) and 53 (*per* Lord Rodger).

justified by the need for a zone of privacy in the preparation for litigation[28] and remains firmly entrenched in English law as a consequence of decisions at appellate level, including the House of Lords.[29]

No adverse inference can be drawn where privilege is relied on 35.2.4

No adverse inferences may be drawn from the assertion by a person of a claim to legal professional privilege.[30] This is a principle that may sometimes be overlooked when an authority is seeking disclosure of privileged materials. But any responsible regulator or prosecuting authority must accept that it can neither require disclosure of privileged communications, nor rely on the regulated entity's refusal to provide it. As Lord Scott observed in *Three Rivers 6*, the existence of legal professional privilege means that: 'cases may sometimes have to be decided in ignorance of relevant probative material.'[31]

There is, however, some uncertainty as to whether UK prosecuting authorities can require privilege to be waived when entering into co-operation agreements with parties.[32] In *R v. George*,[33] a case against certain British Airways executives concerned with a cartel offence involving alleged collusion with Virgin Atlantic, this issue arose in circumstances where the relevant Virgin Atlantic executives had admitted the offences and were given immunity from prosecution by the Office of Fair Trading (OFT).[34] Under the OFT's leniency and immunity guidelines, these executives were expected to assume an obligation of continuous and complete co-operation with the OFT's investigation and any subsequent proceedings. Owen J considered that it would be reasonable for the OFT to press for disclosure of privileged material in the hands of the Virgin Atlantic executives, as part of the OFT's duty to obtain material held by a third party that might be capable of undermining the prosecution case, on the basis that the Virgin Atlantic executives were under a duty to give continuous and complete co-operation as a condition of leniency/immunity and failing a satisfactory response to have invoked its power to revoke the leniency agreements.[35] By contrast, in *R v. Daniels*,[36] in which a co-defendant to a murder charge had entered into an agreement pursuant to section 73 Serious Organised Crime and Police Act 2005 (SOCPA) under which he agreed to give assistance to the authorities, the Court of Appeal did not express a view as to whether a requirement to waive privilege could lawfully be included in a

28 See *Thanki*, para. 3.132; *Passmore*, para. 3.022.

29 See *Thanki*, para. 1.25.

30 *Wentworth v. Lloyd* (1864) 10 HLC 589; *Sayers v. Clarke Walker* [2002] EWHC Ch 60, para. 52.

31 *Three Rivers 6* at para. 34.

32 See generally *Passmore*, paras. 1.077-1-085.

33 Unreported, 7 December 2009.

34 The OFT has now been superseded, along with the Competition Commission, by the Competition and Markets Authority (CMA), though regulation of consumer credit passed to the Financial Conduct Authority (FCA).

35 The case against the BA executives ultimately collapsed following the discovery of thousands of prosecution e-disclosure documents that had not been disclosed to BA or reviewed by the OFT.

36 [2010] EWCA Crim 2740.

SOCPA agreement and indicated (without deciding) that, if so, an express condition would be required. The ability of a prosecuting authority to require waiver of privilege, and the circumstances in which it will be taken to have done so, therefore remains in some doubt and would appear to vary depending on the particular rules and guidelines applicable to the prosecuting authority. Since the decision in *R v. George*, the OFT guidance 'Applications for leniency and no-action in cartel cases' (the 2013 Leniency Guidance), now adopted by the CMA, has changed and no longer requires waiver of privilege as an element of co-operation. However, the CMA does not rule out inquiring as to whether a leniency applicant may be prepared to waive privilege over certain material during the course of a possible criminal cartel prosecution, although making it clear that any refusal to waive privilege will not have any adverse consequences for the leniency application and that granting such a waiver would not yield any advantage to the leniency applicant. The CMA will, unless the position is uncontroversial, instruct independent counsel to provide an opinion on whether the relevant information is privileged and will require disclosure of information not found to be privileged.[37]

35.2.5 Privilege belongs to the client

Privilege belongs to the client and not to the lawyer or agent.[38] Only the client can invoke the privilege.[39] It is not open to a lawyer or other agent to do so, unless acting on behalf of the client, and the lawyer or agent cannot invoke the privilege if the client has waived it.[40] In the case of litigation privilege, a third party with whom a lawyer or client has communicated for the purposes of adversarial proceedings may not assert the privilege of the party to the actual or prospective litigation.[41]

35.3 Legal advice privilege

The scope of legal advice privilege was the subject of authoritative reconsideration by the House of Lords in *Three Rivers 6*. Lord Rodger defined the privilege (at paragraph 50) as extending to:

> *[A]ll communications made in confidence between solicitors and their clients for the purpose of giving or obtaining legal advice even at a stage where litigation is not in contemplation. It does not matter whether the communication is*

37 2013 Leniency Guidance paras. 3.15 to 3.23.

38 *R v. Derby Magistrates' Court, ex p B* [1996] AC 487, 504-5, HL.

39 Although the lawyer is under a professional obligation to assert the privilege on behalf of his or her client unless it has been waived: *R v. Central Criminal Court, ex p Francis and Francis* [1989] AC 346, 383, HL; *Bolkiah v. KPMG* [1999] 2 AC 222, 235-6, HL; *Nationwide Building Society v. Various Solicitors* [1999] PNLR 52, 69. The court may also intervene to prevent a third party or even the client's lawyer making disclosure in breach of the client's privilege: *Harmony Shipping v. Saudi Europe Line* [1979] 1 WLR 1380, 1384-1385, CA.

40 *Re International Power Industries* [1985] BCLC 128; *R v. Peterborough Justices, ex p Hicks* [1977] 1 WLR 1371; *Nationwide Building Society v. Various Solicitors (No. 2)* The Times, 1 May 1988.

41 *Lee v. SW Thames Health Authority* [1985] 1 WLR 845, CA; *Schneider v. Leigh* [1955] 2 QB 195.

> *directly between the client and his legal advisor or is made through an intermediate agent of either.*

The requirements thereby identified can be summarised as follows:

- a communication, whether written or oral;
- between a client and a lawyer (or an intermediate agent of either);
- made in confidence;[42]
- for the purpose of giving or obtaining legal advice.

Communication 35.3.1

The basic concept of communication is self-explanatory. However, privilege does not arise upon the exchange of pre-existing and previously unprivileged documents: the document's existence must be attributable to the intention to communicate.[43] The scope of the privilege is, however, broader than references merely to 'communications' might seem to indicate. In addition to communications, the following documents will also (if the remaining requirements are satisfied) fall within the privilege:

- a document intended to be a communication between client and lawyer, which was never communicated;[44]
- documents or parts of documents that evidence the substance of lawyer–client communications.[45] This would include, for example, a written record of an oral communication or a document disseminating the contents or substance of legal advice within[46] or even beyond[47] the corporation receiving the advice; and
- the lawyer's working papers, including drafts, attendance notes and memoranda.[48]

Between a client and lawyer 35.3.2

Lawyer 35.3.2.1

The scope of the term 'lawyer' for the purposes of legal advice privilege (and legal professional privilege more generally) is broad rather than formalistic, but not without limits. In *R (Prudential PLC) v. Special Commissioner of Income Tax* the

42 This requirement has been considered above.

43 *Pearce v. Foster* (1885) 15 QBD 114, 118-119, CA; *R v. Peterborough Justices, ex p Hicks* [1977] 1 WLR 1371, 1374; *Ventouris v. Mountain* [1991] 1 WLR 607, 616, CA (*per* Bingham LJ).

44 *Three Rivers 6*, para. 21.

45 *Three Rivers District Council and others v. Governor and Company of the Bank of England (No. 5)* [2003] QB 1556 (CA) (*Three Rivers 5*), paras. 19, 26.

46 *Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 2 Lloyd's Rep 540.

47 *USP Strategies Plc v. London General Holdings Ltd* [2004] EWHC (Ch) 373.

48 *Greenough v. Gaskell* (1833) 1 M&K 98, 101-102 (entries made by the lawyer in his accounts held to be privileged); *Ainsworth v. Wilding* [1900] 2 Ch 315, 323 (*per* Stirling J) (notes or memoranda made by a lawyer are placed on the same footing as communications between lawyer and client); *Balabel v. Air India* [1988] Ch 317, 323 (*per* Taylor LJ); *Three Rivers 5*, para. 30.

Supreme Court confirmed that legal professional privilege is applicable only to 'communications in connection with advice given by members of the legal profession, which includes members of the Bar, the Law Society, and the Chartered Institute of Legal Executives (CILEX) (and, by extension, foreign lawyers)'.[49] The privilege extends to their non-qualified employees including secretaries,[50] clerks, trainee solicitors, pupils or paralegals acting under the direction of a lawyer.[51] For the avoidance of doubt, under English law[52] no distinction is made between in-house lawyers and lawyers in independent practice.[53] However, that an individual happens to be a 'lawyer' in the sense required above will not suffice; in each case the relevant question is whether he or she is consulted in that professional capacity.[54] The lawyer must also be subject to the control of the professional body and the governing rules of practice; in other words, the lawyer must have a current practising certificate. Therefore a qualified solicitor who has been struck off the roll is not a lawyer for the purposes of legal professional privilege,[55] unless the client in good faith does not know that the solicitor has been struck off.[56]

Subject to certain specific statutory exceptions,[57] communications with other professionals – including, for example, patent and trade mark attorneys – will not attract legal advice privilege at common law, even where they are giving advice on strictly legal matters.[58]

---

49 *R (Prudential PLC) v. Special Commissioner of Income Tax* [2013] 2 AC 185, para. 29, SC. On communications with foreign lawyers, see *Thanki*, para. 1.44.

50 *Descoteaux v. Mierzwinski* (1982) 141 DLR (3d) 590, 603.

51 *Taylor v. Forster* (1825) 2 C&P 195; *Wheeler v. Le Marchant* (1881) 17 Ch D 675, 682, CA.

52 This is subject to one narrow exception: the European Court of Justice has held that, as a matter of European Community law, parties to investigations into alleged breaches of Articles 81 (now 101) and 82 (now 102) of the Treaty of Rome cannot claim legal professional privilege for internal communications with employees, even if the employee is acting as an in-house lawyer: *Akzo Nobel Chemicals Ltd v. European Commission*, Case C550/07 P.

53 *Alfred Crompton Amusement Machines Ltd v. Customs & Excise Comrs (No. 2)* [1972] 2 QB 102, 129, (*per* Lord Denning MR) CA. This conclusion was not challenged on appeal: *Alfred Crompton Amusement Machines Ltd v. Customs & Excise Comrs (No. 2)* [1974] AC 405, 430-431, HL.

54 *Minter v. Priest* [1930] AC 558, 581 (*per* Lord Atkin).

55 *Dadourian Group International and others v. Simms and others* [2008] EWHC 1784 (Ch), paras. 119-128. See also *Waterford v. Commonwealth of Australia* (1987) 163 CLR 54, 81-82 (*per* Deane J).

56 *Dadourian Group International and others v. Simms and others* [2008] EWHC 1784 (Ch), para. 127. The burden is on the client to show that he or she continued to believe that the solicitor held a practising certificate at the time.

57 For example: patent attorneys (section 280, Copyright, Designs and Patents Act 1988); trade mark attorneys (section 284, Copyright, Designs and Patents Act 1988); licensed conveyancers (section 33, Administration of Justice Act 1985); authorised advocates and litigators (section 63, Courts and Legal Services Act 1990). It is clear that patent and trade mark attorneys do not attract legal professional privilege at common law: *Dormeuil Trade Mark* [1983] RPC 131; *Wilden Pump Engineering Co v. Fusfield* [1985] FSR 159, CA; *R (Prudential plc) v. Special Commissioner of Income Tax and Pandolfo* [2013] 2 AC 185, para. 68.

58 *R (Prudential Plc) v. Special Commissioner of Income Tax and Pandolfo* [2013] 2 AC 185. See R Pattenden, The Law of Professional–Client Confidentiality (2003), para. 16.42, for a comprehensive list of other professions to which privilege has been expressly denied, including doctors, accountants, priests, bankers, auditors and journalists.

Legal advice privilege will apply to advice received from foreign lawyers.[59] It covers advice given by foreign lawyers on English law[60] as well as foreign law.[61]

Client 35.3.2.2

The concept of the 'client' in the context of corporations was the subject of appellate consideration by the Court of Appeal in *Three Rivers 5*. The issue is not without controversy, but it appeared from *Three Rivers 5* that the 'client' would not necessarily be the corporation itself, or its employees *per se*, but only those within the corporation who were authorised to communicate with and receive the lawyer's advice.[62] This was the interpretation of *Three Rivers 5* adopted by the Singapore Court of Appeal in *Skandinaviska Enskilda Banken v. Asia Pacific Breweries*. The court in that case commented that: 'The principle is that if an employee is not authorised to communicate with the company's solicitors for the purpose of obtaining legal advice, then that communication is not protected by legal advice privilege.' It went on to state that authorisation need not be express but may be implied.[63]

However, the concept of the 'client' has been interpreted more restrictively in two recent first instance decisions of the English High Court.[64] In *The RBS Rights Issue Litigation*[65] the judge held that notes of witness interviews prepared by RBS's lawyers were not subject to legal advice privilege (although the interviewees were authorised by RBS to communicate with the lawyers), and neither were the notes subject to legal advice privilege on the basis that they comprised lawyers' working papers. In Hildyard J's view, the Court of Appeal in *Three Rivers 5* established a general principle that 'the client' for the purposes of a lawyer–client communication subject to legal advice privilege must be someone who is authorised to seek and receive legal advice. The approach in *The RBS Rights Issue Litigation* was followed by Andrews J in the decision in *Director of the SFO v. ENRC*,[66] where once again the privileged status of interview notes produced by the lawyers during the course of an internal investigation was in question. Andrews J held that legal advice privilege attaches only to 'communications between the lawyer and those individuals who are authorised to obtain legal advice on that entity's behalf.'[67]

59 See, most recently, *R (Prudential PLC) v. Special Commissioner of Income Tax and Pandolfo* [2013] 2 AC 185, paras. 45, 73.

60 *International Business Machines Corp v. Phoenix International (Computers) Ltd* [1995] 1 All ER 413, 429; *Ritz Hotel Ltd v. Charles of the Ritz Ltd (No. 4)* (1987) 14 NSWLR 100, 101-2.

61 *Bunbury v. Bunbury* (1839) 2 Beav 173; *Macfarlan v. Rolt* (1872) LR 14 Eq 580.

62 See *Three Rivers 5*, para. 31 (*per* Longmore LJ, giving the judgment of the Court of Appeal).

63 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Lte* [2007] 2 SLR 367, para. 42.

64 A similar approach was also taken by Chief Master March in *Astex v. Astrazeneca* [2016] EWHC 2759 (Ch).

65 *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

66 *Director of the SFO v. ENRC* [2017] EWHC 1017 (QB) (*ENRC*).

67 Ibid., at para. 70. Andrews J acknowledged that, in the context of a company, the person giving the instructions to the lawyers may not necessarily be the same as the person or persons who want

By 'authorised' Andrews J meant being specifically 'tasked' by the corporation to obtain legal advice. That interviewees were authorised to communicate with the lawyers to provide them with information or relevant facts in order for the lawyers to give advice, did not make those communications privileged. Andrews J also agreed with Hildyard J that lawyers' notes of interviews with witnesses would not be privileged on the ground of being lawyers' working papers, unless the notes would betray the tenor of the legal advice.

Plainly the restrictive interpretation of 'client' in these decisions is likely to exclude the vast majority of employees within the company. A corporate entity that wishes to obtain legal advice and that needs to carry out a fact-finding investigation within the organisation to obtain the necessary information for its lawyers will not, if *The RBS Rights Issue Litigation* and *ENRC* decisions remain good law, be able to claim legal advice privilege over documents created pursuant to that fact finding investigation (except, it seems, to the extent that the facts are known to, and obtained by the lawyers from, individuals who also happen to be authorised to seek and receive legal advice). While the rationale of legal advice privilege is, as explained above, to enable a client to provide full and frank instructions to its lawyer to enable the lawyer to provide sensible advice, it now appears that a corporate client will be severely restricted in the extent to which it can gather information for its lawyer in order for the lawyer to give advice without its communications being disclosable in subsequent proceedings. It makes no difference whether information is obtained from employees by other employees of the company or by the lawyers directly.

In this regard *The RBS Rights Issue Litigation* and *ENRC* are also at odds with the decision of the Hong Kong Court of Appeal in *CITIC Pacific v. Secretary of State for Justice*,[68] which recognised that a narrow definition of client was incompatible with the rationale for legal advice privilege as explained by the House of Lords in *Three Rivers 6*. The decisions in *The RBS Rights Issue Litigation* and *ENRC* also seem to be doubtful in relation to the lawyers' working papers doctrine. Notes of witness interviews that are prepared by lawyers, provided they are not verbatim transcripts, are types of document that should typically qualify as 'lawyers working papers', in line with the decision in *Balabel v. Air India*.[69]

---

to receive the advice. Accordingly there could be instances where particular individuals or groups are authorised to instruct the lawyers, while others individuals are authorised to receive the advice, typically a company's board of directors (see ibid., para. 84).

68 [2012] 2 HKLRD 701.

69 In this regard there must also be some doubt as to whether the court was correct in *The RBS Rights Issue Litigation* and *ENRC* in stating that to qualify as lawyers' working papers, documents must betray the trend of legal advice. That is not a requirement specified in *Balabel* (in which the Court of Appeal was considering a claim to privilege in respect of both communications between client and lawyer and lawyers' working papers) nor is it required in *Three Rivers 5* itself. In specifying that requirement Hildyard J in *The RBS Rights Issue Litigation* and Andrews J in *ENRC* relied on observations made in a different context, namely where a solicitor copies or assembles a collection of documents, and the issue is whether that selection can be said to be privileged (see *Lyell v.*

An appeal of the *ENRC* decision remains outstanding,[70] and the Court of Appeal (and potentially, if necessary, the Supreme Court) will therefore have the opportunity to reconsider *The RBS Rights Issue Litigation* and *ENRC* decisions, which have already attracted significant criticism.

Communication need not in all cases be direct, but may occur through an agent of the client or the lawyer. A distinction needs to be made between an agent for the purposes of communication, that is to say a mere conduit between the client and the lawyer, such as an interpreter (where intellectual input by the agent will risk destroying the privilege[71]) and an agent for the purposes of seeking and obtaining the advice (where it will not). Communications between 'the various legal advisers of the client' with a view to the client obtaining legal advice or assistance will generally be privileged.[72]

For the purpose of giving or obtaining legal advice or assistance 35.3.3

In *Three Rivers 6* the House of Lords unanimously[73] adopted a statement by Taylor LJ in *Balabel v. Air India*[74] that:

> *[L]egal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.*

In most cases the relevant 'legal context' will be obvious. Where there is room for doubt, Lord Scott suggested[75] that the court should consider whether:

- the advice sought from the lawyer relates to the rights, liabilities, obligations or remedies of the client either under private or public law; and
- the communication falls within the policy underlying the justification for legal advice privilege. In short, 'is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply?'

Notwithstanding the first limb of Lord Scott's test, it appears that the 'legal context' is not actually confined to advice concerning the client's legal rights and liabilities. The relevant communications in *Three Rivers 6* involved presentational advice as to how the client (the Bank of England) could best put material before an inquiry, established by the Chancellor of the Exchequer and the Governor of the Bank, which was scrutinising the discharge of the Bank's public duties. The House of Lords held that legal advice privilege plainly applied. Lord Rodger

---

Kennedy (No. 3) (1884) 27 Ch D 1; subsequently commented on by Bingham LJ in *Ventouris v. Mountain* [1991] 1 WLR 607.)

70 The Court of Appeal has granted permission to appeal. The appeal is due to be heard in July 2018.

71 See *Thanki*, para. 2.79.

72 *Trade Practices Commission v. Sterling* (1979) 36 FLR 244, para. 4.

73 *Three Rivers 6*, paras. 38, 59, 62, 111, 122.

74 [1988] Ch. 317, 330, CA.

75 *Three Rivers 6*, para. 38.

emphasised[76] that privilege would similarly have applied 'to presentational advice sought from lawyers by any individual or company who believed himself, herself or itself to be at risk of criticism by an inquiry', emphasising that the 'defence of personal reputation and integrity is at least as important to many individuals and companies as the pursuit or defence of legal rights whether under private law or public law'.

In substance, the test is whether the lawyer is reasonably being consulted because of his or her legal skills. This is reflected in the emphasis placed by the House of Lords on whether the lawyer is being consulted '*qua* lawyer',[77] or is being asked to 'put on legal spectacles'[78] and whether the lawyer is being required to exercise 'special professional knowledge and skills'.[79] The concept of a 'legal context' is therefore very broad.

Once a 'legal context' is established, the question is whether the relevant communication falls within it. The clearest definition of the ambit of legal advice in *Three Rivers 6* was that provided by Lord Carswell (with whom all the Law Lords expressly agreed[80]), in the following passage:

> *[A]ll communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client.*[81]

This passage can be regarded as an authoritative statement of the modern law. If the larger purpose of the instruction is the obtaining of legal advice, the question in respect of any given communication is simply whether it relates directly to the lawyer's performance of his duty as the client's legal adviser. The House of Lords expressly rejected any requirement that the communication must itself contain 'legal advice', in any strict sense of that phrase. *Three Rivers 6* therefore both preserves and consolidates a line of authority that supports the attachment of privilege to documents that, while they do not contain legal advice, nevertheless form part of the 'continuum of communications' made for that broad purpose.
The law as stated above was given effect in the regulatory investigations context in the recent case of *Property Alliance Group v. RBS*.[82] In that case RBS claimed privilege over documents prepared by its solicitors for the RBS Executive Steering Group (ESG), which had been established by RBS to oversee its response to

76 Ibid., para. 44.
77 Ibid., para. 58 (*per* Lord Rodger).
78 Ibid., para. 60 (*per* Lord Rodger).
79 Ibid., para. 62 (*per* Baroness Hale).
80 Ibid., paras. 45, 49, 61, 119.
81 Ibid., para. 111 (emphasis added).
82 [2016] 1 WLR 992. See also *Director of the SFO v. ENRC* [2017] EWHC 1017 (Ch), at 184.

various regulatory and criminal investigations into manipulation of LIBOR and other rates in the United Kingdom, United States and elsewhere. The claimant, Property Alliance Group (PAG), challenged RBS's claim to privilege over these documents, contending that the role of RBS's solicitors was not confined to the provision of legal advice but extended to the performance of administrative functions (for example, acting as the secretariat for the ESG and attending its meetings) for which privilege could not be claimed. Having inspected the disputed documents, Snowden J was 'entirely satisfied' that RBS's solicitors had been engaged in a relevant legal context. He remarked that:

> *RBS was facing Regulatory Investigations in a number of jurisdictions that could have had (and did have) the consequence that RBS was subjected to very large regulatory penalties and consequent private actions for very significant sums of money. Dealing with, and co-ordinating the communications and responses to such regulators was a serious and complex matter upon which RBS naturally wished to have the advice and assistance of specialist lawyers. Clifford Chance were engaged to provide such advice and assistance, and (to use Lord Scott's words), that advice and assistance undoubtedly related to the rights, liabilities and obligations of RBS, and the remedies that might be granted against it either under private law or under public law.*
>
> *I am also entirely satisfied that, in the words of Taylor LJ in [*Balabel*] the two types of ESG High Level Documents* [i.e. tabular memoranda informing and updating the ESG on the progress, status and issues arising in the regulatory investigations, and confidential notes or summaries drafted by Clifford Chance concerning the discussions between the ESG and its legal advisers at the ESG meetings] *form part of 'a continuum of communication and meetings' between Clifford Chance and RBS, the object of which was the giving of legal advice as and when appropriate.*[83]

Snowden J also rejected an argument made by PAG that the ESG documents should be only partly redacted, so that summaries of factual information would not be withheld from inspection, finding that such an approach would be inconsistent with the *dicta* of Taylor LJ in *Balabel*.[84] While, depending on the facts, a court might not uphold a claim to privilege in respect of the minutes of a business meeting simply because the minutes were taken by a lawyer who was present and subsequently sent them to the client, that would be because the court would have taken the view that the lawyer was not being asked *qua* lawyer to provide legal advice.

As to the public policy implications of his judgment, Snowden J noted (at paragraph 45) that there is a clear public interest in regulatory investigations being conducted efficiently and in accordance with law and that the public interest will be advanced if regulators can deal with experienced lawyers who can accurately

83 *Property Alliance Group v. RBS* [2016] 1 WLR 992, at paras. 27-28.

84 *Balabel v. Air India* [1988] Ch 317 at 330F.

advise their clients how to respond and co-operate. Such lawyers must be able to give the client candid factual briefings as well as legal advice, secure in the knowledge that any such communications and any record of their discussions and the decisions taken will not subsequently be disclosed without the client's consent.

35.4 Litigation privilege

The leading modern statement of the scope of litigation privilege is contained in the speech of Lord Edmund-Davies in *Waugh v. British Railways Board*:

> *After considerable deliberation, I have finally come down in favour of the test propounded by Barwick C.J. in* Grant v. Downs*, 135 C.L.R. 674, in the following words, at p 677:*
>
> > *'Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the court should state the relevant principle as follows: a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.'*
>
> *Dominant purpose, then, in my judgment, should now be declared by this House to be the touchstone.*[85]

Litigation privilege can therefore be described as the privilege of a client to withhold from disclosure:

- oral or written communications between the client or the lawyer (on the one hand) and third parties (on the other) or other documents created by or on behalf of the client or the lawyer;
- that come into existence once litigation is in contemplation or has commenced; and
- that come into existence for the dominant purpose of obtaining information or advice in connection with, or of conducting or aiding in the conduct of, such litigation.

35.4.1 Communications or other documents

Litigation privilege will apply to communications between the client or the lawyer and third parties for the relevant purpose. In the case of client–third party communications there is no requirement that the lawyer either requests the client

85 [1980] AC 521, 543-4 (emphasis added).

to contact the third party[86] or that the communications are actually referred on to the lawyer.[87] In fact, no lawyer need have been engaged at the time of the communication.[88] In light of the narrow definition of 'client' in *Three Rivers 5*, as restrictively applied in subsequent decisions, many 'internal' communications within a corporation risk being characterised as communications between the client and 'third parties'. For example, where, as in *Three Rivers 5* itself, the corporation sets up a specific committee to deal with the relevant litigation, communications between a member of that committee and a non-committee employee of the corporation are likely to be characterised as communications between client and third party subject to whether the employee is authorised to give instructions or receive advice on behalf of the corporation.

See Section 35.3.2.2

The privilege will also cover material, aside from communications, brought into existence in furtherance of the litigation purpose. The cases have traditionally spoken in terms of granting protection to the 'materials for the brief'.[89] A modern restatement of this principle is that, in an adversarial system 'each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations.'[90] As regards documents actually brought into existence by a client's lawyer, the better view is that these are in fact protected by legal advice privilege.[91] The 'materials for the brief' concept would apply to preparatory documents generated by the client that do not embody communications with third parties (such as a client's working notes or internal oral or documentary communications) but would not (so it was held in *ENRC*) apply to a document generated for the purpose of being shown to a prospective adversary, even if the document was not ultimately shared with that adversary. Andrews J held that according privileged status to the latter document would be inconsistent with the rationale of litigation privilege, which is to enable opposing parties to prepare their cases confidentially in the context of adversarial litigation.[92]

See Section 35.3

Litigation commenced or in contemplation 35.4.2

In view of the underlying rationale of litigation privilege (see above), the 'litigation' in question must be adversarial in nature.[93] Furthermore, the litigation must

86 *Southwark and Vauxhall Water Company v. Quick* (1878) 3 QBD 315, 320 (per Brett LJ), 322 (*per* Cotton LJ).

87 Ibid. at 320 (*per* Brett LJ), 323 (*per* Cotton LJ).

88 *Re Highgrade Traders Ltd* [1984] BCLC 151, 172 (*per* Oliver LJ); *Buttes Gas and Oil Co v. Hammer (No. 3)* [1981] QB 223, 243 (*per* Lord Denning MR).

89 *Southwark and Vauxhall Water Company v. Quick* (1878) 3 QBD 315, 320 (*per* Brett LJ); *Lyell v. Kennedy (No. 2)* (1883) 23 Ch D 387, 404 (*per* Cotton LJ).

90 *Three Rivers 6*, para. 52 (*per* Lord Rodger).

91 See also *Thanki*, paras. 2.60-2.62, 3.26.

92 *ENRC*, para. 58.

93 See *In re L (a Minor) (Police Investigation: Privilege)* [1997] AC 16 (HL) (litigation privilege was held to be inapplicable to the particular wardship proceedings in question, which were inquisitorial rather than adversarial in nature). The Upper Tribunal noted in *LM v. London Borough of*

be 'reasonably in prospect'.[94] This matter was considered by the Court of Appeal in *USA v. Philip Morris Inc*.[95] In summary, it is not sufficient if there is simply a general apprehension of future litigation.[96] The requirement that litigation be 'reasonably in prospect' is not satisfied unless parties seeking to claim privilege can show that they were aware of circumstances that rendered litigation between themselves and a particular person or class of persons a real likelihood rather than a mere possibility; identifying potential causes of action and defendants to possible claims falls short of the necessary threshold.[97] By the same token, however, litigation need not be likely, in the sense of there being more than a 50 per cent chance of it occurring.[98]

The English courts apply a common-sense approach. Hence, litigation may be considered reasonably in prospect even if the cause of action has not yet arisen[99] or the party has not yet decided whether to take legal advice.[100] If litigation was reasonably in prospect when the communication or document was made, it does not matter if that litigation never commences.[101] Moreover, the litigation in which the privilege is later relied on need not concern the same subject matter or the same parties as the litigation in respect of which the privilege originally arose.[102]

In the regulatory context, the question has arisen whether enforcement proceedings qualify as litigation for the purpose of establishing a claim to litigation privilege. For example, in *Tesco v. OFT*,[103] the Competition Appeal Tribunal was required to consider whether certain OFT enforcement proceedings were 'litigation' for this purpose. The decision concerned the OFT's investigation into dairy retail price-sharing between various supermarkets and dairy processors. In September 2007 the OFT issued a statement of objections against a number of undertakings, including Tesco, alleging violation of the prohibition on anticompetitive agreements and practices. The OFT issued a supplemental statement of objections, in support of its case, in July 2009 and made its infringement decision in July 2011. On Tesco's appeal to the CAT, the OFT sought disclosure from Tesco of records of interviews with employees of other companies allegedly

Lewisham [2009] UKUT 204 that *Re L* did not decide that there is never any litigation privilege in care proceedings but that their Lordships had confined themselves to cases where the filing of a report requires the leave of the court in order that documents already filed in the proceedings may be disclosed to the expert or that the child nay be examined.

94 *Hellenic Mutual War Risks Association (Bermuda) Ltd v. Harrison (The Sagheera)* [1997] 1 Lloyd's Rep 160, 166 (*per* Rix J); *USA v. Philip Morris Inc* [2004] EWCA Civ 330, CA, para. 68; *Three Rivers 6*, para. 83 (*per* Lord Carswell).

95 [2004] EWCA Civ 330.

96 Ibid., para. 68.

97 *Rawlinson & Hunter Trustees SA v. Akers* [2014] EWCA Civ 136, para. 24.

98 Ibid., para. 65.

99 *Mayor and Corporation of Bristol v. Cox* (1884) 26 Ch D 678 (*per* Pearson J).

100 *Guinness Peat Properties v. Fitzroy Robinson Partnership* [1987] 1 WLR 1027, 1035-1036 (*per* Slade LJ).

101 See *The Aegis Blaze* [1986] 1 Lloyd's Rep 203, 204 (*per* Parker LJ).

102 Ibid., para. 210.

103 [2012] CAT 6.

involved in the infringing conduct Tesco had conducted in the first half of 2011. Tesco resisted the application on the ground (among others) that the records were covered by litigation privilege.

The CAT refused the OFT's application for disclosure on the primary ground that such disclosure was not necessary, relevant and proportionate. However, it also considered the application of litigation privilege, finding that at the stage when Tesco contacted the potential witnesses the ongoing proceedings could properly be characterised as 'adversarial'. It was relevant that the statement, and supplementary statement, of objections had been issued and Tesco was contesting the allegations, that the OFT was determining Tesco's liability for a potential breach of the Competition Act and Tesco faced the possibility of a significant fine as a result, and that the proceedings were regarded as criminal for the purposes of Article 6 of the European Convention on Human Rights. The Chairman of the Tribunal also had regard[104] to the underlying rationale of fairness that underpins litigation privilege, finding that a fair procedure included the right of Tesco to present its case and to gather evidence and that, as a corollary, litigation privilege applied to the relevant contacts with third-party witnesses.

The decision of the CAT confirmed that entitlement to claim litigation privilege in the context of regulatory enforcement proceedings will depend on the specific circumstances of the regulatory procedure and the stage it has reached. Passmore suggests that as a general rule one might have thought that a contested process in which the tribunal controlling the proceedings is empowered to make some sort of ruling that has mandatory consequences for a participant that are either penal in nature (such as a prison sentence, a fine or other form of sanction such as a suspension from practice) or otherwise require the participant to do something he or she does not wish to do (such as pay damages, obey an injunction or give an undertaking not to do something) are ones in which the privilege should be available.[105]

However, the law in this area has been made much more complex by the recent decision of Andrews J in *ENRC*. In that case, the defendant, ENRC, claimed litigation privilege in respect of documents created during the course of an investigation conducted by ENRC's lawyers that was initially prompted by a whistleblower report. The documents were created against the background of an anticipated criminal investigation by the SFO and during a period of engagement between the SFO and ENRC (which the SFO contended was part of the self-reporting process).

While the judge accepted that ENRC contemplated that it would be subject to a raid by the SFO, and that it reasonably contemplated a criminal investigation by the SFO, she found that this did not amount to anticipation of adversarial litigation. This is hard to reconcile with the observations in *Tesco v. OFT* discussed above.

104 *Tesco v. OFT*, para. 46.
105 *Passmore*, para. 3-095.

Andrews J also rejected the submission that once ENRC contemplated a criminal investigation by the SFO, criminal prosecution was also in reasonable contemplation. In particular, she in effect drew a distinction between criminal and civil proceedings, finding that, for the purpose of a claim to litigation privilege where criminal proceedings are said to have been contemplated, the relevant party must have uncovered some evidence of wrongdoing before proceedings could be said to be in reasonable contemplation – otherwise there would be insufficient grounds for believing that a prosecution was likely. In this regard, the judge noted that there is an evidential test for the bringing of a criminal prosecution that requires the prosecutor to be satisfied there is a realistic prospect of conviction.[106] She held that unless the relevant party had uncovered evidence of wrongdoing it could not consider this test likely to be met, noting that '[t]he reasonable contemplation of a criminal investigation does not necessarily equate to the reasonable contemplation of a prosecution'.[107] In the *ENRC* case this meant that there could be no litigation privilege because ENRC had not adduced evidence that it knew, either before carrying out its internal investigation or during the course of the investigation, that there was 'a problem' so as to 'appreciate that it [was] realistic to expect a prosecutor to be satisfied that it ha[d] enough material to stand a good chance of securing a conviction'.[108] The implication of this approach would seem to be that for a party to establish that litigation is a real likelihood it must, in practice, adduce evidence that is itself likely to betray the privilege being asserted and would tend to be self-incriminating (because it would need to identify matters discovered during the investigation leading it to believe that prosecution was likely and not merely possible). This puts a party facing possible criminal proceedings in an invidious position: either it has to reveal potentially incriminating evidence, or it has to accept that it cannot effectively assert a claim to litigation privilege. It is very doubtful that this approach can be correct. It also seemingly ignores the possibility that the prosecuting authority may be in possession of information that may make a prosecution highly likely but is unknown to the potential suspect.

The decision in *ENRC* is subject to a possible appeal so it may be that this aspect of the decision will be reconsidered at appellate level. However, pending that appeal, establishing the anticipation of litigation in the criminal context has undoubtedly been made more difficult. The decision is also likely to make claims for litigation privilege in a regulatory context more problematic.

35.4.3 Dominant purpose

The dominant purpose for the communication or the production of the relevant document must have been either to obtain information or advice in connection with the litigation or to conduct or assist in the conduct of it. However, in keeping both with the general language adopted by Lord Edmund-Davies in *Waugh's* case

106 *ENRC* at para. 160.

107 Ibid., para. 151.

108 Ibid., para. 160.

and the overriding rationale underlying litigation privilege, it must be understood as applying to documents and communications produced in many aspects of the litigation process.[109]

See Section 35.4

The test of 'dominance' is necessarily framed at a certain level of generality. Moreover, it is accepted that in applying it, the court will have to accept that 'human motivation is rarely linear'.[110] A dominant purpose has been described as the ruling, prevailing or most influential purpose – in other words, a purpose that is of greater importance than any other.[111] As a consequence, a practical approach to ascertaining the pre-eminent purpose must necessarily be adopted. In particular, it is not necessary that it be the sole purpose. By the same token, however, it will not suffice if the relevant litigation purpose is merely a secondary, or merely co-equal, purpose.[112] The courts will examine 'purpose' from an objective standpoint,[113] looking at all the relevant evidence, including evidence of the relevant person's subjective purpose.[114]

The 'dominant purpose' issue was considered by the Court of Appeal in *Rawlinson & Hunter Trustees SA v. Akers.*[115] In that case the claimants sought disclosure from the defendants, joint liquidators of certain companies in which the Tchenguiz family had an interest, of five reports prepared by Grant Thornton LLP that, the claimants said, had played a key role in the preparation of, and informed the content of, material placed before a judge in support of the application by the Serious Fraud Office (SFO) for search warrants of the homes and business premises of Robert and Vincent Tchenguiz. The joint liquidators resisted disclosure on the ground of litigation privilege. Tomlinson LJ explained that the identification of dominant purpose presented the biggest challenge, since 'plainly the first duty of the liquidators was to obtain information simply to establish what if any assets or liabilities existed and what if any steps were open to the liquidators to collect in the assets or to reduce or discharge the liabilities'.[116] The claim to privilege failed in circumstances where the evidence put forward by the joint liquidators in support of that claim failed to grapple with the need to establish which of dual or even multiple purposes was dominant. The dominant purpose must relate to the conduct of actual or contemplated litigation. This includes advice relating to settlement of that litigation once it is in train. However, Andrews J held in *ENRC* that litigation privilege does not extend to third-party documents created to obtain legal advice as to how best to *avoid* contemplated litigation (even if

See Section 35.4.2

109 In support of this view, see *Passmore*, para. 3.010.

110 See to this effect *Esso Australia Resources Limited v. The Commissioner of Taxation* (1999) 201 CLR 49, para. 65 (*per* McHugh J), para. 93 (*per* Kirby J).

111 JD Heydon, *Cross on Evidence* (8th Australian edn., 2010), 891.

112 *Waugh v. British Railways Board* [1980] AC 521, 532 (*per* Lord Wilberforce); *Rawlinson & Hunter Trustees SA & Ors v. Akers & Anr* [2014] EWCA Civ 136; *Rawlinson & Hunter Trustees SA & Ors v. Director of the SFO* [2014] EWCA Civ 1129, para. 19.

113 *Price Waterhouse (a firm) v. BCCI Holdings (Luxembourg) SA* [1992] BCLC 583, 591 (*per* Millett J).

114 *Three Rivers 5*, para. 35.

115 [2014] EWCA Civ 136.

116 Ibid., para. 15.

that entails seeking to settle the dispute before proceedings are commenced).[117] The judge considered that this would contradict the underlying rationale for the privilege. It is hard to see how a distinction can be drawn as a matter of principle between advice as to how to settle litigation, and advice as to how to avoid it, particularly when litigation privilege is concerned with anticipated litigation as well as actual litigation. It is also likely to prove to be a very difficult distinction to draw in practice and may, for example, give rise to arguments as to whether litigation has 'commenced', in order to determine whether the party claiming privilege was trying to settle or avoid it.

35.5 Common interest privilege

Common interest privilege (like joint interest privilege, which is not discussed here) can be said to be derivative insofar as it relies on establishing the existence of a primary ground of privilege (whether legal advice or litigation privilege) and then determining the circumstances in which multiple persons become entitled to assert it.

Common interest privilege arises in circumstances where party A voluntarily discloses a document that is privileged in its hands to party B, who has a common interest in the subject matter of the communication, or in the litigation in connection with which the document was produced.[118] Where this occurs, provided disclosure is given in recognition that the parties share a common interest,[119] the document will also be privileged in the hands of party B. Recent judicial formulation of this principle is found in the following terms:

> *[W]here a communication is produced by or at the instance of one party for the purposes of obtaining legal advice or to assist in the conduct of litigation, then a second party that has a common interest in the subject matter of the communication or the litigation can assert a right of privilege over that communication as against a third party.*[120]

The function of common interest privilege is not simply to prevent party A's privilege from being waived.[121] Where a common interest is made out, it enables party B actually to assert privilege as against a third party. Notwithstanding some terminological confusion, it seems that (unlike joint interest) common interest privilege, properly so-called, does not give party B the right to obtain disclosure of

117 *ENRC*, paras. 60-61.

118 See generally *Thanki*, paras. 6.14-6.19.

119 See *Newcrest Mining (WA) Ltd v. Commonwealth of Australia* (1993) 113 ALR 370, 372, Australian Federal Court.

120 *Winterthur Swiss Insurance Company and another v. AG (Manchester) Ltd (in liquidation) and others* [2006] EWHC 839 (Comm), (12 April 2006), (*The TAG Group Litigation*) para. 78 (*per* Aikens J).

121 The fact that, independently of common interest, the disclosure of privileged material to third parties need not involve a broader loss of confidentiality or waiver of privilege is discussed below.

otherwise privileged documents from party A.[122] The rationale of common interest privilege can be explained as follows:

> *It is the communication in confidence to another interested party [in circumstances giving rise to a common interest] that requires the privilege to be available in respect of the document in his hands, whether or not he had the right to require that the document be disclosed to him.*[123]

In other words, common interest privilege is concerned with voluntarily shared privileged information. The aspect of voluntarism is important in understanding the limitations of common interest privilege.[124]

It ought to follow that common interest privilege can be waived by the primary privilege holder.[125] This is the logical conclusion if common interest privilege involves the voluntary disclosure of information. It would be an undue fetter on the primary privilege holder to say that he or she cannot waive privilege without the consent of all those parties with whom he or she has chosen to share his or her advice.

Furthermore, insofar as the proper focus of the doctrine is therefore on the voluntary disclosure of privileged material by party A, it seems that the moment when a common interest must be established is when disclosure occurs.[126]

Although the doctrine is well established, its precise scope continues to be clarified and its requirements must therefore be understood by reference to developments in the recent case law. The doctrine of common (as distinct from joint) interest privilege was first recognised by the Court of Appeal in *Buttes Gas and Oil Co v. Hammer (No. 3)*.[127] A number of statements in that case indicated potential

---

122 For support for this view see *Thanki*, para. 6.17 and *Passmore* para. 6.035. The point appears to have been misunderstood in *The TAG Group Litigation*, where it was held that 'common interest privilege' could operate as a 'sword' to obtain disclosure against party A as well as a 'shield' to deny disclosure to third parties. It seems that that case is therefore best understood as a case of joint interest privilege.

123 Ibid. 645 (emphasis added).

124 *Commercial Union Assurance Co plc v. Mander* [1996] 2 Lloyd's Rep 640, 647-8.

125 See, for example, N Andrews, *English Civil Procedure* (2003), para. 27.63. Cf C Tapper, *Cross and Tapper on Evidence* (12th edn., 2010), 445, where it is stated, without citing any authority, that common interest privilege cannot be waived by one of the parties, without the authority of the other.

126 This point has not received detailed consideration. In *The TAG Group Litigation*, it seems that Aikens J wrongly considered that the relevant time was when the privileged material was first created. However, insofar as he was considering the use of 'common interest' as a 'sword', it appears that his remarks should properly be understood as applying to cases of joint interest. Equally, in *Robert Hitchins Limited v. International Computers Limited* (10 December 1996, CA), Peter Gibson LJ appeared to consider that common interest could not be made out where such an interest did not exist at the time the material first came into being. However, as discussed below, it seems that this did not affect the result in the case, which is probably best seen as a case of common interest privilege.

127 [1981] QB 223, CA. The Court of Appeal's decision was reversed on appeal. However, the House of Lords' ruling (see [1982] AC 888) left unaffected the issue of common interest privilege and the

limitations to the doctrine, which, subsequent applications of it have clarified, do not in fact restrict its application.

First, in *Buttes* Lord Denning MR described common interest privilege as being 'a privilege in aid of anticipated litigation'.[128] While this confirms that one core application of the doctrine will be to circumstances in which a common interest arises out of parties' shared concerns regarding prospective litigation (discussed further below), it is now clear that the doctrine is not limited to this context. Hence in *Svenska Handelsbanken v. Sun Alliance and London Insurance plc*,[129] Rix J stated that:

> *It seems to me that if legal advice obtained by one person is passed on to another person for the sake of informing that other person in confidence of legal advice which that person needs to know by reason of a sufficient common interest between them, then it would be contrary to the principle upon which all legal professional privilege is granted to say that the legal advice which was privileged in the hands of the first party should be lost when passed over in confidence to the second party, merely because it was not done in the context of pending or contemplated litigation.*

Support for the fact that common interest privilege can apply outside the context of anticipated litigation can also be found within Commonwealth authority.[130]

The second relevant aspect of *Buttes* concerns whether the parties to the common interest need to have retained the same lawyer (though not under a common retainer). Brightman LJ expressed the doctrine (at p. 267) in terms of the existence of 'a common interest and a common solicitor'. However, it does not appear that either of the other Lords Justice viewed the existence of a common lawyer as a requirement.[131] In some subsequent cases, deference has been paid to Brightman LJ's comments to the extent of suggesting that, while a common lawyer is not required, the commonality of interest requires that the parties could have used the same lawyer.[132] This has also been put in terms of the retention of separate

Court of Appeal's decision continues to be seen as the seminal authority for that doctrine.

128 Donaldson LJ (at 251-252) and Brightman LJ (at 267) each spoke of 'contemplated or pending litigation'.

129 [1995] 2 Lloyd's Rep 84 at p. 88.

130 See in particular *Unilateral Investments v. VNZ Acquisitions Ltd* [1993] 1 NZLR 468, 476, 478 (New Zealand High Court).

131 Donaldson LJ in fact pointed out (at pp. 251-252) that, in that particular case, the parties did not initially share a lawyer. Lord Denning also appears to have contemplated that the parties may have separate legal representation. This is implicit to his comments (at p. 243) that the parties may 'have consulted lawyers on the self-same points' and that each 'can collect information for the use of his or the other's legal adviser'.

132 See *Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd (Note)* [1992] 2 Lloyd's Rep 540, 542 (*per* Saville J); *USP Strategies plc v. London General Holdings Limited* [2004] EWHC 373 (Ch), para. 14, The Times, 30 April 2004 (*per* Mann J).

lawyers being a *prima facie* indication that the parties did not have the necessary common interest.[133]

However, even this limited expression of the need for a putative common lawyer has been criticised in the Australian authorities, in favour of a broader appraisal of common interest.[134] This also now appears to be the approach under English law.[135]

Without prejudice privilege 35.6

The 'without prejudice' rule applies to exclude all negotiations genuinely aimed at settlement from being given in evidence. As with legal professional privilege, no adverse inferences can be drawn against a party invoking the privilege.[136] The rule has two justifications:

- the public policy of encouraging parties to negotiate and settle their disputes out of court; and
- an implied agreement arising out of what is commonly said to be the consequences of offering or agreeing to negotiate without prejudice.[137]

The first justification is the prevailing justification and the second is now doubted and regarded as being at best of limited application.[138] In this context, 'settlement' means 'the avoidance of litigation'.[139] Therefore, the rule is not limited to negotiations aimed at resolving the legal issues between the parties but applies to any negotiations aimed at avoiding or reducing the scope of litigation, irrespective of whether they directly address or seek to resolve the relevant legal issues.

The rule requires the existence of a dispute and an attempt to compromise it.[140] The crucial consideration is whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not

133 *Hellenic Mutual War Risks Association (Bermuda) Ltd v. Harrison* [1997] 1 Lloyd's Rep 160, 172 (*per* Rix J).

134 See *Bulk Materials (Coal Handling) Services Pty Ltd v. Coal and Allied Operations Pty Ltd* (1988) 13 NSWLR 689, 695 (*per* Giles J); *Network Ten Ltd v. Capital Television Holdings Ltd* (1995) 35 NSWLR 275, 282, Supreme Court of New South Wales (*per* Giles J).

135 In *Formica Ltd v. Export Credits Guarantee Department* [1995] 1 Lloyd's Rep 692, 699 Colman J framed the issue in the following terms: 'The protection by common interest privilege of documents in the hands of someone other than the client must pre-suppose that such third party has a relationship with the client and the transaction in question which, in relation to the advice or other communications, brings that third party within that ambit of confidence which would prevail between the legal adviser and his immediate client. . . . the essential question in each case is whether the nature of their mutual interest in the context of their relationship is such that the party to whom the documents are passed receives them subject to a duty of confidence which the law will protect in the interests of justice'.

136 *Reed Executive plc v. Reed Business Information Ltd* [2004] 1 WLR 3026, para. 36.

137 See, for example, *Oceanbulk Shipping & Trading SA v. TMT Asia* [2011] 1 AC 662, paras. 24 and 27.

138 *Barnetson v. Framlington* [2007] 1 WLR 2443, para. 24.

139 *Forster v. Friedland* (CA, 10 November 1992).

140 *Bradford & Bingley plc v. Rashid* [2006] 1 WLR 2066, para. 81.

agree.[141] The use of a 'without prejudice' heading on a letter is not decisive as to whether the privilege applies but does give rise to a rebuttable presumption that the document was intended to be a negotiating document.[142] If a letter is written in reply to a letter written without prejudice or is part of a continuing sequence of negotiations, it will be privileged and cannot be given in evidence without the consent of both parties.[143]

While there was previously some authority to suggest that the without prejudice rule only applied to prevent disclosure of 'admissions', it now appears to be settled that the rule is not limited in this way but that without prejudice discussions as a whole will be protected.[144]

The without prejudice rule is subject to a number of exceptions – it will not apply in the following circumstances:

- *Unambiguous impropriety:* one party may be allowed to give evidence of what the other said or wrote in without prejudice discussions if the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety'.
- *Proof, interpretation and rectification of an agreed settlement:* the rule will not operate to render inadmissible an actual compromise agreement.
- *Misrepresentation, fraud or undue influence:* evidence of without prejudice negotiations is admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence.
- *Estoppel:* where an estoppel founded on a statement made in without prejudice negotiations is alleged, the relevant without prejudice material will be admissible to determine the existence of the estoppel.
- *Reasonableness of mitigating steps:* where there is an issue as to whether a party has acted reasonably to mitigate loss in the conduct and conclusion of negotiations for a settlement the without prejudice material may be examined for that purpose.
- *Delay:* evidence of negotiations may be given to explain delay or apparent acquiescence.[145]

141 *Barnetson v. Framlingham Group* [2007] 1 WLR 2443 (CA).

142 *Thanki*, paras. 7.10-7.11.

143 *Dixons Stores Group v. Thames Television* [1992] 1 All ER 349.

144 *Oceanbulk Shipping & Trading v. TMT Asia Limited* [2011] 1 AC 662, [27]; *Somatra v. Sinclair Roche & Temperley* [2000] 1 WLR 2453, para. 22.

145 See *Thanki*, paras. 7.29-7.38.

Since the without prejudice privilege belongs to both parties, it cannot be waived without both parties' consent, at least in the context of civil litigation.[146] This is because it is categorised as a joint privilege.[147] However, there is now some limited authority for the proposition that a party to negotiations with a regulatory authority may unilaterally waive without prejudice privilege in respect of communications with that authority if it subsequently puts the basis of the regulator's decision in issue in civil proceedings.

The law took an unusual and unexpected turn in this direction with the recent decision of Birss J in *Property Alliance Group Ltd v. Royal Bank of Scotland plc*.[148] The case concerned alleged LIBOR fixing by RBS employees. The claimant, PAG, had purchased interest rate swaps from RBS in 2004–2008 that had been referenced to GBP LIBOR. PAG claimed that it had entered into the swaps in reliance on certain misrepresentations to the effect that RBS was not rigging LIBOR (PAG also relied on alleged implied terms to that effect). In support of its plea that the representations were false, PAG referred to the contents of the final notice issued by the Financial Services Authority (FSA), the predecessor body to the FCA, against RBS, which had found that RBS had manipulated Swiss Franc LIBOR and Japanese Yen LIBOR; but otherwise made no findings in relation to other currency denominations. The FSA final notice had been issued following a settlement reached between RBS and the FSA.

In its defence, RBS admitted that it had manipulated Swiss Franc LIBOR and Japanese Yen LIBOR but denied any wrongdoing in relation to GBP LIBOR. In support of that denial, RBS pleaded: '[f]or the avoidance of doubt, there have been no regulatory findings of misconduct on the part of RBS in connection with GBP LIBOR.'

PAG sought disclosure of a wide range of documents over which RBS claimed both without prejudice privilege and also legal professional privilege.[149] RBS claimed that communications passing between it and the FSA between December 2012 and January 2013 were subject to without prejudice privilege on the grounds that they recorded negotiations with a view to the settlement announced in February 2013. The FCA wrote a letter in support of RBS's claim to without prejudice privilege on the grounds of public interest.

The judge rejected RBS's right to withhold disclosure of these documents. He held that by pleading in its defence that the regulators had not found any misconduct relating to GBP LIBOR, RBS 'had itself put in issue the basis on which the regulatory findings were made'[150] and as a result RBS had to give disclosure of

146 *Walker v. Wilsher* (1889) 23 QBD 335, at 337; *Reed Executive plc v. Reed Business Information Ltd* [2004] 1 WLR 3026, para. 19.

147 D Vaver, 'Without Prejudice Communications – their admissibility and effect' (1974) 9 UBC Law Review 85, at p. 105; Heydon, *Cross on Evidence* (10th edn.) [25350].

148 *Property Alliance Group Ltd v. Royal Bank of Scotland plc.* [2015] EWHC 1557 (Ch).

149 RBS relied on the doctrine of limited waiver. The part of the decision dealing with limited waiver is uncontroversial and consistent with previous authority (see further below).

150 *Property Alliance Group Ltd v. Royal Bank of Scotland plc.* [2015] EWHC 1557 (Ch), para. 94.

the communications.[151] The judge's reasoning, while difficult to discern, appears to have been that communications on which the settlement was based might have been incomplete, mistaken or misleading.[152] As he explained:

> *If the communications on which the Final Notice was based were false, then to allow RBS to rely on what is absent from the Final Notice but at the same time to withhold inspection of those communications would compound the falsehood. That will not do.*[153]

PAG argued that the sort of regulatory context in which the communications between RBS and the FSA took place was not within the without prejudice rule.[154] Birss J rejected the submission that the without prejudice rule was inapplicable, finding that 'the public policy on which the without prejudice rule is based is capable of applying in order to promote the settlement of FCA investigations',[155] but suggested that there is a particular kind of privilege covering settlement negotiations between firms and the FCA (and presumably therefore other regulators) that is 'analogous with' but 'not identical to' without prejudice privilege.[156] Unlike the normal without prejudice rule (where the consent of both parties is required for any waiver of the privilege), this 'analogous' type of without prejudice rule could, according to Birss J, be waived unilaterally by RBS putting the basis on which a final notice was decided in issue in civil proceedings, without the consent of the FCA. This decision is difficult to understand, in particular why the judge decided he needed to fashion a new type of privilege and why this new type of without prejudice privilege is apparently capable of being waived unilaterally.

In the event, RBS applied to amend its defence so as to remove the paragraph that Birss J had held put in issue the basis of the FSA's findings. Birss J held that by doing so RBS could prevent the waiver that had been identified in his earlier judgment from taking place.[157] He held that it was open to a party to decide not to rely on privileged material and therefore amend the relevant pleading, in which case, if the amended pleading was permitted, no waiver would have taken place merely by virtue of having been pleaded previously. Any substantive need for RBS to appeal on the waiver aspect of the first decision of Birss J therefore fell away (and RBS's appeal in relation to other aspects of the decision was in any event settled). The law has accordingly been left in a state of some uncertainty on this topic.

---

151 For the same reason – namely that RBS had 'put in issue' the basis on which regulatory findings were made – Birss J held that RBS was not entitled to withhold from inspection the six privileged documents that it had shared with regulators (see para. 114). This aspect of the decision is discussed below at Section 35.8, but must be wrong.

152 *Property Alliance Group Ltd v. Royal Bank of Scotland plc.* [2015] EWHC 1557 (Ch), para. 92.

153 Ibid., para. 96.

154 Ibid., para. 59.

155 Ibid., para. 87.

156 Ibid., para. 99.

157 [2015] EWHC 3272 (Ch), para. 69.

Exceptions to privilege 35.7

The crime-fraud exception 35.7.1

Aside from certain very limited statutory exceptions where privilege may exceptionally be overridden, the principal situation[158] where communications may not be protected by privilege is the crime-fraud exception. In broad terms, this exception provides that there is no privilege in documents or communications that are themselves part of a crime or a fraud, or that seek or give legal advice about how to facilitate the commission of a crime or a fraud. This exception applies to both legal advice privilege and litigation privilege.[159]

See Section 35.7.2

It is important to bear in mind the truly exceptional nature of the crime-fraud exception. A court will not lightly deprive a party of the fundamental protection of legal professional privilege,[160] particularly where the privilege is challenged on an interlocutory application.[161] The reason for such caution is plain: once the court determines that the veil of privilege is to be lifted, and that the privileged documents are to be disclosed, there is no return. The holder's right to privilege will have been irretrievably destroyed.

The solicitor need not be involved in the crime or fraud for the exception to apply: the solicitor may be wholly innocent.[162]

Notwithstanding its exceptional nature, it may be that regulators or prosecutors in certain circumstances will wish to challenge a party's claim to privilege on the basis of this exception. To successfully challenge that claim the regulator or prosecutor will need to establish that:

- there was a specific dishonest criminal (i.e., fraudulent) purpose; and
- the privileged material was produced in furtherance of or in preparation for that purpose.[163]

---

158 The Court of Appeal held in the recent case of *R v. Brown (Edward)* [2016] 1 WLR 1141 that in addition to the fraud/iniquity exception, the normally absolute rule of privilege is capable of further qualification at common law. The Court of Appeal held that it was appropriate, in what was likely to be an extremely narrow band of cases and by way of an additional common law qualification or exception to the inviolable nature of legal professional privilege, to impose a requirement that particular individuals could be present at client–lawyer discussions if there was a real possibility that the discussions were to be misused for a purpose and in a way involving impropriety amounting to an abuse of the privilege that justified interference. In this case, it was appropriate for two nurses to be present with and handcuffed to the appellant, who was in detention in a high security psychiatric hospital, when he consulted with his lawyers because there was reason to think he would otherwise take that opportunity to harm himself or others.

159 *Dubai Aluminium Co Ltd v. Al Alawi* [1999] 1 WLR 1964; *Dubai Bank v. Galadari (No. 6)* The Times, 22 April 1991; *Kuwait Airways Corporation v. Iraqi Airways Company* [2005] 1 WLR 2734.

160 *R v. Cox and Railton* (1884) 14 QBD 153 at 176.

161 *Derby & Co Ltd v. Weldon (No. 7)* [1990] 1 WLR 1156, 1173.

162 *Banque Keyser Ullman SA v. Skandia (UK) Insurance Co. Ltd* [1986] 1 Lloyd's Rep 336, 337.

163 *Butler v. Board of Trade* [1971] 1 Ch 680 at 689C *Per* Goff J: 'What has to be shown *prima facie* is not merely that there is a *bona fide* and reasonably tenable charge of crime or fraud but a *prima facie* case that the communications in question were made in preparation for or in furtherance or as part of it.'

As to the evidential burden on the party invoking the exception, there must be some *prima facie* evidence of the crime or fraud, a mere allegation or charge of crime or fraud is not sufficient.[164] In a case where the crime-fraud relied on is one of the issues in the action, the applicable standard is the 'very strong *prima facie* case'; whereas in a case where the issue of fraud is freestanding it may be sufficient to establish a 'strong *prima facie* case'.[165]

There is some debate as to the proper scope of the exception. In the authors' view, being an exceptional principle, the crime-fraud exception applies only in circumstances where the conduct in question amounts to a crime or a fraud (i.e., involving an element of dishonesty).[166] There is, however, some suggestion in some texts and cases that the scope of the exception has been broadened to cases arguably not involving crime or fraud (which has also led to the exception sometimes being termed the 'iniquity exception').

The widening of the exception to encompass conduct falling short of dishonesty is said to emanate from the Court of Appeal's decision in *Barclays Bank v. Eustice*.[167] However, it is doubtful that *Eustice* should be taken as authority for extending the scope of the crime-fraud extension. Though using the language of 'iniquity', in the context of civil proceedings, the Court of Appeal nonetheless was clear that the impugned conduct was a type of fraud (in this case, on the creditors), within the meaning of section 423 of the Insolvency Act 1986. Equally, in *JSC BTA Bank v. Ablyazov* Popplewell J characterised Mr Ablyazov's conduct in terms of concealment and deceit, namely as dishonest and fraudulent.[168]

Even if, contrary to the above, *Eustice* is understood as having extended the crime-fraud exception to conduct falling short of dishonesty, the basis for such extension is dubious, being based on an authority – *Ventouris v. Mountain*[169] – that was not about the crime-fraud exception at all. Indeed in *McE v. Prison Service of Northern Ireland*[170] Lord Neuberger left open the question as to whether *Eustice* had been correctly decided.

A further issue that may arise is whether the dishonest purpose needs to be a purpose of the privilege holder, or whether a dishonest purpose of a third party will suffice. The decision of the House of Lords in *R v. Central Criminal Court,*

164 *O'Rourke v. Darbishire* [1920] AC 581, 604, 614; *Derby & Co v. Weldon (No. 7)* [1990] 1 WLR 1156,1166.

165 *Kuwait Airways Corporation v. Iraqi Airways Corp (No. 6)* [2005] 1 WLR 2734, para. 42, *per* Longmore LJ.

166 *Crescent Farm (Sidcup) Sports Ltd v. Sterling Offices Ltd* [1972] Ch 553, 565 (*per* Lord Goff); *Gamlen Chemical Co (UK) Limited v. Rochem Ltd (No. 2)* 7 December 1979 (CA).

167 [1995] 1 WLR 1238.

168 [2014] EWHC 2788 (Comm) at para. 98: 'The evidence establishes at least a very strong *prima facie* case that from the moment Mr Ablyazov engaged Clyde & Co he was bent on a strategy of concealment and deceit in relation to his assets which would involve perjury, forgery and contempt as and when such was required for that purpose.'

169 [1991] 1 WLR 607.

170 [2009] 1 AC 908, para. 109.

ex p Francis & Francis,[171] followed in *BBGP Managing General Partner Limited v. Babcock and Brown*[172] suggests that it may be sufficient if a criminal or dishonest purpose of a third party, not the privilege holder, can be established to the requisite evidential standard. However, those cases do not address the situation where the party claiming privilege is also the party against whom the criminal conduct is alleged.

While these points currently remain untested, it is suggested that the requirements for establishing the crime-fraud exception are likely to present some difficulty for regulators and prosecutors where the privilege holder is a company but where a dishonest or criminal purpose can only be established against certain individuals. In particular, it does not follow that because the criminal or fraudulent purposes of one or more individuals can be established, the necessary fraudulent purpose of the corporate is established. Whether it can be, will depend on complex issues of attribution and the doctrine of identification in the criminal context.

A case of particular interest in the regulatory context is *CITIC Pacific Ltd v. Secretary for Justice and anor*,[173] in which the Hong Kong Court of Appeal considered the application of the crime-fraud exception in the context of alleged fraud and breach of listing rules by a company (CITIC) listed on the Hong Kong Stock Exchange. Hong Kong's Securities and Futures Commission (SFC) had commenced investigating why CITIC had delayed a profit warning in October 2008, during the financial crisis. As part of its investigation into alleged 'defalcation, fraud, misfeasance and other misconduct' on the part of CITIC's management, the SFC sought various documents, including privileged documents, which CITIC subsequently provided to it. The police commenced criminal investigations and CITIC learned that the SFC had passed the privileged documents to the United States Department of Justice for use in the criminal proceedings. CITIC issued an application for an order that the privileged documents be returned on the basis that privilege had been waived for the limited purpose only of the SFC investigation. The application was resisted by the Department of Justice, *inter alia*, on the basis that the documents were created by certain of the persons responsible for the management of CITIC for the purposes of the fraud, such that the crime-fraud exception applied.

The Court of Appeal (reversing the decision of Wright J) found that the crime-fraud exception had not been made out since there needed to be evidence of a fraudulent purpose behind the seeking and obtaining of the advice by the relevant directors of CITIC, which had not been established, for there to be the necessary causal relationship between the advice received and the fraudulent conduct.

The decision in *CITIC* is instructive in demonstrating a cautious approach by an appellate court to the encroachment of legal professional privilege where the crime-fraud exception is invoked by a prosecuting authority in the context of, and (presumably) in aid of, anticipated criminal proceedings.

171 [1989] 1 AC 346.
172 [2011] Ch 296.
173 [2012] 2 HKLRD 701.

35.7.2 Statutory exceptions

Previously, the courts did not require a great deal of persuasion that Parliament had intended to override legal professional privilege.[174] That is no longer the case.[175] For example, statutory powers requiring the production of documents would generally be deemed to exclude the right to demand documents subject to legal professional privilege. Any exception to this rule would have to be explicitly supported by primary legislation.[176] Explicit support would require clear language or necessary implication. A necessary implication in this area is not an exercise in interpretation; it is a matter of express language and logic.[177] A necessary implication arises only where the legislative provision would be rendered inoperative or its object largely frustrated in its practical application if the privilege were to prevail.[178] Any curtailment of privilege could only be to the extent reasonably necessary to meet the ends that justify the curtailment.[179]

The most significant exception in the regulatory context is covert surveillance under the Regulation of Investigatory Powers Act 2000 (RIPA).[180] However, if covert surveillance is likely to result in the acquisition of knowledge of matters subject to legal professional privilege, the appropriate authorisations or approval cannot be made unless there are exceptional and compelling circumstances. Unless that risk can be entirely removed, steps must be taken to ensure that any such information will not be used for the purpose of further investigations or during the course of any subsequent criminal trials.[181]

35.8 Loss of privilege and waiver

Although privilege, once established, will endure indefinitely, it may be lost, principally in two ways. First, the party entitled to assert privilege may waive the right. This can occur expressly, for example, by choosing to place privileged

174 See, for example, *R v. Inland Revenue Commissioners, ex p Lorimer* [2000] STC 751.

175 Although *R (Morgan Grenfell & Co Ltd) v. Special Commissioner of Income Tax* [2003] 1 AC 563, HL is regarded as the landmark ruling in this area, *R v. Secretary of State for the Home Department, ex p Daly* [2001] 2 AC 532, paras. 5, 31, HL is of equal significance. These cases applied the more general principle that a statute is generally not intended to override fundamental rights: *R v. Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131, HL; *McE v. Prison Service of Northern Ireland* [2009] 1 AC 908, paras. 96-97, HL (*per* Lord Carswell).

176 *R (Morgan Grenfell & Co Ltd) v. Special Commissioner of Income Tax* [2003] 1 AC 563, para. 8; *General Mediterranean Holdings SA v. Patel* [2000] 1 WLR 272; *R v. Secretary of State for the Home Department, ex p Daly* [2001] 2 AC 532; *Bowman v. Fels* [2005] 1 WLR 3083, paras. 70-91, CA. See also *Baker v. Campbell* (1983) 153 CLR 52.

177 *R (Morgan Grenfell & Co Ltd) v. Special Commissioner of Income Tax* [2003] 1 AC 563, para. 45 (*per* Lord Hobhouse).

178 *Daniels Corporation International Pty Ltd v. Australian Competition and Consumer Commission* (2002) 213 CLR 543, para. 43 (*per* McHugh J).

179 *R v. Secretary of State for the Home Department, ex p Daly* [2001] 2 AC 532, paras. 5 (*per* Lord Bingham) and 31 (*per* Lord Cooke).

180 See *McE v. Prison Service of Northern Ireland* [2009] 1 AC 908. Other limited statutory exceptions are set out in *Thanki*, para. 4.82.

181 *R v. Turner (Elliott Vincent)* [2013] EWCA Crim 643.

material before the court. For this purpose, the partial disclosure of a privileged document will usually involve a waiver of privilege in respect of the whole document.[182] Waiver will also occur by necessary implication in certain proceedings (implied waiver). For example, where a client sues a lawyer, the client will be taken impliedly to waive privilege in respect of those documents arising under the retainer subject to dispute.[183]

The second principal circumstance in which privilege will be lost is where there is a loss of confidentiality. As discussed above, the confidentiality of the communication or document is a condition precedent to its being privileged. However, the significance of this requirement should not be misunderstood. It is well established that a privileged document does not lose its quality of confidence simply because it is disclosed to persons other than the client and the lawyer. Plainly, if a document has been made available to the general public, all confidence (and with it privilege) will have been lost.[184] However, where privileged material is disclosed to a limited number of third parties in circumstances expressly or impliedly preserving the overall confidentiality as against the rest of the world, privilege will be maintained. This point is well illustrated by an example cited with approval by the English courts:

> *If A shows a privileged document to his six best friends, he will not be able to assert privilege if one of the friends sues him because the document is not confidential as between him and the friend. But the fact six other people have seen it does not prevent him claiming privilege as against the rest of the world.*[185]

It has therefore been accepted that where a client disseminates a record of privileged material either within its own corporation or to third parties confidentiality will not necessarily be lost.[186] It is a separate question whether the party to whom the documents are disclosed acquires a right to assert privilege by virtue of a common interest.

See Section 35.5

As noted above, in *Property Alliance Group Ltd v. Royal Bank of Scotland plc*[187] it was suggested that privilege can be lost by a party 'putting something into issue'.

182 *Great Atlantic Insurance Co. v. Home Insurance Co.* [1981] 1 WLR 529.

183 See *Paragon Finance v. Freshfields* [1999] 1 WLR 1183. An implied waiver may, however, be limited: see *Eurasian Natural Resources Corporation v. Dechert* [2016] EWCA Civ 375.

184 See (in the general context of an action for breach of confidence) *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 AC 109, 177, where Sir John Donaldson MR said: 'As a general proposition, that which has no character of confidentiality because it has already been communicated to the world, i.e., made generally available to the relevant public, cannot thereafter be subjected to a right of confidentiality: *O. Mustad & Son v. Dosen* (Note) [1964] 1 WLR 109. However, this will not necessarily be the case if the information has previously only been disclosed to a limited part of that public.'

185 *USP Strategies v. London General Holdings* [2004] EWHC (Ch) 373, para. 19 (*per* Mann J); *Gotha City v. Sotheby's* [1998] 1 WLR 114, CA, para. 119 (*per* Staughton LJ).

186 *Gotha City v. Sotheby's* [1998] 1 WLR 114, CA; *USP Strategies v. London General Holdings* [2004] EWHC (Ch) 373.

187 [2015] EWHC 1557 (Ch).

This aspect of the decision must be wrong: legal professional privilege is absolute unless waived or overridden by statute. There is no balancing act to be carried out with some competing public interest. It may be that the reference to 'putting something into issue' was a confusion with the doctrine of collateral waiver, as to which see further below. However, collateral waiver requires some form of 'deployment' of the privileged material, not simply that a relevant matter is put in issue.

35.8.1 Limited waiver

Limited waiver is achieved where a party discloses a privileged document, or communicates privileged information, to a limited number of third parties in circumstances expressly or impliedly preserving the overall confidentiality of the document or information as against the rest of the world. It is well established that in such circumstances the disclosing party does not lose privilege in the document.[188]

Limited waiver may frequently arise in a regulatory context. In *B v. Auckland District Law Society*[189] in the course of investigating a complaint against a law firm, certain privileged documents had been handed over to counsel appointed by the Law Society. The letter handing over the documents stated that the documents were made available to counsel for the limited purposes of the investigation and 'on the express basis that in doing so privilege is not waived.' The Law Society sought to use the documents in subsequent disciplinary proceedings brought against the law firm, on the basis that the privilege had been 'let out of the bag'. The Privy Council rejected this submission. Lord Millett held:

> *It does not follow that privilege is waived generally because a privileged document has been disclosed for a limited purpose only. . . . The question is not whether privilege has been waived, but whether it has been lost. It would be unfortunate if it were. It must often be in the interests of the administration of justice that a partial or limited waiver of privilege should be made by a party who would not contemplate anything which might cause privilege to be lost, and it would be most undesirable if the law could not accommodate it.*[190]

There was further development of the limited waiver doctrine in *Berezovsky v. Hine*.[191] Mr Berezovsky's lawyers had sent privileged draft witness statements in relation to Mr Berezovsky's action against Mr Abramovich to solicitors acting for his friend, Mr Patarkatsishvili, in an asylum application as it was thought they might be useful. Mr Patarkatsishvili died and his estate wanted to use the statements in subsequent litigation against Mr Berezovsky. Mann J held that as the statements had been disclosed by Mr Berezovsky's solicitors without any express

188 *Gotha City v. Sotheby's* [1998] 1 WLR 114); *Nederlandse Reassurantie Groep Holding NV v. Bacon & Woodrow and others* [1995] 1 All ER 976; *USP Strategies plc v. London General Holdings* [2004] EWHC 373.

189 *B v. Auckland District Law Society* [2003] 2 AC 736.

190 Ibid., para. 68.

191 *Berezovsky v. Hine* [2011] EWCA Civ 1089.

limitation on their use, it was not open to Mr Berezovksy to prevent their use by the estate against him. The Court of Appeal disagreed. Lord Neuberger MR said that the statements were obviously intended to remain confidential and were disclosed for a limited and defined purpose. In explaining the nature of limited waiver and its scope, Lord Neuberger noted:

> *[W]here privilege is waived, the question whether the waiver was limited, and, if so, the parameters of the limitation, must be determined by reference to all the circumstances of the alleged waiver, and, in particular, what was expressly or impliedly communicated between the person sending, and the person receiving, the documents in question, and what they must or ought reasonably have understood . . . .*[192]

The limited waiver principle was also applied in *CITIC Pacific Ltd v. Secretary for Justice*.[193] The Hong Kong Court of Appeal held that privilege had been waived in favour of the SFC for the purpose of its investigation only, even though at the time of the surrender of the documents to the SFC, CITIC's solicitors provided no written document setting out specific terms as to limitation of the waiver of privilege. It was only several weeks later, in response to an enquiry from the SFC, that CITIC stated in writing what it considered the terms of limitation to have been.

Another instance of the application of the limited waiver doctrine in the regulatory context is the *Property Alliance Group Ltd v. Royal Bank of Scotland plc* decision.[194] RBS claimed privilege over six documents that it had shown to various regulators and the United States Department of Justice and the Attorneys-General of several US states. PAG argued that by showing those documents to third parties RBS had waived any privilege in them. The judge disagreed on the basis that the privilege had been waived for a limited purpose only (applying *B v. Auckland District Law Society* and *Berezovsky v. Hine*). Significantly, the judge held that the existence of 'non waiver' agreements between RBS and the third parties – which recognised by certain 'carve-outs' that the regulator could use the information in a way which could in future destroy the privilege, for example, by publishing the material – did not undermine the limited nature of the waiver. Confidentiality and privilege would continue to be preserved unless some act such as publication, which would destroy the privilege, occurred.[195]

However, while under English law voluntary disclosure to a regulator may not entail a general waiver of privilege, this may be inconsistent with the position in other common law jurisdictions.[196]

192 Ibid., para. 29.

193 [2012] 2 HKLRD 701, discussed at Section 35.7.1.

194 [2015] EWHC 1557 (Ch).

195 Ibid., at para. 113.

196 CJQ 324, Case Comment by James Hayton.

In the recent case of *Dechert v. ENRC*,[197] the Court of Appeal held that the respondent, ENRC, was entitled to have proceedings for the detailed assessment of the bills of its former solicitors, Dechert, held in private and that ENRC had not waived privilege by commencing assessment proceedings. The implied waiver of privilege the application for detailed assessment had entailed was limited, temporary and extended only to the opposing party and to the judge. Gloster LJ remarked that 'the concept of limited waiver is of general application, designed to ensure that the loss of LPP [legal professional privilege] (given its fundamental importance) is limited to that which is necessary to protect other interests.'[198]

35.8.2 Collateral waiver

In certain circumstances the loss of privilege in a document can lead to waiver of privilege in other material. The rationale for this is one of fairness; the court is concerned to avoid having an incomplete picture of the events in question and to avoid 'cherrypicking' of privileged documents by a party.[199] Lord Bingham CJ commented in *Paragon Finance v. Freshfields* that 'While there is no rule that a party who waives privilege in relation to one communication is taken to waive privilege in relation to all, a party may not waive privilege in such a partial and selective manner that unfairness or misunderstanding may result.'[200] For this reason it will be more difficult to establish collateral waiver where the initial disclosure was made inadvertently.

The weight of authority suggests that some reliance must be placed on the primary material before any waiver in collateral material can be triggered. Simple disclosure and inspection of the primary material is probably insufficient. The necessary reliance has been said to be deployment of the primary material in court[201] but the approach of the courts to the question of what this means has not always been consistent.[202] Ultimately the touchstone is fairness, and waiver will be found where a party has crossed the line from, for example, merely referring to legal advice to actually relying on that advice in support of its position.[203] In *R v.*

197 [2016] 3 Costs LO 327.

198 Ibid., para. 52.

199 *Nea Karteria Maritime Co v. Atlantic & Great Lakes Steamship Corporation (No 2)* [1981] Com LR 138; *Paragon Finance v. Freshfields* [1999] 1 WLR 1183.

200 [1999] 1 WLR 1183 at 1188.

201 *Nea Karteria Maritime Co v. Atlantic & Great Lakes Steamship Corporation (No 2)* [1981] Com LR 138; *General Accident Fire and Life Corp v. Tanter* [1984] 1 WLR 100.

202 Compare, for example, *MAC Hotels Limited v. Rider Levett Bucknall UK Limited* [2010] EWHC 767 (TCC) in which HHJ Havelock-Allan QC found that collateral waiver could occur by referring to and relying on privileged material in a witness statement served in support of an (as yet unheard) interlocutory application with the approach of Hobhouse J in *General Accident Fire and Life Corp v. Tanter* [1984] 1 WLR 100, holding that there was no collateral waiver where a privileged note of a conversation was used in cross-examination but before the author of the note was called and before it had been formally admitted in evidence. For a fuller discussion of the authorities see *Thanki*, paras. 5.127-5.132.

203 *Mid-East Sales v. Engineering & Trading Co PVT Ltd* [2014] EWHC 892 (Comm).

Papachristos & Kerrison[204] an issue arose as to whether Innospec, a company that had pleaded guilty to corruption charges, had waived privilege in certain interview notes by providing a subsequent PowerPoint presentation to the SFO and United States Department of Justice during negotiations, thereby waiving privilege in the presentation. Innospec was not a party to the proceedings and had not sought to deploy any document before the court. It was held that there had been no sufficient deployment by Innospec of the notes in the presentation to amount to a collateral waiver of privilege in respect of the notes as opposed to the PowerPoint presentation itself.

The court determined that there had been neither express nor collateral waiver in the interview notes because the waiver that had occurred over the PowerPoint was expressly limited and was in the context of the investigatory stage of the case.

Reliance on part of a document may require disclosure of the whole. While severance may be possible if the document deals with entirely different subject matters, where the document deals with only one subject matter the court may conclude that it is or appears dangerous or misleading to allow a party to deploy part of the document and assert privilege over the remainder.[205]

Once privilege is waived in a particular document, the waiver extends to all documents relating to the same 'transaction', and possibly beyond.[206] The underlying principle applied by the courts is the need to ensure that the evidence adduced by the party claiming privilege is being presented fairly. Hence in *R v. Secretary of State for Transport ex p Factortame Ltd* Auld LJ said that:[207]

> *In each case the question for the Court is whether the matters in issue in the document or documents in respect of which partial disclosure has been made are respectively severable so that the partial disclosed material clearly does not bear on matters in issue in respect of which material is withheld. The more confined the issue, for example as to the content of a single document or conversation, the more difficult it is likely to be to withhold, by severance, part of the document or other documents relevant to the document or conversations.*

Inadvertent disclosure and restraining use of privileged documents 35.8.3

The Civil Procedure Rules (CPR) at rule 31.20 provide that, where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court. While the solicitor for one side does not owe a duty of care to the other party,[208] where there is an obvious mistake the solicitor should promptly notify the other party and then, where the client wishes to use the document, make an application under rule 31.20 of the CPR to allow such use. Such use is unlikely

204 Unreported Southwark Crown Court, 13 May 2013.
205 *Great Atlantic v. Home Insurance* [1981] 1 WLR 529.
206 *Thanki*, paras. 5.136-5.140.
207 (1997) 9 Admin LR 591 at 599.
208 *Al-Fayed v. Commissioner of Police of the Metropolis* [2002] EWCA Civ 780, para. 16.

to be allowed where the relevant party wishes to use the inadvertently disclosed document as the basis for a new claim, as distinct from the situation where a document is disclosed during litigation.[209]

The question of what is meant by an 'obvious mistake' was considered by the Court of Appeal in *Rawlinson & Hunter Trustees SA & Ors v. Director of the SFO*.[210] Moore-Bick LJ stated that, once it is accepted that the person who inspected a document did not realise that it had been disclosed by mistake, despite being a qualified lawyer, it would be a strong thing for the judge to hold that the mistake was obvious. Further, given the scale of the disclosure in the case and the range of documents involved, general assertions in correspondence that the SFO did not intend to waive privilege were not sufficient to make it obvious that any document arguably privileged must have been disclosed by mistake. On the facts, it was held that it would not have been obvious that the documents at issue in the appeal had been disclosed by mistake.

In *Ford v. FSA*[211] the claimant established that he had joint interest privilege in two documents provided to the FSA by another party with the benefit of that privilege, and referred to by the FSA in a supplementary investigation report (SIR), without his consent. It followed that the FSA had not been entitled to rely on the content of the communications in the regulatory proceedings. The claimant subsequently sought relief including:

- the quashing of the warning notice issued by the FSA's Regulatory Decisions Committee that referred to the privileged material;
- the destruction of all copies of the privileged documents held by the FSA, together with their permanent deletion from databases and email accounts within the FSA;
- the destruction of all copies of the SIR and warning notices held by the FSA and their permanent deletion from databases and email accounts within the FSA, at least by redaction of the offending passages; and
- the redaction from all hard copy and electronic documents held by the FSA of quotations from or references to the substance of the privileged documents.

Burnett J refused to quash the warning notice, in circumstances where he found that the privileged material formed a very modest part of the overall picture painted by a detailed exposition of the facts and matters on which the FSA relied; it was 'peripheral but not irrelevant'. Rather than equating the FSA's reliance on the privileged material with the public law concept of taking into account an irrelevant matter, the judge held that it was more accurate to consider the error as equivalent to a judicial or administrative body acting, in part, on inadmissible

209 *Fadairo v. Suit Supply UK Lime Street Ltd* [2014] ICR D11 (EAT) (Singh J).

210 [2014] EWCA Civ 1129.

211 [2011] EWHC 2583 (Admin) (establishing that two of the documents referred to by the FSA in their supplementary investigation report were subject to joint interest privilege); [2012] EWHC 997 (Admin) (concerning the remedies sought by the claimant in relation to the use of the privileged documents by the FSA).

evidence. The warning notice, shorn of the offending references to privileged material, was said to remain a coherent, seamless and powerful document.

However, despite the FSA's submission that it would be sufficient to redact the privileged material from the SIR, warning notice and any other documents now to be deployed by the FSA, and to refrain from using or disseminating unredacted copies, Burnett J went further and ordered the FSA to use its best endeavours to identify and destroy such copies (both hard copy and electronic) of the privileged material that existed, together with such copies of the SIR and warning notices. In dealing with the claimant's further request for an order that anyone who had read the privileged documents or was aware of their content should be removed from further involvement in the relevant FSA investigation, the judge held that, while the approach identified in the private law context to the question whether a lawyer in possession of privileged material should be restrained from acting is a useful guide, when the question arises in judicial review proceedings there will necessarily be a public law element in the underlying dispute. The public interest may form an important element in any discretionary decision made in judicial review proceedings. In the particular circumstances of the case, he found that the order sought would be disproportionate and contrary to the public interest.

Maintaining privilege – practical issues 35.9

At the beginning of an investigation litigation may well not yet be in prospect (in which case litigation privilege will not apply) and therefore a corporate may wish to ensure that sensitive communications are, where possible, covered by legal advice privilege. It will be much more difficult to do this in light of the recent decisions in *The RBS Rights Issue Litigation* and *ENRC*, and a corporate embarking on an internal fact-finding investigation with a view to taking legal advice should therefore be aware of the risk that documents created pursuant to that investigation will be disclosable in any subsequent proceedings.

See Section 35.3.2.2

Conducting interviews 35.9.1

The conduct of interviews with potential witnesses is clearly an area of particular sensitivity. Because of the narrow view of who may constitute the 'client' in *Three Rivers 5*, as now applied in *The RBS Rights Issue Litigation* and *ENRC,* regulators or prosecutors may attempt to challenge a claim that the notes of evidence prepared by lawyers at such interviews are protected by legal advice privilege. In a March 2016 speech to compliance professionals, Alun Milford, General Counsel of the SFO, emphasised the importance the SFO places on witness accounts of relevant events and stated, in this context, that:

> *1. We will view as uncooperative false or exaggerated claims of privilege, and we are prepared to litigate over them: to do otherwise would be to fail in our duty to investigate crime.*
>
> *2. If a company's assertion of privilege is well-made out, then we will not hold that against the company: to do otherwise would be inconsistent with*

> *the substantive protection privilege offers. We will simply judge the question of cooperation in our normal way against our published criteria.*
> *3. By the same token if, notwithstanding the existence of a well-made-out claim to privilege, a company gives up the witness accounts we seek, then we will view that as a significant mark of co-operation: here again, to do otherwise would be inconsistent with the substantive protection privilege offers.*
> *4. For the same reason, we will view as a significant mark of cooperation a company's decision to structure its investigation in such a way as not to attract privilege claims over interviews of witnesses.*[212]

In the first edition of this book it was suggested that, to preserve privilege when conducting interviews with potential witnesses, in the case of employees, where possible, they should be expressly authorised by the corporate to communicate with the lawyers for the purposes of receiving advice. Such practice would be consistent with the decision of the Singapore Court of Appeal in Skandinaviska *Enskilda Banken v. Asia Pacific Breweries* and would in principle have provided a reasonable ground for asserting privilege on the basis of that decision. The position is much more difficult in light of *The RBS Rights Issue Litigation* and *ENRC* decisions. Following those decisions, and pending any reconsideration of the issue by the Court of Appeal or the Supreme Court,[213] only documents recording communications between the client (i.e., those within the organisation who are authorised to seek advice from, or receive the advice of, the lawyers) and the lawyers will be protected by legal advice privilege. Accordingly, notes of interviews with other employees or ex-employees of the client organisation, whether taken by employees or by the lawyers, will be potentially disclosable in any subsequent proceedings, unless they can be said to form part of the lawyers' working papers. As to that, *The RBS Rights Issue Litigation* and *ENRC* decisions suggest that it will be necessary to establish in evidence that the notes, if disclosed, would betray the tenor of the legal advice. It may therefore be tempting for the lawyers to ensure that any notes recording factual information obtained from employees and ex-employees are produced so that they contain the solicitor's commentary and advice and are not merely a recitation of facts provided by the interviewee.

See Section 35.4.2

Of course, all interviews conducted for the dominant purpose of anticipated litigation ought to attract litigation privilege.

See Section 35.4.3

Where a corporation under investigation provides oral summaries of otherwise privileged interviews to a regulator or prosecutor it is likely that this would be held to amount to a limited waiver in respect of matters communicated to the regulator or prosecutor because the information is provided for the limited purpose of the investigation.

See Section 35.8.1

212 Alun Milford, General Counsel, SFO, Speech at the European Compliance and Ethics Institute, Prague, 29 March 2016.

213 There is an appeal outstanding from the decision in *ENRC*.

Ensuring that any waiver is limited 35.9.2

It is clearly very valuable for a regulated entity to be able to waive privilege vis-à-vis the regulator for a particular purpose (e.g., in connection with a specific investigation) but without waiving it more generally. As noted above, in *ENRC v. Dechert* the Court of Appeal has confirmed that the concept of limited waiver is of general application, designed to ensure that the loss of legal professional privilege (given its fundamental importance) is limited to that which is necessary to protect other interests.[214]

Although it may be possible for a regulated entity to contend that waiver of privilege was impliedly, if not expressly, limited (having regard to all the circumstances of the waiver), the safest course will always be to make clear at the time of disclosure that waiver is for a limited purpose only and confidentiality is otherwise being maintained.

However, as noted above, while it may be possible to achieve a limited waiver under English law, the waiver may not be so regarded in other jurisdictions.

Redaction of documents 35.9.3

Where only part or parts of a document are privileged, the appropriate procedure (assuming the privilege holder wishes to maintain privilege) is to disclose the document but redacting the privileged parts. Disclosure of a redacted document will not give rise to a waiver of privilege in respect of the redacted parts.[215] Disclosure of a redacted document in this way should be distinguished from deployment of a redacted document in court. In the latter circumstance, reliance on the unprivileged part of a document may give rise to collateral waiver in respect of the privileged part, where both parts deal with the same subject matter.

See Section 35.2

Where there is a dispute as to the justification for a redaction, the court may inspect the relevant document. In civil proceedings, the court's power to inspect documents to resolve an application for specific disclosure is found in the CPR at rule 31.19(6). However, an order for inspection by the court is usually regarded as a solution of last resort and should not be undertaken unless the court considers that there is credible evidence that those claiming privilege have either misunderstood their duty, or are not to be trusted with the decision, or there is no reasonably practical alternative.[216]

In the criminal context, if the prosecution is asserting public interest immunity in order not to disclose material, there is a defined route to follow under Criminal Procedure and Investigations Act 1996 (CPIA 1996) and the Criminal Procedural Rules (CrimPR) at rule 15.3.

The ability of the defence to challenge the adequacy of prosecution disclosure is provided for under section 8 CPIA 1996 and rule 15.5 of the CrimPR, after service of the defence case statement. The court may order disclosure of further

214 [2016] 3 Costs LO 327, para. 52, *per* Gloster LJ.

215 *GE Capital Corporate Finance Group v. Bankers Trust Co* [1995] 1 WLR 172.

216 *West London Pipeline v. Total UK* [2008] 2 CLC 258, para. 86(4)(c).

material if the defence can demonstrate that the prosecution has that material and is required to disclose it in accordance with the CPIA 1996. A criminal court also has inherent jurisdiction to ensure a fair trial and, in the event of a dispute over the justification for a redaction, a judge can always review the material if he or she considers it appropriate.

35.9.4 Substantiating a claim to privilege if challenged

If a claim to privilege is challenged by an investigating authority or regulator, and the matter comes before the court, it will be necessary for the party claiming privilege to provide evidence to substantiate its claim. The principles to be applied in assessing that evidence were set out by Beatson J in *West London Pipeline v. Total UK*.[217] The judge explained that an affidavit claiming privilege 'should be specific enough to show something of the deponent's analysis of the documents or, in the case of a claim to litigation privilege, the purpose for which they were created. It is desirable that they should refer to such contemporary material as it is possible to do so without making disclosure of the very matters that the claim for privilege is designed to protect.'[218]

While these principles are well established, their application may be more controversial. In *ENRC* the court did not consider that the evidential burden has been satisfied.[219] In particular, Andrews J was unimpressed by the explanation that had been given as to why evidence had to be adduced in the form of a witness statement from ENRC's solicitors rather than in the form of direct evidence from individuals at ENRC responsible for giving instructions to their lawyers. (The explanation for this was that the senior officers and employees at ENRC were not willing to give evidence in circumstances where they were or might become suspects in the SFO's investigation, without assurances that the SFO would not pursue cross-examination of those witnesses in the proceedings or seek to refer to that evidence against that witness or against ENRC in any subsequent criminal proceedings. The SFO was unwilling to give any such assurances.) This approach would seem to prejudice a corporate claiming privilege in a criminal context given that necessarily the company can only give direct evidence through its directors and employees who may themselves be at risk of investigation and prosecution.

In rejecting ENRC's evidence Andrews J was also influenced by what she perceived to be an absence of contemporaneous documents to support the claim. In particular, she commented that she had not been shown any records of discussions

217 [2008] 2 CLC 258.

218 Ibid., at para. 53. It was also noted (at paras. 65 and 86) that an affidavit is generally to be treated as conclusive unless it appears that the deponent has mischaracterised documents or it is reasonably certain from the evidence before the court that it is incorrect or incomplete on material points.

219 Similarly, in *The RBS Rights Issue Litigation*, Hildyard J did not consider that the evidence adduced by RBS was sufficient to make good RBS's claim that the interview notes comprised the lawyers' working papers as the evidence amounted to no more than a 'conclusory assertion'. As in *ENRC,* it is not easy to see what further evidence RBS could have adduced in support of the contention that disclosure of the notes would betray the trend of legal advice, without revealing the very matters over which RBS was seeking to claim privilege.

either at board level or within any group at ENRC that might have shed light on what ENRC contemplated, and why they contemplated it.[220] She therefore considered that for the purposes of the claim to litigation privilege, ENRC had failed to establish a reasonable anticipation of litigation. Again, this is a surprising and potentially unfair approach. A corporate's contemplation of litigation will be informed by the advice that it receives from its lawyers. It is hard to see how a company could explain why it contemplated litigation without revealing privileged advice – which is precisely what Beatson J in *West London Pipeline* said a party could not be expected to do.

While a possible appeal in *ENRC* remains outstanding, parties should be cognisant of the relatively heavy burden on them to make good claims to privilege in the event that they are challenged.

Use of independent counsel 35.9.5

Where there is a potential dispute concerning the application of privilege it is reasonably common for independent counsel to be appointed to review the relevant documents. Such counsel would then be prevented from acting for either side of the relevant dispute. An appointment may be made by the court or can be made more informally by the parties themselves. This process is, for example, frequently adopted by the SFO, although parties should always ensure the genuine independence of any counsel appointed.

In *R (McKenzie) v. Director of the Serious Fraud Office*[221] the court was required to consider the procedures adopted by the SFO for dealing with potentially privileged material embedded in electronic devices seized using statutory powers or produced in response to a notice. The applicant complained that the SFO procedure was unlawful in using in-house technical staff to conduct an electronic search of the content of seized devices by reference to search terms for the purpose of isolating potentially privileged material for subsequent review by independent counsel. It was argued that this initial exercise should be contracted out by the SFO to independent IT specialists, despite the SFO having detailed procedures in place to ensure, in so far as possible, that its investigators would not gain access to any potentially privileged material before it had been reviewed by independent counsel. The applicant contended that the involvement of in-house SFO IT specialists and the uploading of the digital material, including the potentially privileged material embedded within it, onto the SFO's digital review system unnecessarily exposed the person to whom privilege attached to an avoidable risk that privileged material may come to the knowledge of the SFO and be used to his disadvantage.

The applicant in *McKenzie* argued that the same approach should apply when an investigating body lawfully comes into possession of potentially privileged material as applies to a solicitor in relation to privileged material relating to a former client. The investigating body must satisfy the court with convincing evidence

220 *ENRC* at para. 46.

221 [2016] EWHC 102 (Admin).

that there is no real risk of the privileged material being disclosed to an investigator. The court disagreed, finding that it would not be appropriate to apply the same reasoning to the relationship between a criminal investigating body and the subject of its investigation as applies in relation to a solicitor and former client. In the case of an investigating body there is no fiduciary relationship and the body is exercising statutory powers for the public good in the investigation of suspected crime. It would therefore be imposing too onerous an obligation on the SFO to require it to demonstrate that there could be no real risk of the privileged material being read by anyone involved in the investigation; instead, the seizing authority has a duty to devise and operate a system to isolate potentially privileged material from bulk material lawfully in its possession that can reasonably be expected to ensure that such material will not be read by members of the investigative team before it has been reviewed by an independent lawyer to establish whether privilege exists. There should also be clear guidance in place so that, if an investigator does by mischance read privileged material, that fact is recorded and reported, the potential conflict recognised and steps taken to prevent privileged information being deployed in the investigation. On the facts, the SFO procedure was held to satisfy these requirements.

36

Privilege: The US Perspective

Richard M Strassberg and Meghan K Spillane[1]

The attorney–client privilege is recognised in the United States as 'the oldest of the privileges for confidential communications known to the common law.'[2] It is viewed as serving a crucial function in 'encourag[ing] full and frank communication between attorneys and their clients' and thereby promoting 'the observance of law and administration of justice.'[3] The attorney–client privilege protects information shared between a lawyer and the client, where the information is: (1) a communication, (2) made in confidence, (3) between a person who is, or is about to become, a client (4) and a lawyer (5) for the purpose of obtaining legal advice or assistance.[4] Attorney–client privileged communications may take many forms, from oral communications, to emails, to text messages, so long as each communication is undertaken in confidence for the purpose of seeking or rendering legal advice.[5] Once the privilege is created, the privilege continues, and may be invoked at any time (unless it has been waived or is otherwise subject to an exception), even following the termination of the attorney–client relationship or the death of the client.[6]

1 Richard M Strassberg and Meghan K Spillane are partners at Goodwin.

2 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

3 Id. at 392.

4 See, e.g., *In re Richard, Inc.*, 68 F.3d 38, 39-40 (2d Cir. 1995).

5 See, e.g., *Haines v. Liggett Grp.*, 975 F.2d 81, 90 (3d Cir. 1992) (explaining that privilege extends to verbal statements, documents and tangible objects conveyed in confidence for the purpose of legal advice).

6 David M. Greenwald & Michele L. Slachetka, Protecting Confidential Legal Information, Jenner & Block LLP 104 (2015), https://jenner.com/system/assets/assets/8948/original/2015Jenner_26B

In *Upjohn Co. v. United States*,[7] the United States Supreme Court held that a company's attorney–client privilege extends to company counsel's communications with employees in certain prescribed circumstances.[8] Rather than providing a simple objective test, the *Upjohn* court instead established five factors to guide courts in determining whether the company's privilege should extend to counsel's communications with its employees: (1) whether the communications were made by employees at the direction of superior officers of the company for the purpose of obtaining legal advice; (2) whether the communications contained information necessary for counsel to render legal advice, which was not otherwise available from 'control group' management; (3) whether the matters communicated were within the scope of the employee's corporate duties; (4) whether the employee knew that the communications were for the purpose of the company obtaining legal advice; and (5) whether the communications were ordered to be kept confidential by the employee's superiors, including that the communications were considered confidential at the time and kept confidential subsequent to the interview.[9] When these elements are established, courts generally consider communications between company counsel and an employee to be within the scope of the company's attorney–client privilege.[10]

See Section 36.3.1

While the privilege provides broad protection for confidential communications among those within the attorney–client relationship, disclosing the contents of these communications to a third party outside the scope of the protection – such as a government agency – may result in a waiver of the applicable privilege.

See Section 36.4

36.1.1.1 Crime-fraud exception

The attorney–client privilege does not offer an absolute protection for all of a lawyer's communications with the client. An important exclusion is the crime-fraud exception, which removes the protection of the attorney–client privilege for communications concerning contemplated or continuing illegal or fraudulent acts.[11]

---

lockAttorney–clientPrivilegeHandbook.pdf (citing *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950); *Swidler & Berlin v. United States*, 524 U.S. 399, 405-06 (1998)).

7 449 U.S. 383 (1981).

8 Id.

9 Id. at 394-96. While the majority of jurisdictions have adopted *Upjohn*'s approach, some states employ other tests to determine if conversations with an employee are covered by the company's privilege. See, e.g., *Motorola, Inc. v. Lemko Corp.*, No. 08 C 5427, 2010 WL 2179170, at *1-2 (N.D. Ill. 1 June 2010) (noting that Illinois continues to apply the control group test and assess privilege questions accordingly).

10 To ensure that the employee understands the purpose of the interview, the expectation of confidentiality, and the scope of the attorney–client privilege, company counsel typically begins each meeting with a company employee by providing a summary of these factors, known as an '*Upjohn* warning.'

11 See, e.g., *United States v. Zolin*, 491 U.S. 554, 563 (1989) (explaining that the crime-fraud exception 'assure[s] that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime') (citation omitted); *Clark v. United States*, 289 U.S. 1, 15 (1933); *In re Antitrust Grand Jury*,

After a party has invoked the attorney–client privilege, the person seeking to abrogate the privilege under this exception has the burden of making a *prima facie* case that: (1) the client was committing or intending to commit a crime or fraud; and (2) the attorney–client communications at issue were in furtherance of that alleged crime or fraud.[12] Significantly, for the exception to be applicable, the party need not show that the alleged crime or fraud was actually completed, only that the crime or fraud was the objective of the communication.[13] Further, the party need not show that the attorney was aware of the alleged fraud or misconduct. In fact, the attorney's knowledge or ignorance of the crime is irrelevant. Instead, courts look to the client's intent or objective in the subject communication.[14]

For example, in the case of *United States v. Gorski*,[15] a defendant was indicted for making fraudulent representations related to the ownership and control of his company when bidding on government contracts.[16] The government alleged that the defendant fraudulently represented that his business qualified as a service-disabled veteran-owned small business entity,[17] and also sought to restructure his company through backdated documents to give the appearance of compliance with ownership regulations.[18] In response to a government subpoena for access to communications between the defendant and his lawyer regarding the ownership and restructuring efforts, the trial court held an *in camera* review and *ex parte* hearing, and determined that the requested documents should be produced under the crime-fraud exception.[19] On appeal, the First Circuit upheld the trial court's ruling, finding that (1) the indictment provided a reasonable basis to believe that the defendant was engaged in criminal or fraudulent activity; and (2) there was a reasonable basis to believe that the attorney–client communications 'were intended by the client to facilitate or conceal the criminal or fraudulent activity.'[20] In so ruling, the court specifically noted that the crime-fraud exception

805 F.2d 155, 162 (6th Cir. 1986); *In re Grand Jury Subpoenas Duces Tecum*, 773 F.2d 204, 206 (8th Cir. 1985); *United States v. Horvath*, 731 F.2d 557, 562 (8th Cir. 1984).

12 See *In re Grand Jury Subpoena*, 223 F.3d 213, 217 (3d Cir. 2000); *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985).

13 See *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1039 (2d Cir. 1984).

14 See, e.g., *United States v. Weingold*, 69 Fed. Appx. 575, 578 (3d Cir. 2003) (noting that the privilege may be disregarded even if the lawyer is innocent in relation to the fraudulent scheme); *In re Grand Jury Proceedings*, 87 F.3d 377, 381-82 (9th Cir. 1996) ('[I]t is the client's knowledge and intentions that are of paramount concern to the application of the crime-fraud exception; the attorney need know nothing about the client's ongoing or planned illicit activity . . . .'); *In re Sealed Case*, 754 F.2d at 402 ('[A]n attorney's ignorance of his client's misconduct will not shelter that client from the consequences of his own wrongdoing.'); *Horvath*, 731 F.2d at 562 ('Whether the attorney is ignorant of the client's purpose is irrelevant.').

15 807 F.3d 451 (1st Cir. 2015).

16 Id. at 455-56.

17 By representing his company as being a service-disabled-veteran-owned small business, the defendant was awarded certain set-aside or sole source government contracts for which he would not have otherwise been eligible. See 13 C.F.R. §125.8-125.10.

18 Id.

19 Id. at 456-57.

20 Id. at 460-61 (internal quotation marks omitted).

does not require – and therefore does not reflect – any finding on the ultimate question as to whether the defendant acted wrongfully, nor does it bear on the conduct or intent of the lawyers involved.[21]

The crime fraud exception does not apply to attorney–client communications that reflect the solicitation or provision of legal advice concerning crimes or frauds that occurred in the past; such attorney–client communications remain protected,[22] unless the communications are made for the purpose of covering up past misconduct or obstructing justice.[23] Attorney–client communications reflecting advice about the legality of a client's intended course of conduct are likewise protected as privileged.[24] Finally, communications where an attorney dissuades or prevents the client from engaging in further illegal conduct are also protected; such communications are viewed as serving an important purpose in the administration of justice by promoting legal conduct.[25]

21 Id. at 462.

22 See, e.g., *Zolin*, 491 U.S. at 562 (explaining that the crime-fraud exception applies 'where the desired advice refers not to prior wrongdoing, but to future wrongdoing') (citation omitted).

23 See, e.g., *In re Grand Jury Proceedings*, 102 F.3d 748, 751 (4th Cir. 1996) (noting that the crime-fraud exception includes 'concealment or cover-up of [the client's] criminal or fraudulent activities'); *United States v. Laurins*, 857 F.2d 529, 540 (9th Cir. 1988) ('Obstruction of justice is an offense serious enough to defeat the privilege.').

24 If a client seeks advice from counsel about the legality of a course of conduct and then relies to his or her detriment on that advice in taking action later determined to be unlawful, the client may choose to assert an 'advice of counsel' defence to demonstrate a lack of wrongful intent. The client generally must show (1) full disclosure of all material facts to the attorney before seeking advice; and (2) actual reliance on counsel's advice in the good faith belief that the conduct was legal. See, e.g., *United States v. West*, 392 F. 3d 450, 457 (D.C. Cir. 2004). Invoking the 'advice of counsel' defence generally waives the attorney–client privilege protecting the underlying communications with counsel related to the advice, since the client is putting the contents of those communications at issue. See, e.g., *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992). There are limits to the ability of an individual employee to assert the advice-of-counsel defence where the client is the company, rather than the individual. In the civil context, for example, if the corporation controls the privilege over the attorney advice at issue, at least one court has found that the company may refuse to waive that privilege on behalf of the individual employee, even if the disclosure would amount to a complete defence of the individual. See *United States v. Wells Fargo Bank, N.A.*, 132 F. Supp. 3d 558, 566 (S.D.N.Y. 2015). In the criminal context, however, there appears to be split authority as to whether an individual's right to present his defence may trump the company's interest in preserving the privilege. Compare *United States v. Grace,* 439 F. Supp.2d 1125, 1142 (D. Mont. 2006) (finding that such evidence may be 'of such probative and exculpatory value as to compel the admission of the evidence over [the company's] objection as the attorney-client privilege holder.'), with *Wells Fargo Bank, N.A.,* 132 F. Supp 3d at 562-63 (suggesting that the Supreme Court's rejection of a 'balancing test' for attorney–client privilege in *Swidler & Berlin v. United States,* 524 U.S. 399 (1998), may extend to criminal cases as well).

25 See, e.g., *In re Grand Jury Investigation*, 772 N.E.2d 9, 21-22 (Mass. 2002).

Derivative claim exception 36.1.1.2

Another exception to a company's assertion of attorney–client privilege arises from the case of *Garner v. Wolfinbarger,*[26] where shareholders filed a derivative suit against a company, charging management with fraud and seeking discovery of privileged communications between management and in-house counsel.[27] In an effort to balance the importance of maintaining the confidentiality of attorney communications with the need to keep the shareholders informed of matters affecting the corporation, the Fifth Circuit created an exception to attorney–client privilege, which has become known as the *Garner* doctrine. The doctrine permits a company's shareholders who are suing on behalf of the corporation to bypass the company's attorney–client privilege upon a showing of 'good cause', based on a nine-factor analysis.[28] The *Garner* doctrine has been recognised as creating a shareholder fiduciary exception to attorney–client privilege, though the doctrine is not universally accepted by the courts.[29]

While the *Garner* case arose in the context of a shareholder derivative suit, its principles apply more broadly to other situations where a company owes a fiduciary duty to the party seeking to abrogate the privilege.[30] In a case where, for example, a special litigation committee has undergone an internal investigation into the merits of such a claim, derivative plaintiffs might seek access to the investigation materials under *Garner*. To protect attorney–client privileged communications in this context from the risk of later disclosure to the company's shareholders, counsel should diligently mark any written legal advice as attorney–client privileged

26 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974, 91 S. Ct. 1991, 28 L.Ed.2d 323 (1971).

27 Id. at 1095-96.

28 Id. at 1104 (outlining the 'indicia' of the presence or absence of 'good cause' to include: (1) the number of shareholders and the percentage of stock they represent; (2) the *bona fides* of the shareholders; (3) the nature of the shareholders' claim and whether it is obviously colourable; (4) the apparent necessity and desirability of the shareholders having the information and the availability of it from other sources; (5) whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; (6) whether the communications related to past or to prospective actions; (7) whether the communication is of advice concerning the litigation itself; (8) the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; and (9) the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons).

29 See, e.g., *Wal-Mart Stores Inc. v. Indiana Elec. Workers Pension Fund Trust IBEW*, 95 A.3d 1264, 1278-80 (Del. 2014) (adopting the 'fiduciary' exception outlined in *Garner* and finding that plaintiff shareholders who make a showing of good cause can inspect documents concerning a corporation's internal investigation, even if those documents were otherwise governed by the attorney-client privilege); *NAMA Holdings, LLC v. Greenberg Traurig, LLP,* 18 N.Y.S.3d 1, 9-10 (N.Y. App. Div. 2015) (adopting the fiduciary exception test enunciated in *Garner* and rejecting the corporation's argument that the fiduciary exception is inapplicable once its shareholder-plaintiffs become adverse to the company); but see *Hoiles v. Superior Court,* 204 Cal. Rptr. 111, 115 (Cal. Ct. App. 1984) (rejecting *Garner* and holding that California does not afford an 'extraordinary avenue . . . to petitioners to pierce the privilege in their capacity as shareholders.').

30 See, e.g., *Henry v. Champlain Enter., Inc.* 212 F.R.D. 73, 84 (N.D.N.Y. 2003) (collecting cases).

See Section 36.1.2 and, where applicable, attorney work-product. Counsel should also seek to avoid situations where the only evidence of an unprivileged fact is a privileged writing, as this may support a shareholder's 'good cause' to pierce the attorney–client privilege to discover that underlying fact.

36.1.2 Attorney work-product

In the United States, the doctrine of 'attorney work-product' also protects from disclosure certain documents and other materials prepared in anticipation of litigation or for trial. Although such work-product is most commonly prepared by an attorney, work-product protection may extend to materials prepared in anticipation of litigation by certain third parties at the attorney's direction, including materials prepared by the client.[31] But while the work-product doctrine offers certain protections for an attorney's impressions, opinions and legal conclusions, such documents are not considered 'privileged' like attorney–client communications, but instead are afforded a qualified protection from discovery.[32]

In the seminal case of *Hickman v. Taylor*,[33] the United States Supreme Court formally recognised the attorney work-product doctrine, establishing the scope of the protection to include materials prepared in anticipation of litigation.[34] The *Hickman* court also qualified this work-product protection by finding that, upon a showing of good cause, an adversary could obtain discovery of documents containing 'factual work product'.[35] The Court recognised that substantially greater – if not absolute – work-product protection should be given to documents that reflect the attorney's legal theories, strategy, assessments and mental impressions (opinion work-product).[36]

In *United States v. Nobles*,[37] the Supreme Court extended the work-product doctrine beyond the scope of materials created by counsel, recognising that attorneys often rely on the assistance of investigators and other agents in preparation for trial. The Court found that it is 'necessary that the [attorney work-product] doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.'[38] Following the Supreme Court's guidance in *Nobles*, work-product protection is understood to be extended to material prepared 'by or for [a] party's representative' as long as the agent is assisting in preparing for litigation and working at the direction of the attorney.[39]

---

31 *Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 76 (D.D.C. 2003).

32 See Fed. R. Civ. P. 26(b)(3).

33 329 U.S. 495 (1947).

34 Id. at 511.

35 Id. at 511-12.

36 Id. at 511 (noting that '[p]roper preparation of a client's case' involves creating such documents, and that providing them to opposing counsel on 'mere demand' would be 'demoralizing' to the legal profession and disserve both clients and the 'cause of justice').

37 422 U.S. 225, 238-39 (1975).

38 Id.

39 See Fed. R. Civ. P. 26(b)(3) advisory committee's note to 1970 amendment ('[T]he weight of authority affords protection of the preparatory work of both lawyers and nonlawyers . . . .').

The modern federal work-product doctrine is codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure (the Federal Rules), and stands in line with the Supreme Court's guidance in *Hickman* and *Nobles*. In particular, Rule 26(b)(3) eliminates the distinction between attorney work-product and non-attorney work-product, focusing on whether the materials were prepared in anticipation of litigation or trial.[40] Further, Rule 26(b)(3) preserves work-product protections unless the party seeking discovery has a 'substantial need' for the materials in the preparation of the party's case and the party is unable without 'undue hardship' to obtain the 'substantial equivalent' of the materials by other means.[41]

While the attorney work-product doctrine offers a qualified protection for documents created in anticipation of litigation, disclosing the contents of such documents to a third party outside of the attorney–client relationship (such as a government agency) may result in a waiver of this protection.[42]

See Section 36.4

Common interest or joint defence privilege 36.1.3

The joint defence (or 'common interest') privilege is a doctrine that preserves the attorney–client privilege and work-product doctrine, despite disclosure of otherwise protected information to third parties.[43] As explained by the Second Circuit Court of Appeals, the privilege 'serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.'[44] In general, a party asserting the privilege must demonstrate that (1) the communications were made in the course of a joint defence effort; (2) the statements were designed to further the effort; and (3) the privilege has not otherwise been waived.[45] If the privilege is challenged, the burden is on the defendants to demonstrate the existence of a joint defence arrangement.[46]

While a joint defence arrangement has not been held to create a direct attorney–client relationship between counsel for one party and another, some courts have found that the sharing of confidential information creates an implied attorney–client relationship among the parties to the joint defence. In *United States v. Henke*,[47] for example, the Ninth Circuit held that the joint defence privilege can, in certain circumstances, create an implied attorney–client relationship, as well as a disqualifying conflict of interest. In that case, three executives – Gupta, Desaigoudar and Henke – were charged with conspiracy, making false statements,

40 See Fed. R. Civ. P. 26(b)(3).

41 Id.

42 See *Qwest*, 450 F.3d at 1181, 1192.

43 See *United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1989), cert. denied, 502 U.S. 810 (1991).

44 Id.

45 See, e.g., *United States v. Bay State Ambulance*, 874 F.2d 20, 28 (1st Cir. 1989); *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986); *In re Grand Jury Subpoena Duces Tecum*, 406 F. Supp. 381, 385 (S.D.N.Y. 1975).

46 See *United States v. Weissman*, 195 F.3d 96, 100 (2d Cir. 1999).

47 222 F.3d 633 (9th Cir. 2000).

securities fraud and insider trading.[48] All three defendants participated in joint defence meetings where they shared confidential information.[49] On the eve of trial, however, Gupta entered into a co-operation agreement and agreed to testify for the government.[50] Gupta's lawyers threatened Desaigoudar and Henke's attorneys with legal action if they revealed any confidential information obtained as part of the joint defence meetings. Desaigoudar and Henke's attorneys eventually moved to withdraw because they believed their duty of confidentiality to Gupta prevented them from effectively cross-examining him.[51] The Ninth Circuit held that the lower court erred in denying the motions to withdraw, as the joint defence privilege created 'a disqualifying conflict where information gained in confidence by an attorney [became] an issue.'[52]

To mitigate the risk that information shared in the context of a joint defence agreement may lead to disqualification at a later time, many lawyers choose to include written disclaimers in their joint defence agreements along the following lines:

> *Nothing contained [in this agreement] shall be deemed to create an attorney–client relationship between any attorney and anyone other than the client of that attorney . . . and no attorney who has entered into this Agreement shall be disqualified from examining or cross-examining any joint defense participant who testifies at any proceeding, whether under a grant of immunity or otherwise, because of such an attorney's participation in this agreement, and it is herein represented that each party to this agreement has specifically advised his or her client of this clause.*[53]

Courts have found such provisions to permit an attorney to cross-examine a witness who was a former member of a joint defence arrangement and has since become a government co-operator, and have even permitted counsel to impeach the witness using statements that would otherwise be protected as privileged under the joint defence.[54]

48 Id. at 635.

49 Id. at 637.

50 Id.

51 Id. at 637-38.

52 Id. at 637.

53 See *Weissman*, 195 F.3d at 100.

54 See, e.g., *United States v. Almeida*, 341 F.3d 1318, 1326 (11th Cir. 2003) (holding that statements made under the joint defence doctrine 'do not get the benefit of the attorney–client privilege in the event that the co-defendant decides to testify on behalf of the government in exchange for a reduced sentence.'); *United States v. Stepney*, 246 F. Supp. 2d 1069, 1086 (N.D. Cal. 2003) (finding that when a former codefendant testified on behalf of the government, the joint defence team could cross-examine him on statements made pursuant to a joint defence agreement that (1) specified that the agreement would not create a duty of loyalty or an attorney–client relationship; and (2) explicitly permitted the lawyer to use any material or information provided by the testifying defendant during the course of the joint defence in later cross-examining the witness.)

Further, to preserve the attorney–client privilege in the context of a joint defence arrangement, confidentiality must still be maintained against those outside the arrangement, because disclosure to a single outside person could constitute waiver of the information discussed in the outsider's presence.

Identifying the client 36.2

The 'client' in an attorney–client relationship is generally defined as the intended and immediate beneficiary of the lawyer's services, who communicates with the attorney to obtain legal advice, and interacts with the attorney to advance his or her own interests.[55] Defining the 'client' becomes more difficult in the context of corporate representation, as a company typically speaks by and through its employees, but the corporation's counsel represents not those individual agents, but rather the corporation itself.[56] As a general matter, a corporation's attorney–client privilege is controlled by the management of the organisation.[57] An employee or officer cannot assert the corporation's privilege if the corporation waives it,[58] and an employee cannot waive the corporation's privilege if the corporation asserts it.[59]

In cases where the interests of an employee are or may become adverse to that of the company during a government investigation, the Rules of Professional Conduct[60] dictate that attorneys explain clearly whom they represent.[61] Interviewing employees in the context of a government investigation inevitably creates situations in which conflict between company and employee may arise. In particular, individuals should be advised to obtain separate counsel in situations where they are (1) the target of the investigation; (2) a probable whistleblower; or (3) an employee facing risk of criminal liability. In any of these circumstances, employees should not be involved in the day-to-day supervision of company counsel's own investigation, including serving in the reporting chain.

Company counsel may encounter circumstances where an employee seeks to assert the attorney–client privilege to prevent the disclosure of information uncovered by counsel during investigative interviews by arguing that company counsel represents the employee as an individual. The Third Circuit in *In re Bevill Bresler & Schulman Asset Management Corp.*, developed a five-part test (the *Bevill* test) to

55 Greenwald & Slachetka, supra note 6, at 15-16 (citing *Wylie v. Marley Co.*, 891 F.2d 1463 (10th Cir. 1989)).

56 See, e.g., *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec, Inc.*, 529 F.3d 371, 389 n.4 (7th Cir. 2008).

57 See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) (noting that 'the power to waive the corporate attorney–client privilege rests with the corporation's management').

58 See *In re Bevill*, 805 F.2d at 124-25; *In re Hechinger Inv. Co.*, 285 B.R. 601, 606 (D. Del. 2002) (finding that former officers and employees could not assert the corporation's privilege).

59 See *In re Grand Jury Proceedings*, 219 F.3d 175, 184 (2d Cir. 2000).

60 American Bar Association, Center for Professional Responsibility, Model Rules of Professional Conduct (2016), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html.

61 ABA Model Rule of Professional Conduct 1.13(f).

examine the merits of such an assertion by an individual employee against company counsel.[62] Under this test, employees must show that (1) they approached corporate counsel for the purpose of seeking legal advice; (2) they made it clear that they were seeking advice in their individual capacity; (3) counsel sought to communicate with the employee in this individual capacity, mindful of the conflicts with its representation of the company; (4) the communications were confidential; and (5) the communications did not concern the employee's official duties or the general affairs of the company.[63] The *Bevill* test has been recognised by other jurisdictions as a means of assessing whether a company employee may assert attorney–client privilege in an individual capacity arising out of communications with corporate counsel.[64]

See Chapter 14 on employee rights

In *United States v. Blumberg*,[65] for example, the District of New Jersey applied the *Bevill* test where an individual employee sought to claim personal privilege protection for communications with the company's lawyer. In assessing the fifth factor of the test, the court considered the individual employee's claim that he had discussed with company counsel his 'potential for criminal exposure' and the fact that he was just a 'fact witness'.[66] The court ultimately concluded that this exchange did not create an individual attorney–client relationship, and that the company still owned the privilege covering the employee's communications, and thus could waive it (presumably over his objection).[67]

To mitigate the risks created by potentially divergent interests between the company and individual employees, counsel should be clear in their engagement letter about not only whom they represent, but also whom they do not. Further, mindful of the considerations outlined by the *Bevill* court, company counsel should take care during interviews with individual employees to limit their discussions to matters within the scope of the employee's official duties, rather than matters that may implicate the employee's personal interests. Finally, in the event that discussions with an individual employee diverge to matters implicating legal advice in the employee's individual capacity, counsel should reiterate to the employee that they have been retained to represent the company and the company's interests, and potentially advise the employee to retain separate counsel with respect to these other matters.

62 805 F.2d 120, 123, 125 (3rd Cir. 1986).

63 Id.

64 See, e.g., *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, AFL-CIO, 119 F.3d 210, 215 (2d Cir. 1997); *United States v. Graf*, 610 F.3d 1148, 1160-61 (9th Cir. 2010) (adopting the *Bevill* test and listing other jurisdictions who have adopted the test as well).

65 2017 U.S. Dist. LEXIS 47298 (D.N.J. 27 Mar. 2017).

66 Id. at *14.

67 Id. at *14-15.

Maintaining privilege 36.3

Employee interviews 36.3.1

It is generally best if counsel conducts the employee interviews in the context of a government investigation, to ensure that what is said during the interview is covered by the attorney–client privilege, and that notes or memoranda documenting the interview are similarly privileged.[68] Recordings of interviews may, however, be considered purely factual communications that – as verbatim transcriptions – may not be subject to the attorney work-product doctrine.[69] Accordingly, it is general practice to have the attorney interviewer (or, more likely, another attorney in the room) take written notes of the interviews that include his or her thoughts and mental impressions. And because opinion work-product receives greater protection than fact work-product, it is more likely that written notes including an attorney's thoughts and impressions will be protected.

While it is often most advantageous to have counsel conduct the witness interviews in an investigation, a court may still find that interviews conducted by non-lawyers maintain attorney–client privilege if they are acting as agents for lawyers. For example, in *In re Kellogg Brown & Root Inc* (*KBR*),[70] the DC Circuit court held that the work of an engineering and construction firm involved in an the internal investigation was afforded work-product protection where the investigation was conducted 'under the auspices of KBR's in-house legal department, acting in its legal capacity.'[71] The court held that '[s]o long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney–client privilege applies.'[72] The court's decision in *KBR* underscores the importance of making it clear that witness interviews conducted in the context of an internal investigation are for the purpose of rendering legal advice.[73]

Consistent with these principles, at the outset of any employee interview, counsel should give the employee an *Upjohn* warning, which makes clear that

68 *Upjohn*, 449 U.S. at 394-99 (explaining that attorney–client privilege protects attorney notes taken during interviews with employees during internal investigations); see also *In re Gen. Motors Ignition Switch Litig.*, 80 F. Supp. 3d 521, 527-28 (S.D.N.Y. 2015) (finding that documents related to the internal investigation were protected from discovery because (1) the investigation was conducted at the direction of counsel; (2) those interviewed were told that the purpose of the interview was to facilitate the rendering of legal advice; (3) they were told that that the content of the discussions should remain confidential; and (4) the communications underlying the published report were not shared with third parties).

69 See Fed. R. Crim. P. 26.2(a), (f)(2); see also *United States v. Nobles,* 422 U.S. 225, 230-32 (1975).

70 756 F.3d 754 (D.C. Cir. 2014).

71 *KBR*, 756 F.3d at 757 (citing *Upjohn*, 449 U.S. 383).

72 Id. at 758-59.

73 In contrast, in *Wultz v. Bank of China*, the Southern District of New York granted a motion to compel documents collected by non-lawyers in the context of an internal investigation, where the party invoking the privilege failed to demonstrate that the documents were collected at the direction of an attorney to assist the attorney in providing legal advice. 304 F.R.D. 384, 395-97 (S.D.N.Y. 2015). The court also found that the work-product doctrine would not protect the documents from disclosure because the bank had failed to show that the documents would not have been created in 'essentially similar form irrespective of the litigation.' Id. at 395.

the communications between company counsel and the employees are confidential and protected as attorney–client privileged, and specifies that the privilege belongs to the company, and the company may choose to waive that privilege in the future. If clearly given, an *Upjohn* warning sets the boundaries of the interview and removes any doubt about whether counsel represents the employee.

In *KBR*, the DC Circuit noted that there are no 'magic words' that must be used to deliver a proper *Upjohn* warning.[74] Nevertheless, in practice, *Upjohn* warnings typically include some variation of the following components:

- *The lawyer represents the company only and not the witness personally.*
- *The lawyer is collecting facts for the purpose of providing legal advice to the company.*
- *The communication is protected by attorney–client privilege, which belongs exclusively to the company, not the witness.*
- *The company may choose to waive the privilege and disclose the communication to a third party, including the government.*
- *The communication must be kept confidential, meaning that it cannot be disclosed to any third party other than the witness's counsel.*[75]

Once the *Upjohn* warning is given, and before any substantive interview commences, counsel should confirm that the witness understands the warning, answer any questions the witness has about it and establish that the witness is agreeable to being interviewed under these terms. As an additional precaution, counsel should remind the witness at the conclusion of the interview not to discuss the substance of the interview with anyone else, except to the extent that the witness wishes to convey additional information or to ask follow-up questions of counsel.

Once a witness interview is complete, memorialising the content of the interview is essential to the investigation. The summary should state expressly that it does not constitute a verbatim transcription of the interview and that the summary contains the thoughts, mental impressions and legal conclusions of counsel. The summary should also confirm the delivery of the *Upjohn* warning, indicating the employee's understanding of the warning and willingness to proceed with the interview.

36.3.2 Former employees

Interviews with former corporate employees about matters within the scope of their prior employment may also be protected by the attorney–client privilege.[76] Indeed, while courts of different jurisdictions are split as to whether attorney–client

74 *KBR*, 756 F.3d at 758.

75 See, e.g., ABA, White Collar Working Group, *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts With Corporate Employees* (17 July 2009).

76 *Upjohn*, 449 U.S. at 403 (Burger, C.J., concurring) (finding a former employee's communication is privileged when the employee 'speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment').

privilege should extend to discussions with former employees as a general matter,[77] most courts agree that narrowly tailored discussions related to the period of the individual's former employment should remain privileged.[78] As such, counsel conducting an investigation should carefully focus the interview with a former employee on matters that occurred during the former employee's tenure, as some district courts have held that interviews with a former employee on subjects that occurred after the employment had ended are not privileged.[79]

In determining whether a former employee is likely to be co-operative or to maintain the confidentiality of the interview, counsel should consider (1) the circumstances of the employee's departure and (2) whether the employee will be contractually obliged to maintain the confidentiality of the interview, through a severance agreement, for example.

Non-legal advice 36.3.3

At the outset of an internal investigation, the corporation should document that the investigation is being conducted for the purpose of obtaining legal advice and at the direction of counsel. If such intention is not documented, and it appears instead that employee interviews are being conducted in the context of a non-legal investigation, such communications may not be effectively cloaked in the attorney–client privilege. In *Koumoulis v. Independent Financial Marketing Group Inc*,[80] for example, plaintiffs were former and current employees of a company in the business of providing investment products to financial institutions.[81] The Eastern District of New York found that reports documenting internal discrimination complaints and the subsequent investigation by the company's human resources managers were not protected as attorney–client privileged because 'their

77 Compare *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 658 F.2d 1355, 1361 n. 7 (9th Cir. 1981) (finding that the *Upjohn* rationale extended the attorney–client privilege to former employees because 'former employees . . . may possess the relevant information needed by corporate counsel to advise the client with respect to actual or potential difficulties.'), with *Clark Equip. Co. v. Lift Parts Mfg Co.*, No. 82 C 4585, 1985 WL 2917, at *5 (N.D. Ill. 1 Oct. 1985) (declining to apply privilege protection to communications with former employees, noting that '[i]t is virtually impossible to distinguish the position of a former employee from any other third party who might have pertinent information about one or more corporate parties to a lawsuit').

78 See, e.g., *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d 554, 558 (E.D. Pa. 2004) ('the line to be drawn is not difficult: if the communication sought to be elicited relates to [the former employee's] conduct or knowledge *during* her employment . . . , or if it concerns conversations with corporate counsel that occurred *during* her employment, the communication is privileged; if not, the attorney-client privilege does not apply.') (emphasis in original).

79 See, e.g., *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d 554, 558 (E.D. Pa. 2004); *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999). Interviews about such topics may, however, be covered by work-product protection.

80 295 F.R.D. 28 (E.D.N.Y. 1 November 2013), aff'd in part, 29 F. Supp. 3d 142 (E.D.N.Y. 21 January 2014).

81 Id. at 33.

predominant purpose was to provide human resources and thus business advice, not legal advice.'[82]

In light of *Koumoulis*, counsel must be ever mindful of stating explicitly at the outset of an investigation that its communications are outside the course of the day-to-day operation of the client's business and are explicitly aimed at assisting the delivery of legal advice. To the extent that litigation is reasonably foreseeable, it should be noted in all memoranda generated in the context of the investigation. Further, counsel should confirm with individual employees that when they are seeking legal advice – rather than business advice – the employees should be similarly explicit in their communications, labelling them as 'attorney–client privileged'. More important than any label or transcription, however, is that the context of such documents must reflect the solicitation and receipt of legal, rather than business, advice.[83]

36.4 Waiving privilege

Even if all the prerequisites for establishing attorney–client privilege are met, whenever a client discloses confidential communications to third parties, including government agencies, the disclosure may constitute a waiver of the privilege as to both the communication that has been disclosed and other communications relating to the same subject matter. Federal Rule of Evidence 502(a) governs disclosures made to a federal officer or agency and also the scope of waiver in such disclosures.[84] The rule explicitly states that disclosures of attorney–client or work-product protection to the federal government creates a waiver that extends to other undisclosed communication or information in a federal or state proceeding if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.[85]

While the 'fairness' requirement of Rule 502(a) creates some uncertainty as to when subject-matter waiver might occur, in practice, courts typically look to the reason for the initial disclosure when determining the scope of a waiver. If a court determines that a party selectively disclosed privileged information to gain a strategic advantage to the government's detriment, it is more likely to find a full subject-matter waiver.[86] But, if the disclosure occurred outside the context of

82 Id. at 46. See also *Welland v. Trainer*, No. 00 Civ. 0738(JSM), 2001 WL 1154666, at *2 (S.D.N.Y. 1 October 2001) (finding certain communications between the investigator, who conducted the internal investigation, and in-house and outside counsel are protected by attorney–client privilege because the investigator received legal advice from counsel under circumstances in which the employee under investigation was an executive and litigation was expected if the employee were terminated).

83 *Koumoulis*, 29 F. Supp. 3d at 147 (finding that legal memoranda must contain more than 'a stray sentence or comment within an email chain referenc[ing] litigation strategy or advice').

84 Fed. R. Evid. 502(a).

85 Id.

86 See, e.g., *In re Teleglobe Commc'ns Corp.,* 493 F.3d 345, 361 (3d Cir. 2007) ('When one party takes advantage of another by selectively disclosing otherwise privileged communications, courts

litigation, or if the disclosure was not intended for – or did not actually result in – a strategic advantage to the disclosing party, the court is likely to find a limited waiver.[87] In the case of *United States v. Treacy,*[88] for example, Judge Rakoff of the Southern District of New York quashed a defendant's subpoena for a law firm's interview memoranda that had not previously been provided to the government, rejecting the theory that furnishing some interview memoranda to the government waived privilege to others covering the same subject matter. [89] The Court relied on the advisory committee notes in Rule 502(a) in support of its 'fairness' assessment, finding that subject-matter waiver should be reserved for the narrow circumstances where a party seeks to disadvantage their adversary through a selective or misleading disclosure.[90] Further, if a party chooses to disclose attorney work-product to the government – in the form of White Papers, presentations or other memoranda – with the purpose of dissuading the government from bringing suit, one court has recently held that such a disclosure will waive any privilege with respect to those materials, which may subsequently be discoverable by third parties.[91]

Co-operation credit and waiver 36.4.1

Corporations subject to criminal or regulatory investigations have long faced the question of whether and when to turn over privileged material to the government. Waiving privilege has historically resulted in increased co-operation 'credit' from the Department of Justice (DOJ)[92] and the Securities and Exchange Commission

broaden the waiver as necessary to eliminate the advantage.').

87 See, e.g., *In re Keeper of the Records,* 348 F.3d 16, 24 (1st Cir. 2003) (holding that 'the extrajudicial disclosure of attorney–client communications, not thereafter used by the client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter'); *Swift Spindrift, Ltd. v. Alvada Ins. Inc.*, No. 09 Civ. 9342 (AJN)(FM), 2013 WL 3815970, at *5 (S.D.N.Y. 24 July 2013) (finding that the intentional disclosure of two privileged emails did not result in a broader waiver of the attorney–client privilege because (1) the emails were actually unfavourable to the disclosing party's position; and (2) therefore could not be used to the other parties' disadvantage).

88 No. S2 08 CR 366 (JSR), 2009 WL 812033 (S.D.N.Y. 24 Mar. 2009).

89 Id. at *1-2.

90 Id.

91 See *Alaska Electrical Pension Fund v. Bank of America Corp.*, 2017 WL 280816. at *2-3 (S.D.N.Y. 20 January 2017); See also SEC Division of Enforcement, *Enforcement Manual*, Office of the Chief Counsel. §3.2.3.2 (28 October 2016) (specifying that White Papers, excluding Wells notices, submitted to the SEC may be discoverable by third parties in acordance with applicable law).

92 See, e.g., Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys, regarding Principles of Federal Prosecution of Business Organizations (20 January 2003) (Thompson Memorandum); see also Memorandum from Paul McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys, regarding Principles of Federal Prosecution of Business Organizations (12 December 2006) (McNulty Memorandum).

(SEC).[93] However, changes to DOJ guidelines now forbid the government from requesting that companies waive attorney–client privilege, and preclude consideration of whether the corporation waived privilege in assessing co-operation credit.

Indeed, in response to pressure from the private sector and the legislative and judicial branches, on 12 December 2006, the then Deputy Attorney General Paul J McNulty issued a memorandum containing new corporate charging guidelines for federal prosecutors through a revision to the Principles of Federal Prosecution of Business Organizations.[94] The McNulty Memorandum required that, before requesting a waiver of attorney–client or work-product privileged information from a corporation under investigation, prosecutors must: establish a 'legitimate need' for privileged communications and seek approval of the US Attorney, who must obtain written approval of the Deputy Attorney General.[95]

In 2008, the DOJ replaced these guidelines in a memorandum authored by then Deputy Attorney General Mark R Filip.[96] The Filip Memorandum further adjusted what factors the government should consider in determining whether a corporation deserves 'co-operation credit': where co-operation credit had previously turned on factors including waiver of attorney–client privilege or work-product protections, it will now focus on disclosure of relevant facts.[97] In other words, a company could receive the same co-operation credit if it disclosed facts contained in non-privileged materials as it would if it disclosed facts contained in privileged materials, so long as the company discloses all relevant facts known to it.

In September 2015, the Department of Justice issued a memorandum authored by then Deputy Attorney General Sally Quillian Yates entitled 'Individual Accountability for Corporate Wrongdoing'.[98] The Yates Memorandum set forth policies intended to guide the DOJ in holding individual defendants civilly and criminally liable for corporate misconduct.[99] Significantly, the Yates Memorandum now requires a company to disclose 'all relevant facts relating to the individuals responsible for the misconduct' for the company 'to be eligible for any cooperation credit.'[100] While Yates has publicly remarked that these new policies are not

93 See, e.g., Sec. & Exch. Comm'n, SEC Rel. No. 34-44969, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (the Seaboard Report) (23 October 2001) (explaining that a company that disclosed internal investigation interviews without asserting privilege had fully co-operated).

94 McNulty Memorandum, supra note 93.

95 Id. at 8-9.

96 Memorandum from Mark R. Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys, regarding Principles of Federal Prosecution of Business Organizations (28 August 2008) (Filip Memorandum).

97 Id.

98 Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys, regarding Individual Accountability for Corporate Wrongdoing (9 September 2015) (Yates Memorandum).

99 Id. at 1.

100 Id. at 2.

intended to undermine the Filip Memorandum's guidance regarding the waiver of attorney–client privilege,[101] the mandate to disclose 'all relevant facts' creates some uncertainty as to whether, at least practically speaking, such a waiver may now be required once again. In describing the impact of the Yates Memorandum on companies seeking co-operation credit, Yates explained the DOJ's view that 'facts are not [privileged],' and therefore a company must 'produce all relevant facts – including the facts learned through . . . interviews [with company employees] – unless identical information has already been provided.'[102]

In light of the Yates Memorandum, corporate counsel must be mindful about entering into joint defence agreements that might limit their ability to share with the government the underlying facts learned during the investigation, especially if the company is facing exposure to a potentially devastating criminal charge if it does not receive credit for co-operating with the government. In addition, the Yates memorandum underscores the importance of issuing comprehensive *Upjohn* warnings when interviewing company employees, as a mandate to disclose 'all relevant facts' may involve the revelation to the government of facts disclosed by (potentially culpable) employees in the context of investigative interviews.

Inadvertent disclosure of privileged material 36.4.2

Particularly in cases where large numbers of documents are produced, it is not uncommon that a party might inadvertently disclose privileged communications. Federal Rule of Evidence 502(b) governs the court's treatment of attorney–client privileged and work-product material that has been inadvertently disclosed. The rule provides that, when making a disclosure in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: '(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error.'[103] According to Rule 502(b)'s advisory committee explanatory notes, courts are to consider several factors in determining whether the privilege holder took steps to promptly rectify the error, including: (1) the reasonableness of precautions taken; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the number of documents reviewed and the time constraints for production; (5) the extent of disclosure; and (6) 'the overriding issue of fairness.'[104] The explanatory notes also suggest that a party can

101 Remarks of Deputy Att'y Gen. Sally Quillian Yates delivered at American Banking Association and American Bar Association Money Laundering Enforcement Conference (16 November 2015), available at https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0 ('[T]here is nothing in the new policy that requires companies to waive attorney–client privilege or in any way rolls back the protections that were built into the prior factors.').

102 Id.

103 Fed. R. Evid. 502(b).

104 Fed. R. Evid. 502 advisory committee's note.

help demonstrate that its steps were reasonable by employing 'advanced analytical software applications and linguistic tools' in screening for privilege.[105]

Federal Rule of Civil Procedure 26(b)(5)(B) provides additional guidance on how clawback provisions may intersect with a claim of inadvertent disclosure. Under this Rule, if information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, 'the party making the claim may notify any party that received the information of the claim and the basis for it.'[106] After being notified, a party:

> *must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim*.[107]

While the same clawback procedure is not explicitly contemplated in the criminal context, parties making disclosures in federal proceedings or to a federal office or agency may choose to enter into a voluntary clawback arrangement under Rule 502(e), including an explicit agreement that inadvertent disclosure will not constitute a waiver.[108] Such agreements are generally binding only on the parties to the agreement.[109] A carefully-drawn clawback agreement can be to the benefit of everyone in the context of a government investigation: the agency will benefit from receiving discovery more expeditiously, and the producing party will benefit from minimising the risk and added review costs in the absence of such an agreement.[110] Even where counsel takes reasonable steps to prevent the disclosure of privileged material, the complexity of government investigations creates a real risk that such materials may still be inadvertently produced. To further mitigate this risk, document production letters should include unequivocal language, preserving the client's ability to claw back and recover inadvertently disclosed documents.

36.5 Selective waiver

The attempt to disclose privileged material to the government in the context of an investigation, while still claiming privilege and confidentiality over that same material as to other third parties, is called 'selective waiver'. Generally, courts have refused to sanction selective waiver, finding that the disclosure of privileged material to the government destroys the confidentiality necessary to maintain a claim

105 Id.

106 Fed. R. Civ. P. 26(b)(5)(B).

107 Id.

108 Fed. R. Evid. 502(e).

109 Id.

110 In the context of an investigation that is already public, a party may choose to request a court order limiting the scope of waiver and/or setting forth a clawback procedure to govern its production. See Fed. R. Evid. 502(d).

of privilege in the first place, and therefore waives the privilege with respect to other third parties as well.[111]

The leading case applying the selective-waiver analysis is *Diversified Industries Inc v. Meredith*.[112] In *Diversified Industries*, a corporation retained outside counsel to conduct an internal investigation into allegations of bribery.[113] The internal report prepared by outside counsel was then produced to the SEC.[114] The Eighth Circuit held that this disclosure constituted only a 'limited waiver' that did not preclude the corporation from subsequently withholding the report from private litigants on the grounds of attorney–client privilege.[115] The court reasoned that a contrary ruling may undermine corporate incentives to initiate internal investigations conducted by counsel.[116]

But while *Diversified Industries* is still good law, the concept of selective waiver is disfavoured by most federal circuit courts,[117] which routinely hold that selective disclosure of a document to the government constitutes complete waiver of the privilege. As the DC Circuit reasoned, the privilege was not designed to allow a client 'to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others.'[118]

The Second Circuit confronted the issue of selective waiver in *In re Steinhardt Partners LP*.[119] While expressing reluctance to embrace selective waiver, the *Steinhardt* decision refused to foreclose the possibility that selective waiver may be found in some cases, at least where the disclosing party and the government share a common interest or the disclosing party has entered into an explicit agreement with the government to maintain the confidentiality of the disclosed materials.[120] As a result, in the Second Circuit, a case-by-case analysis of the facts is necessary to determine whether selective waiver may apply.[121]

Some courts have suggested that production pursuant to a valid confidentiality agreement entered into with the government prior to the disclosure of attorney–client privileged or work-product information effectively preserves the privilege and does not amount to a waiver as to third parties.[122] Consequently,

111 See, e.g., *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681 (1st Cir. 1997); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981).

112 572 F.2d 596 (8th Cir. 1977) (en banc).

113 Id. at 607.

114 Id. at 600.

115 Id. at 611.

116 Id.

117 See, e.g., *In re Pac. Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012) (asserting that the doctrine has been 'rejected by every other circuit to consider the issue since' Diversified Industries).

118 *Permian Corp.*, 665 F.2d at 1219-20.

119 9 F.3d 230 (2d Cir. 1993).

120 Id. at 236.

121 Id.

122 See, e.g., *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1375 (D.C. Cir. 1984); *In re Natural Gas Commodity Litig.*, No.

if the company does intend to disclose privileged material to the government, it should first attempt to obtain such an agreement from the government that it will keep the information confidential (a McKesson letter).[123] But even though future plaintiffs would not be parties to such an agreement, some courts have still found that the production of privileged materials pursuant to confidentiality agreements with the government nonetheless constitutes a waiver.[124] In light of federal courts' reluctance to find selective waiver, when a company voluntarily discloses documents or communications to government agencies, it must do so with the understanding that the documents and communications may lose the protection of the privilege and be subject to discovery by other parties, including private litigants.

Safe harbours

Banks, in particular, often face pressure to share privileged materials with the government, both in the context of enforcement actions aimed at suspected wrongdoing and during routine regulatory oversight. But as a statutory matter, sharing privileged materials with bank supervisors results in a waiver of privilege only with respect to those supervisors; it does not waive applicable privileges with respect to third parties. Under Section 1828(x) of the Regulations Governing Insured Depository Institutions, the submission of information to 'the Bureau of Consumer Financial Protection, any [f]ederal banking agency, [s]tate bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process' shall not be construed as waiving privilege 'as to any person or entity other than such agency, supervisor, or authority'.[125] This approach provides one of the few examples of federal statutes that explicitly allow for the idea of selective waiver.[126]

36.6 Disclosure to third parties

Generally, the attorney–client privilege is waived if the holder of the privilege voluntarily discloses or consents to the disclosure of any significant part of the communication to a third party or stranger to the attorney–client relationship.[127] A third-party agent may have communications with an attorney that remain covered by the attorney–client privilege if the agent's role is limited to helping a lawyer give effective advice to the client.[128] Whether disclosure to outside consultants will constitute a waiver will depend on the surrounding facts and circumstances,

---

03 Civ. 6186 (VM) (AJP), 2005 U.S. Dist. Lexis 11950, at *39 (S.D.N.Y. 21 June 2005).

123 See David N. Powers & Sara E. Kropf, Disclosure of Internal Investigation Reports: A Legislative Solution to the McKesson Letter Dilemma, 32 Sec. Reg. L.J. 340, 341 (2004).

124 See, e.g., *In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 302-04; *Westinghouse Elec. Corp.*, 951 F.2d at 1424-27, 1431.

125 12 U.S.C. § 1828(x).

126 Section 1828(x)'s companion statute, 12 U.S.C. § 1785(j), applies the same rule to credit unions.

127 See *In re Grand Jury Proceedings*, No. M-11-189 (LAP), 2001 WL 1167497, at *7 (S.D.N.Y. 3 October 2001).

128 See *United States v. Kovel,* 296 F.2d 918, 922 (2d Cir. 1961).

including the purpose for the disclosure and the involvement of counsel with that third party.[129]

United States v. Kovel is the seminal case concerning the bounds of attorney–client privilege with respect to third-party consultants.[130] In *Kovel*, a law firm employed an accountant who was held in criminal contempt for refusing to testify about his conversations with the law firm's client under a claim of privilege.[131] In considering whether the accountant had a basis to assert attorney–client privilege, the Second Circuit recognised that there are situations 'where the lawyer needs outside help,' and found that when the accountant assists in the 'effective consultation between the client and the lawyer which the privilege is designed to permit,' the privilege should protect the communications.[132] The *Kovel* court analogised the accountant's role to that of an interpreter, which is sometimes necessary for the attorney effectively to communicate with his or her client.[133] The *Kovel* doctrine has been recognised by many courts as protecting attorney–client privilege in circumstances where a third party has specialised knowledge or skills that assist the attorney in rendering legal advice.[134]

For example, a client's statements to a private investigator hired by the client's attorney are often protected by the attorney–client privilege when the investigator acts as an agent of the attorney.[135] Similarly privileged (as work-product) are an

129 See, e.g., *Fed. Trade Comm'n v. GlaxoSmithKline*, 294 F.3d 141, 148 (D.C. Cir. 2002) (finding 'no reason to distinguish between a person on the corporation's payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice'); *NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 131-32 (N.D.N.Y. 2007) (finding that when attorney acted solely as coordinator of media relations, communications between attorney and client were not protected). See generally Michele DeStefano Beardslee, The Corporate Attorney–Client Privilege: Third-Rate Doctrine for Third-Party Consultants, 62 SMU L. Rev. 727, 744-55 (2009) (outlining the doctrine of attorney–client privilege when third parties are involved).

130 296 F.2d 918 (2d Cir. 1961).

131 Id. at 919.

132 Id. at 922.

133 Id. at 921.

134 See, e.g., *United States v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995) ('Under certain circumstances . . . the privilege for communication with attorneys can extend to shield communications to others when the purpose of the communication is to assist the attorney in rendering advice to the client.'); *United States v. Ackert*, 169 F.3d 136, 139 ('[T]he inclusion of a third party in attorney–client communications does not destroy the privilege if the purpose of the third party's participation is to improve the comprehension of the communications between attorney and client.'); *Exp.-Imp. Bank of the U.S. v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 113 (S.D.N.Y. 2005) (recognising, under Kovel, that 'communications with a financial adviser are covered by the attorney–client privilege if the financial adviser's role is limited to helping a lawyer give effective advice by explaining financial concepts to the lawyer').

135 See *U.S. Dept. of Educ. v. National Collegiate Athletic Ass'n.*, 481 F.3d 936, 937 (7th Cir. 2007) (recognising that, while there is no 'private investigators privilege,' there are circumstances where attorney–client privilege can 'embrace a lawyer's agents (including an investigator).'); see also, e.g., *Clark v. City of Munster*, 115 F.R.D. 609, 613 (N.D. Ind. 1987) (finding that statements made by a defendant to a private investigator employed by his attorney are protected by attorney–client privilege.)

investigator's interviews to gather background information for the attorney.[136] If, however, the investigator is going to be a fact witness concerning the information she has gathered, then all aspects of the investigator's fact gathering may be open to discovery, including statements by third parties to the investigator and the underlying factual data gathered by the investigator. Therefore, any work-product privilege that might have protected that information is waived by virtue of the private investigator's decision to testify.[137]

Courts have also extended attorney–client privilege to include public relations consultants under certain circumstances.[138] In particular, communications with public relations consultants have been found to maintain privilege if the primary purpose of the communication was to aid in the rendering of legal advice.[139] Such communications are found within the bounds of attorney–client privilege if the consultant provides services necessary to promote the attorney's effectiveness in the client's legal representation or the consultant is essentially an extension of the attorney under agency principles, or both.[140]

Even with this guidance, the extent to which public relations consultants come within the bounds of attorney–client privilege is often unclear. For example, in *Calvin Klein Trademark Trust v. Wachner*, a court in the Southern District of New York refused to extend the attorney–client privilege to protect documents and testimony sought from Robinson Lerer & Montgomery (RLM), a public-relations firm retained by counsel to Calvin Klein.[141] In so ruling, the court held, *inter alia*, that the 'possibility' that communications between counsel and RLM might help counsel formulate legal advice was 'not in itself sufficient to implicate the privilege';[142] and that extending the privilege to the documents and communications at issue would apply the privilege too broadly because RLM did not appear to perform functions 'materially different from those that any ordinary public relations firm would have performed'.[143]

---

136 *Clark*, 115 F.R.D. at 614.

137 See *Brown v. Trigg*, 791 F.2d 598, 601 (7th Cir. 1986); *United States v. Nobles*, 422 U.S. 225 (1975) (finding that by electing to present the investigator as witness, the defendant waived his privilege as to information collected by the investigator and his attorney).

138 See *Grand Jury Subpoenas*, 265 F. Supp. 2d 321, 321 (S.D.N.Y. 2003); *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000).

139 See, e.g., *Grand Jury Subpoenas*, 265 F. Supp. 2d at 325; but see *Guiffre v. Maxwell*, No. 15 Civ. 7433 (RWS), 2016 U.S. Dist. LEXIS 58204, at *23-25 (S.D.N.Y. 2 May 2016) (finding that the media agent's involvement in otherwise privileged communications between the defendant and her lawyer destroyed any privilege protection because the defendant failed to establish (1) 'that [the agent] was necessary to implementing [the lawyer's] legal advice;' (2) that she 'was incapable of understanding counsel's advice . . . without the intervention of a "media agent"' or (3) 'that [the agent] was translating information between [the lawyer] and Defendant in the literal or figurative sense.').

140 See *Haugh v. Schroder Inv. Mgmt. N. Am., Inc.*, No. 02 Civ. 7955 (DLC), 2003 U.S. Dist. Lexis 14586, at *8 (S.D.N.Y. 25 August 2003); *GlaxoSmithKline*, 294 F.3d at 148.

141 198 F.R.D. at 54.

142 Id.

143 Id. at 55.

A few months later, in *In re Copper Market Antitrust Litigation*, a different judge from the same district court reached the exact opposite conclusion regarding the same public relations firm, finding that RLM acted as the company's 'spokesperson' when dealing with issues related to a copper trading scandal, and frequently conferred with counsel.[144] Under these facts, the court found that RLM acted as the 'functional equivalent of an in-house public-relations department with respect to Western media relations' and therefore found that the communications between RLM, the company and counsel were made for the purpose of facilitating the provision of legal advice.[145]

Similarly, in *FTC v. GlaxoSmithKline*, the US Court of Appeals for the DC Circuit found that communications with a public relations firm were protected by the privilege.[146] In so ruling, the court adopted the *Copper Market* court's rationale, crediting a party affirmation that the consultant became an 'integral member of the team assigned to deal with the issues [that] . . . were completely intertwined with [the client's] litigation and legal strategies.'[147] Hence, to improve the likelihood that communications with a public relations firm will be cloaked in attorney–client privilege, the firm should interact regularly with counsel, and act as an agent at counsel's direction.

In sum, a party claiming the benefit of attorney–client privilege has the burden of establishing all of the essential elements to qualify for the protections of the privilege.[148] Consequently, an attorney who wishes to consult with a non-attorney professional must seek to establish that the third party's involvement will facilitate legal advice from the beginning of the engagement.[149]

To support its claim that communications with, and documents generated by, a third party consultant are protected under the attorney–client relationship, counsel should memorialise the nature of the consultant's engagement in a *Kovel* letter. Such a letter should (1) state that counsel is retaining the consultant to assist with the provision of legal advice to the client; (2) instruct the consultant about specific tasks to be performed in support of the provision of that legal advice; (3) state that all work-product generated under the scope of the engagement is the property of counsel; and (4) instruct the consultant to maintain the confidentiality of all information received or created in the course of the engagement. Further, the consultant should be guided in his or her actions by the attorney, rather than independently by the client.

144 200 F.R.D. 213, 215 (S.D.N.Y. 2001).

145 Id. at 216.

146 294 F.3d 141 (2002).

147 Id.

148 See *Adlman*, 68 F.3d at 1500 (finding that a party claiming protection under the attorney–client privilege has the burden of proving each of the elements of such a privilege by contemporaneous proof of a *Kovel* agreement).

149 See, e.g., *In re G-I Holdings, Inc.*, 218 F.R.D. 428, 436 (D.N.J. 2003).

36.6.1 Disclosure to the company's auditors

The disclosure of attorney–client privileged information to a company's external auditors ordinarily constitutes a subject-matter privilege waiver.[150] To the extent that counsel anticipates that the company's outside auditors may require information about the status of an ongoing investigation, counsel should be prepared to communicate with auditors in a way that will limit any waiver of privilege. For example, counsel may provide the outside auditor detailed information about the investigative process – including the structure, the personnel involved, the document preservation steps that were taken, general information about the process of reviewing documents and conducting interviews, and outside consultants employed to assist in the investigation – which may provide the outside auditors with a level of comfort about the comprehensive nature of the investigative process, without waiving the privilege regarding the substance of the investigation.

And while the disclosure of privileged information to auditors will likely waive the attorney–client privilege, work-product protection may remain intact if the auditor's interests are found not to be 'adverse' to the client. For instance, in *Merrill Lynch & Co v. Allegheny Energy Inc*,[151] Allegheny sought to compel discovery of two internal investigation reports (prepared by counsel) that Merrill Lynch had disclosed to its auditor, arguing that the disclosure constituted a waiver of any applicable privilege.[152] The court disagreed, stating that the 'critical inquiry' is whether the auditors 'should be conceived of as an adversary or a conduit to a potential adversary.'[153] The court held that 'any tension between an auditor and a corporation that arises from an auditor's need to scrutinize and investigate a corporation's records and book-keeping practices simply is not the equivalent of an adversarial relationship contemplated by the work-product doctrine.'[154] Consistent with the *Allegheny* court's guidance, if the client cannot avoid disclosure of privileged information to its auditors, counsel may be able to argue in subsequent civil litigation that work-product protection remains intact under this principle.

36.6.2 Disclosure to foreign governments

When analysing issues of waiver surrounding productions to foreign governments, courts of the United States tend to focus on whether the production of privileged material was compelled or voluntary. Where the submission is compelled or where there was no opportunity to assert the privilege, United States courts will generally find that the privilege was not waived.[155]

---

150 See, e.g., *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992).

151 229 F.R.D. 441 (S.D.N.Y. 2004).

152 Id. at 444.

153 Id. at 447.

154 Id. at 448.

155 See *In re Grand Jury Proceedings*, 219 F.3d at 191 ('[V]oluntary (as opposed to compelled) disclosure of documents to the SEC waived the company's work-product privilege as to other parties.'); *Westinghouse Elec. Corp.*, 951 F.2d at 1427 n.14 (finding privilege waiver in subsequent litigation where the party withdrew objections to SEC subpoena production and produced documents

Expert witnesses 36.7

Where government investigations involve complex financial transactions and other areas requiring specialised knowledge, counsel will often retain experts during the investigative stage to assist in their assessment of potential liability and in the building of the defence case. As with any outside consultants, counsel should take steps to clarify that experts are being retained to assist counsel in their provision of legal advice, to maintain privilege over communications with the expert and their underlying analysis.

See Section 36.6

In the context of a criminal action that may follow an internal investigation, unless counsel determines that it would be advantageous to present expert analysis in conjunction with a report of its investigative findings to the government or regulatory authority, consulting expert materials will otherwise remain shielded from discovery as attorney–client privileged materials. If the defence intends to call an expert witness at trial, however, counsel may be obliged – at the government's request – to provide a written summary of the testimony that the defendant intends to offer at trial.[156] And while Federal Rule of Criminal Procedure 16 contemplates that the expert's underlying memoranda and other documents created during the case investigation will remain protected from disclosure,[157] counsel will still be required to produce documents that may qualify as 'statements' of a testifying expert under Rule 26.2 prior to trial.[158]

In the context of civil litigation that may follow an internal investigation, however, expert discovery will be governed by Federal Rule of Civil Procedure 26. Prior to 2010, there was a significant risk that any documents provided to a testifying expert witness would be discoverable under Rule 26, even if they were previously considered attorney–client privileged.[159] But the 2010 amendments to the Rule made significant changes that strictly limited the discovery of communications between counsel and experts, including the discovery of draft expert reports. For example, Rule 26(b)(4)(B) was added to provide work-product protection for drafts of expert reports or disclosure.[160] In addition, Rule 26(b)(4)(C) was added

---

and noting that 'had [party] continued to object to the subpoena and produced the documents only after being ordered to do so, we would not consider its disclosure of those documents to be voluntary'); *In re Vitamin Antitrust Litig.*, No. MC 99-197 (TFH), 2002 WL 35021999, at *28 (D.D.C. 23 January 2002) ('[C]ompulsion avoiding waiver requires that a disclosure be made in response to a court order or subpoena or the demand of a governmental authority backed by sanctions for noncompliance, and that any available privilege or protection must be asserted.').

156 See Fed. R. Crim. P. 16(b)(1)(C).

157 See Fed. R. Crim. P. 16(b)(2)(A).

158 See Fed. R. Crim P. 26.2(f) (listing 'statement[s]' of testifying witnesses to include (1) a written statement that the witness makes and signs, or otherwise adopts or approves; (2) a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or (3) the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement).

159 See *Synthes Spine v. Walden*, 232 F.R.D. 460, 463 (E.D. Pa. 2005) (collecting cases and requiring disclosure of privileged material); see also *Galvin v. Pepe*, No. 09-cv-104-PB, 2010 WL 3092640, at *6-7 (D.N.H. 5 August 2010) (citing id.).

160 Fed. R. Civ. P. 26(b)(4) advisory committee's note.

to provide work-product protection for attorney-expert communications.[161] These amendments to Rule 26 were designed to protect counsel's work-product and ensure that lawyers may interact with experts 'without fear of exposing those communications to searching discovery.'[162]

Although the 2010 amendments provide significant protection for expert drafts and attorney-expert communications, counsel should still make efforts to limit the scope of potential disclosure by effectively managing a testifying expert's access to information and the development of the expert's opinions. For example, Rule 26 does not preclude discovery of facts or data provided to the expert by an attorney, such as fact work-product prepared for the expert by counsel.[163] Consequently, counsel should create an inventory of all factual materials provided to a testifying expert and ensure that all of such factual materials are accurate and final, and that such materials have been produced or are otherwise matters of public record. Further, where the committee notes accompanying Rule 26 extend to 'any materials considered by' an expert, counsel should ensure that all of the facts made available to a testifying expert are based upon the record in the case, rather than as the result of attorney–client privileged communications.

Finally, while the amendment to Federal Rule 26 protects drafts of expert reports from disclosure, state court rules of civil procedure may vary as to whether such drafts are discoverable. If there is any question as to whether drafts of an expert report may be discoverable, especially if the matter is pending in a jurisdiction governed by state law, it may be advisable to negotiate a stipulation that explicitly extends the protection of the Federal Rules to expert discovery.

161 Id.

162 See *Commodity Futures Trading Comm'n v. Newell*, 301 F.R.D. 348, 352 (N.D. Ill. 2014) (explaining that the government is not allowed to discover drafts of expert reports or attorney expert communications, unless communications fall within one of the three specific exceptions in Rule 26(b)(4)(C)).

163 Fed. R. Civ. P. 26(b)(4)(D).

37

Publicity: The UK Perspective

Stephen Gentle[1]

Publicity in connection with investigations or proceedings is generally unwelcome for the corporation involved – there may be reputational implications, the company's share price and market share may be affected, relationships with any authorities investigating may be harmed, and indeed the interest of additional authorities may be piqued. In addition, there may be serious consequences if publicity damages the investigative or trial process or breaches legal or professional obligations. Accordingly, it is important for corporations to understand the legal contexts for publicity: the principle of open justice, the extent to which legislation imposes restrictions on information relevant to investigations and proceedings entering into, and circulating in, the public domain, and the mechanisms available to allow or prevent information becoming public. There may also be occasions when corporations wish to explore whether there may be benefits from publicity. This chapter explores these areas with particular reference to media reporting of investigations and proceedings conducted by public authorities.

The openness of judicial proceedings is a constitutional principle long recognised by the common law,[2] now supplemented by the European Convention on Human Rights (ECHR). Article 6(1) protects the right of a defendant to a public

1 Stephen Gentle is a partner at Simmons & Simmons LLP.

2 In a recent judgment given by the Lord Chief Justice, Lord Thomas, in *Guardian News and Media Ltd and Others v. R and Erol Incedal*, Neutral Citation Number [2016] EWCA Crim 11, he noted that he was unable to improve on the 'eloquent' statements of those who gave judgments

hearing, although that right is not absolute and is subject to the court's discretion to exclude press and public from proceedings in the interests of justice.[3] This transparency imperative applies to pretrial hearings as well as the trial. Alongside Article 6, Article 10 of the ECHR protects the freedom of expression and information although this right too is qualified in certain circumstances.[4]

The right to a public hearing means that not only what is said in court may be reported but also those with a legitimate interest in the proceedings (particularly the press) may have access to material supplied to a judge or referred to in open court but not made public.[5] The court has noted that the purpose of the '"open justice" principle . . . is to enable the public to understand and scrutinise the justice system of which the courts are the administrators'.[6]

The jurisprudence of the European Court of Human Rights has stated that ensuring the transparency of the administration of justice helps to achieve a fair trial: 'By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the principles of any democratic society'.[7]

Article 6 has also been held to apply to pretrial investigations by public authorities. However, as we explain below, domestic law and practice would generally prevent any significant publicity at this early stage of the criminal process.

The principle of open justice has also been incorporated into Part 6 of the Criminal Procedure Rules (CrimPR).[8] The rules are comprehensive in their treatment of the principle and should be the first port of call for anyone approaching the issue of publicity and reporting, and how the principle is applied in practice. Reference is made there to the importance of dealing with criminal cases in public before going on to describe the circumstances and procedure where restrictions on public proceedings can be imposed. The overriding objective of the CrimPR is that all criminal cases are dealt with 'justly' and that transparency is a key component of that objective.

---

in the case of *Scott v. Scott* [1913] AC 417, see Lord Haldane LC at 437-9 and Lord Shaw of Dunfermline at 476-8.

3 '[T]he press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

4 Article 10(2) ECHR. 'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

5 *R (Guardian News and Media Ltd) v. City of Westminster Magistrates Court* [2012] 3 All ER 551.

6 Ibid.

7 *Stefanelli v. San Marino* (2001) 33 EHRR 16.

8 The rules referred to in this chapter were published in October 2015.

The architecture of the principle of open justice is completed by 6B of the Criminal Practice Directions where reference is made to the joint publication, Reporting Restrictions in the Criminal Courts issued by the Judicial College, the Newspaper Society, the Society of Editors and the Media Lawyers Association.[9] Particular emphasis is given to the need to ensure that any restrictions are proportionate and necessary to comply with Article 10 of the ECHR.

Publicity and investigations 37.2

Restrictions on disclosure of information: the pre-charge position 37.2.1

There are a number of restrictions on the disclosure of information at the stage where law enforcement authorities are carrying out an investigation – whether that is to the media or generally. These will include legal restrictions imposed where money laundering disclosures have been made, where legal privilege applies, complying with conditions imposed by the authorities and complying with duties of confidentiality that form part of employment contracts or settlement agreements. These restrictions will generally continue if criminal proceedings are commenced.

See Chapter 35 on privilege

Money laundering 37.2.1.1

For entities and individuals in the 'regulated sector',[10] care must be taken to avoid making any comments or statements publicly that a money laundering disclosure has been made where, as a result, an investigation may be prejudiced, thereby committing a 'tipping off' offence.[11] For those not in the regulated sector, an offence of prejudicing an investigation[12] will apply if, in summary, a person makes a disclosure he or she knows or suspects might prejudice a money laundering, civil recovery or confiscation investigation.

Perverting the course of justice 37.2.1.2

Staying with the criminal law implications of making information public in the course of an investigation, a common law offence of perverting the course of justice would apply if making information public tended to pervert the course of justice and the defendant intended the disclosure to have that effect. This is a high bar. However, although a prosecution may be difficult to bring, this does not, of course, prevent an unwelcome and damaging investigation taking place should a law enforcement authority suspect an offence has taken place. The reference by the Serious Fraud Office (SFO) in guidance to an offence being committed by 'disrupting' criminal investigations by improper disclosure of information is a not overly oblique reference to the risk of publicity straying into criminality.

9 Issued in April 2015 and revised in May 2016 https://www.judiciary.gov.uk/publications/reporting-restrictions-in-the-criminal-courts-2/.

10 Defined in the Proceeds of Crime Act 2002, Schedule 9.

11 Section 333A of the Proceeds of Crime Act 2002.

12 Section 342 of the Proceeds of Crime Act 2002.

37.2.1.3 The SFO approach to confidentiality

See Chapter 15 on representing individuals in interviews, Section 15.3.3

Of more practical significance is the approach adopted by the SFO to confidentiality of its investigations and, more particularly, the material disclosed to suspects and their lawyers as pre-interview disclosure. This has proved a contentious area recently. The SFO has now published guidance on the process of requesting and handling interviews under section 2 of the Criminal Justice Act 1987.[13] The guidance 'requests' interviewees do not 'disclose anything said or seen in the interview to anyone except the interviewee's lawyer as to do so could disrupt the investigation. It should be noted that disrupting a criminal investigation may in certain circumstances amount to a crime.' In addition, the SFO guidance seeks to place constraints on those representing subjects of section 2 interviews. These constraints include requirements to provide professional undertakings not to copy or disseminate material. The robust stance of the SFO in this area has caused some contention, given the professional and legal obligations already imposed on defence lawyers but it is likely that the new approach will become the default position for the SFO, although modifications are also likely in specific cases through discussions between defence representatives and the assigned case controller.

37.2.1.4 The Financial Conduct Authority (FCA) approach to confidentiality

Paragraph 6.1 of the FCA's Enforcement Guide states that 'the FCA will not normally make public the fact that it is or is not investigating a particular matter, or any findings or conclusions of an investigation' save in 'exceptional circumstances'. Those circumstances are set out in paragraphs 6.2 and include where the FCA considers that a public announcement is required to maintain public confidence in the financial system, to deal with speculation or rumour, to protect consumers or investors or to help the investigation itself by, for example, bringing forward witnesses. The categories are perhaps too wide to be considered 'exceptional' and provide the FCA with a significant degree of discretion in whether to publicise an investigation.

The provisions of the Enforcement Guide are supported by section 348 of the Financial Services and Markets Act 2000 (FSMA), which prevents the disclosure of 'confidential information' by the FCA, the Prudential Regulation Authority (PRA) or any person who obtained information from either agency unless consent is obtained from the person the FCA or the PRA obtained the information from or the person the information relates to.

Two statutory exceptions to section 348 are set out in section 349 of FSMA. The first allows disclosure of confidential information to facilitate the carrying out of a public function and the second relates to disclosure permitted by HM Treasury regulations – in particular, FSMA (Disclosure of Confidential Information) Regulations 2001.[14] The exceptions, in practice, are extensive and

13 https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/codes-and-protocols/.

14 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001/2188) (as amended).

would allow, for example, disclosure of information for the purposes of civil, criminal or disciplinary action.

Internal investigations 37.2.2

Before discussing the question of publicity once criminal proceedings are under way, it is worth noting the position as regards internal investigations where no external law enforcement is involved. Here, the regime is governed by the civil law. For example, the confidentiality of internal investigation reports might be protected by contractual obligations between employer and employee, and leaks may be dealt with through injunctive orders in the civil courts.

Publicity and criminal proceedings 37.3

The reporting restrictions discussed in this chapter fall into two categories. Those where there is a derogation from the principle of open justice and those where legislation imposes reporting restrictions that the court may then vary or remove.

Derogation from the principle of open justice – reporting restrictions 37.3.1

There are limited restrictions on the principle of open justice once proceedings are instituted. Reporting and the restrictions on reporting of public criminal proceedings (including pretrial hearings) are primarily governed by the broad framework of the Contempt of Court Act 1981 (CCA81), which is supplemented by other legislation dealing with restrictions on publicity in specific aspects of criminal proceedings. This legislation includes the Criminal Procedure and Investigations Act 1996 (CPIA96), the Serious Organised Crime and Police Act 2005 (SOCPA05), the Crime and Disorder Act 1998 (CDA98) and the Criminal Justice Act 2003 (CJA03).

The 'strict liability rule' 37.3.1.1

Section 1 of the CCA81 states that: 'conduct may be treated as a contempt of court as tending to interfere with the course of justice regardless of intent to do so' – the so-called strict liability rule. However, the Act goes on to restrict the application of the rule by stating that it will only apply to active proceedings[15] where the relevant 'publication' (widely defined) has been 'addressed to the public at large or any section of the public' and that 'creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.' Crucially, section 4 of the CCA81 states that a person is not guilty of contempt under section 1 'in respect of a fair and accurate report of legal proceedings held in public published contemporaneously and in good faith.'

15 See CCA81 Schedule 1

37.3.1.2 Section 4(2) of the CCA81

Notwithstanding the principle of open justice, the CCA81 sets out certain statutory derogations that will be applied where necessary and proportionate to the overriding requirement to ensure the fairness of the process. Section 4(2) of the CCA81 allows the court to impose an order that the publication of a report of public proceedings should be postponed where necessary to avoid a substantial risk of prejudice to the administration of justice.

Situations where a postponement may be necessary include those where there are further or imminent proceedings or where there is a 'trial within a trial', for example interlocutory proceedings dealing with the same or similar facts that may ultimately form part of a trial.[16]

There is no express statutory provision as to who may make representations in respect of the making or continuance of an order and it has been recognised that the press may make such representations.[17] Indeed, there are examples of journalists making oral submissions to the court when a judge indicates that he or she is minded to make an order, although it is more common for a separate hearing to be listed and media organisations to be represented by counsel. This is in accordance with the recommendation in the publication by the Judicial College, Reporting Restrictions in the Criminal Courts.

37.3.1.3 Section 11 of the CCA81

Section 4(2) of the CCA81, imposes a postponement of reporting of proceedings. Section 11 is more draconian and in any case where a court (having power to do so) allows a name or other matter to be withheld from the public, it allows a court to impose a permanent ban on the reporting of 'a name or other matter' and to give directions in relation to the prohibition on publication. Section 11 does not itself provide a power to 'withhold a name or other matter', rather it builds on the common law jurisdiction of the court and in doing so introduces a new power to give directions to avoid any uncertainty among the media and others as to what may be published.[18]

37.3.1.4 Derogatory remarks in mitigation

Sections 58-60 of the CPIA96 gives the courts power to postpone the reporting of derogatory remarks made in mitigation for a defendant who has been found guilty after a trial or following a plea. The court must have substantial grounds for believing that the assertion is derogatory and false or that the facts asserted are irrelevant to the sentence. The statutory restriction is supplemented by rules

16 *Per* Denning LJ in *Horsham Justices ex p Farquharson* [1982] QB 762 at 805.

17 *R v. Clerkenwell Metropolitan Stipendiary Magistrate, ex p The Daily Telegraph* [1993] QB 462, 97 Cr. App.R. 18, DC.

18 *Att-Gen v. Leveller Magazine Ltd* [1979] AC 440 at 450, 458, 464, 471, HL (as it relates to the granting of anonymity).

of professional conduct.[19] In circumstances where a jury has found a defendant guilty, mitigation that seeks to, for example, traduce the reputation of a victim or re-open the facts of the case would not be allowed. However, where a defendant has pleaded guilty and the facts have not been aired, a judge's discretion is more difficult to apply in the absence of a clear basis of plea.

Co-operating defendants 37.3.1.5

Section 73 of SOCPA05 provides the statutory framework for defendants who plead guilty and, pursuant to a written agreement with the prosecution, assist or offer to assist that prosecution. Section 74 of SOCPA05 allows a prosecutor, in certain circumstances, to refer the case back to the sentencing court to review the sentence. Section 75 of SOCPA05 allows the court to exclude individuals from the review proceedings, other than legal representatives or those directly involved. The courts have noted that this derogation from the principle of open justice, with particular reference to the desirability that those being sentenced are sentenced publicly, should be rarely used[20] and efforts made to adopt proportionate procedures to allow reporting but to protect, where appropriate, the identities of those who have assisted the prosecution – competing ECHR Article 2 (right to life), Article 6 and Article 10 rights will all be in issue.

Statutory reporting restrictions the court may vary or remove 37.3.2

The purpose of the reporting restrictions described below is to preserve the integrity of and prevent prejudice to the trial process.

Preparatory hearings 37.3.2.1

SFO cases of serious or complex fraud and other complex cases may be the subject of preparatory hearings in the Crown Court. The purpose of the preparatory hearing, to which sections 7-10 of the Criminal Justice Act 1987 (CJA87) apply (i.e., SFO prosecutions), or other cases of complexity to which sections 28-38 of the CPIA96 apply, is to identify relevant issues, assist in the management of the trial and consider legal points such as joinder or severance.

Section 11 of the CJA87 and section 37 of the CPIA96 automatically restrict the reporting of preparatory hearings subject to a judge's discretion to not apply the restrictions or apply them to a specified extent. Should a judge make an order that allows reporting, a defendant may make representations and a judge may only then make an order if satisfied it is in the interests of justice. If the order is made, it shall not apply to the extent that a report deals with any objection or representation.

19 Paragraph E3 of the Attorney General's Guidelines on the acceptance of pleas and the prosecutor's role in the sentencing exercise: https://www.gov.uk/guidance/the-acceptance-of-pleas-and-the-prosecutors-role-in-the-sentencing-exercise#e-pleas-in-mitigation.

20 *R v. P*; *R v. Blackburn* [2007] EWCA Crim 2290; [2008] 2 All E.R. 684; [2008] 2 Cr. App. R. 5 CA

37.3.2.2 Allocation and transfer of cases from magistrates' court to Crown Court

Section 51 of the CDA98 deals with the procedure for allocation and sending of cases from a magistrates' court to the Crown Court. Section 52A prohibits the reporting of allocation or sending proceedings subject to the magistrates' discretion to disapply the prohibition. There is, however, certain information that may be reported without falling foul of the legislation, including the names, address and occupation of the accused and the offence or offences (or a summary) with which the accused is charged. An accused may object to an order disapplying the prohibition and in those circumstances the magistrates may only prohibit reporting if it is in the interests of justice and after having heard representations by the accused. The reporting restrictions imposed by section 52A are intended to protect the defendant and, generally, a magistrates' court will only remove them on an application by a defendant.

37.3.2.3 Applications for dismissal

A defendant may make an application for dismissal of the charges in indictable-only cases sent to the Crown Court. The relevant provisions are found in paragraph 2 of schedule 3 of the CDA98. Automatic reporting restrictions apply under paragraph 3 of schedule 3 of the CDA98 in relation to unsuccessful applications, subject to a defendant's right to request their removal. A judge may do so if he or she believes it is in the interests of justice.

37.3.2.4 Pretrial binding rulings in the Crown Court

Section 40 of the CPIA96 empowers the court to make pretrial rulings on any question as to the admissibility of evidence or any other question of law relating to the case. Section 41 of the CPIA96 prohibits the reporting of any pretrial ruling under section 40 or proceedings for such a ruling. In addition, there can be no report made of the variation or discharge of an order or proceedings applying for a variation or discharge.

Under section 41(3), a judge may disapply the prohibition on reporting, in whole or in part, but an accused may object to the judge doing so and in those circumstances a judge should only lift the prohibition after hearing representations and on being satisfied it is in the interests of justice for an order allowing reporting to be made.

37.3.2.5 Deferred prosecution agreements (DPAs)

Schedule 17 of the Crime and Courts Act 2013 sets out the regime for deferred prosecution agreements. Paragraph 12 of Schedule 17 empowers the court to postpone details of the DPA 'for such period as the court considers necessary if it appears to the court that postponement is necessary for avoiding a substantial risk of prejudice to the administration of justice in any legal proceedings.' DPAs are a recent addition to the criminal justice system in the UK and as of June 2017 there had been only four such agreements. Paragraph 12 was invoked by the court to

protect the integrity of ongoing legal proceedings in the second of these DPAs, entered into between the SFO and an unnamed UK company.

Prosecution appeals 37.3.2.6

Part 9 of the CJA03 provides the prosecution the rights of appeal, the most significant of which is with a general right of appeal against a ruling of a judge in relation to a trial on indictment where the ruling either terminates the proceedings or which excludes evidence so that the prosecution case is significantly undermined. In these circumstances, no report of anything done in relation to the appeal may be made, again subject to the judge's discretion to disapply the prohibition or disapply it in part. Where a defendant appeals against any disapplication, the judge may only maintain it where it is in the interests of justice.[21]

Appeals against derogations from open justice 37.3.2.7

Section 159 of the Criminal Justice Act 1988 sets out the right of an aggrieved person to appeal to the Court of Appeal orders under section 4 or 11 of the CCA81 or section 58 of the CPIA in relation to trials on indictment. It also sets out the more extensive right to appeal any order that 'restricts the access of the public to the whole or any part of any trial on indictment or to any proceedings ancillary to such a trial' as well as any order restricting the publication of any report of the whole or any part of a trial on indictment or any such ancillary proceedings.

Part 69 of the CrimPR sets out the procedure for appeal.

Penalties 37.4

In relation to each of the provisions under section 11 of the CJA87, sections 37 and 41 of the CPIA96, the CDA98 and Part 9 of the CJA03 an offence, punishable by a fine, is committed if reports are published in breach of those respective sections. Proceedings may only be instituted with the consent of the Attorney General. Contempt of court under the CCA81 may be punished by imprisonment of up to two years in the Crown Court and a fine.

Hearings in private 37.5

The court retains an inherent jurisdiction to sit in private if the administration of justice requires it.[22] As described by Earl Loreburn in *Scott v. Scott:* 'in all cases where the public has been excluded . . . the underlying principle . . . is that the administration of justice would be rendered impracticable by their presence'.[23] Part 6 of the CrimPR sets out in great detail how applications may be made. The authorities contain many comments by senior judges noting that extreme caution

21 Section 71 of the Criminal Justice Act 2003.

22 *Scott v. Scott* [1913] AC 417, HL.

23 For a more modern description of the principle see *R v. Legal Aid Board ex p Kaim Todner* [1999] QB 966.

should be exercised by the court in excluding the public from proceedings and any application must start from the 'fundamental presumption in favour of open justice'.[24]

It is not therefore surprising that applications for hearings in private on the basis of, for example, financial damage or damage to reputation or goodwill that resulted from the institution of court proceedings concerning a person's business did not provide sufficient grounds entitling a court to restrict or prevent press reporting.[25]

37.6 Trial in private

For a trial to be held in private is almost unprecedented, other than in cases where national security issues are said to arise. A recent judgment of the Court of Appeal emphasised the exceptional nature of trials being held in private. However, the court dismissed an appeal from media organisations against continuing reporting restrictions that precluded the reporting of 'the bulk' of the trial to which accredited journalists had been admitted but that they were precluded from reporting. In this case, the only parts of the trial that were publicly reported were the swearing in of the jury, the reading of charges, a part of the judge's introductory remarks to the jury, a part of the prosecution opening, verdicts and, if convictions resulted, sentences.[26]

37.7 Public relations, media and social media

37.7.1 Media statements by a corporation

Any public statement by a corporation in relation to an investigation or trial in which the corporation may have an interest, either as a suspect, witness or victim, should be approached with great caution. The temptation for a corporation to defend itself in the media if it is under investigation is significant, but the wisest course is generally not to comment. Rousing statements defending its position may be very well but in circumstances where the corporation may face years of investigation and may ultimately admit wrongdoing, precipitate comment, particularly at the early stages of an investigation, may return to haunt even the most sophisticated corporation. The risks of making a statement include prejudicing a trial and potentially being in contempt and, in an extreme case, running a risk of perverting the course of justice. There are also risks of defamation. Public statements will also sometimes strain relations with law enforcement authorities where, even if the corporation is defending its position robustly, constructive relations are generally to be preferred. By way of example of the latter, a statement to the market, by the Sweett Group announced through the London

24 Blackstone's Criminal Practice 2015 at D3.125 by reference to *R (Malik) v. Central Criminal Court* [2007] 4 All ER 1141, per Gray J at 40.

25 *R v. Dover JJ, ex p Dover* District Council, 156 JP 433, DC.

26 *Guardian News and Media Ltd and Others v. R and Erol Incedal*, Neutral Citation Number [2016] EWCA Crim 11.

Stock Exchange's Regulatory News Service, that it was co-operating with the SFO prompted a rebuttal by the SFO, causing significant damage to the company's relations with the SFO.

Consultation of public relations firms for internal investigations 37.7.2

It would be usual in most serious investigations or prosecutions for a corporation to engage PR consultants, who may advise on internal corporate communications. If a corporation does so, it should consult those firms which have experience of criminal investigations and trials and bear in mind that communications with PR consultants are very unlikely to be privileged under English law and potentially disclosable should powers of compulsion or production be used by law enforcement agencies. In addition, they may be disclosable in any parallel or subsequent civil proceedings.

See Chapter 39 on protecting corporate reputation

The risks and rewards of publicity 37.7.3

Tactical media coverage during an investigation or trial may relieve negative public impressions of a corporation or individual and, perhaps, alleviate pressure on a law enforcement agency to bring charges. The media engagement may include unattributable briefings that find their way into media reports, casting a different light on an investigation.

A more extreme approach is to commence litigation. On occasion, a corporation may believe it is appropriate for a corporation to litigate against what it may see as unfounded suspicions. Successful litigation (or even successful interlocutory proceedings in what is often a lengthy process) may undermine the substance of allegations and expose weaknesses in actual or potential prosecution witness evidence. Such an approach must, however, be carefully considered for the reasons noted above.

Finally, following an acquittal or the dropping of an investigation, media coverage may assist in restoring damaged reputations.

38

Publicity: The US Perspective

Jodi Avergun and Bret Campbell[1]

38.1 Restrictions in a criminal investigation or trial

38.1.1 Generally

The US Constitution guarantees defendants in criminal cases the right to a speedy and public trial. It also guarantees all Americans freedom of speech and freedom of the press. In the trial setting, these constitutional rights are sometimes in conflict. For instance, although freedom of the press is guaranteed, media reports about a case might taint the pool of potential jurors, or might allow sworn jurors to learn about matters not in evidence. Accordingly, lawyers practising in the United States must be aware of the multiple, conflicting rights that affect judicial proceedings. These rights include the public's right of access to trial proceedings;[2] the media's right to report what occurs in court;[3] the litigants' freedom of speech;[4]

1 Jodi Avergun is a partner at Cadwalader, Wickersham & Taft LLP. Bret Campbell, formerly a partner in Cadwalader's white-collar defence and investigations group, is a principal of Northstar Consulting LLC. The authors wish to acknowledge the contribution of Stephen Weiss, an associate in Cadwalader's Washington, DC, office to this chapter.

2 *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-81 (1980) (holding that the right of the public and the press to attend criminal trials is guaranteed under the First and Fourteenth Amendments, and that, absent an overriding interest established after a factual hearing, the trial of a criminal case must be open to the public. In 1984, the US Supreme Court extended its ruling in *Richmond Newspapers* to jury selection. *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1 (1986).

3 *Estes v. State of Tex.*, 381 U.S. 532, 541–42 (1965) ('Reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media.').

4 *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074-75 (1991) (describing the bounds to which limitations may be placed on a lawyer's First Amendment right to free speech).

and the defendant's right to a fair trial.[5] No one right is absolute, and each is limited by various rules and regulations.[6]

A lawyer's ethical obligations, for example, may limit the attorney's First Amendment right to speak publicly about a case. Under the American Bar Association Model Rules of Professional Conduct, which have been adopted, in whole or in part, by the vast majority of US jurisdictions, a lawyer who has or is participating in a matter must not make an 'extrajudicial statement' that 'will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.'[7] In federal criminal cases, prosecutors must also comply with these rules, as well as those published in the US Attorneys' Manual, which limits the information a prosecutor may disclose or the issues he or she may comment on.[8]

Apart from the rules prohibiting a lawyer from publicly commenting on a pending case, a lawyer's professional duty to keep client matters confidential may also prevent him or her from publicising information about a case.[9]

Investigatory and pretrial stage 38.1.2

During the investigative stage of the case, before charges have been filed, a court cannot limit an individual involved in an investigation from making public statements about the case. But because such statements can be used by a prosecutor against a defendant in a subsequent criminal proceeding (either as substantive evidence or to demonstrate that the individual waived his or her right to remain silent), lawyers often counsel their clients to exercise their free speech rights carefully, if at all. Prosecutors are more constrained, however. The US Attorneys' Manual provides that a prosecutor cannot make public statements about a case if there is substantial likelihood that the statement will materially prejudice an adjudicative proceeding.[10] Similarly, prosecutors, but not individual witnesses, are prohibited from disclosing any matters that occur before a grand jury.[11] Once charges have been filed, however, courts have greater ability to insulate their proceedings

5 *Press-Enter. Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 508 (1984) ('No right ranks higher than the right of the accused to a fair trial.').

6 See *United States v. Gerena*, 869 F.2d 82, 85 (2d Cir. 1989) ('The district court must balance the public's right of access against the privacy and fair trial interests of defendants, witnesses and third parties.'); *United States v. Rajaratnam*, 708 F. Supp. 2d 371, 374 (S.D.N.Y. 2010) (explaining that '[c]ourts must balance the right [to access criminal proceedings] against other important values, like the Sixth Amendment right of the accused to a fair trial').

7 Model Rules of Prof'l Conduct R. 3.6(a) (2016).

8 U.S. Attorneys' Manual, 1-7.000 (Media Relations), available at https://www.justice.gov/usam/usam-1-7000-media-relations.

9 See, e.g., *Sealed Party v. Sealed Party*, No. 04-2229, 2006 U.S. Dist. LEXIS 28392 (S.D. Tex. 4 May 2006) (finding breach of fiduciary duty where attorney published a press release disclosing the terms of a confidential settlement).

10 U.S. Attorneys' Manual, Media Relations, §1-7.500, available at https://www.justice.gov/usam/usam-1-7000-media-relations.

11 Rule 6(e)(2) prohibits a grand juror, interpreter, court reporter, operator of a recording device, person who transcribes recorded testimony, attorney for the government, or person to whom a proper disclosure is made under Rule 6(e)(3)(a)(ii) or (iii) from disclosing a matter occurring

from the prejudicial effects of any publicity.[12] A judge's failure to exercise this power may, under certain circumstances, violate a defendant's right to a fair trial.[13] In widely publicised cases, the local rules may authorise the court to issue orders governing extrajudicial statements by parties, witnesses and attorneys, and the seating and conduct of spectators, as well as the sequestration of jurors and witnesses.[14] Sometimes, litigants can attempt to prevent the public disclosure of private or prejudicial information prior to trial by filing their documents under seal and pursuant to protective orders.[15] However, because the First Amendment guarantees the public's right of access to governmental proceedings, sealed filings can only be made with the court's permission and upon a showing of necessity or that unfair prejudice might result from public dissemination. Accordingly, motions to seal proceedings are not lightly granted, and government lawyers in particular are severely limited in their ability to file motions under seal or to consent to their opponent's request to close proceedings.[16] Rather than seal proceedings or files, courts must consider whether a change of venue, jury sequestration or gag orders, among other techniques, would adequately protect the rights of the parties. Upon a showing that pretrial publicity about the case will prevent the empanelment of an impartial jury or will otherwise prejudice the defendant, the defendant can move to have the case transferred to another district.[17]

---

before the grand jury. Fed. R. Crim. P. 6(e). The rule does not impose any obligation of secrecy on witnesses.

12 See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (holding that a court may enter a 'gag' order prohibiting the reporting of evidence adduced at an open preliminary hearing if it finds 'a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial').

13 *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (holding that failure of a state trial judge to protect the defendant in a murder prosecution 'from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom' deprived the defendant of a fair trial consistent with the Due Process Clause of the Fourteenth Amendment).

14 See, e.g., L. Cr. R 57.7(c): S.D.N.Y. L. Cr. R 23.1(h).

15 *Johnson v. Greater Se. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277 (D.C. Cir. 1991) (noting that, in permitting a party to file a document under seal, should consider '(1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced'); see also *Strauss v. Credit Lyonnais, S.A.*, No. 06-CV-702, 2011 WL 4736359, at *4 (E.D.N.Y. 6 October 2011) (approving a protective order that governs the filing of documents under seal as well as the public filing of documents).

16 28 C.F.R. §50.9.

17 Fed. R. Crim. P. 21(a); see also *Sheppard*, 384 U.S. at 363 (requiring the defendant to show 'a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial').

Trial and post-trial stage 38.1.3

Because the right to an impartial jury is also guaranteed by the US Constitution,[18] a defendant may question jurors about their exposure to pretrial publicity.[19] In one of the most highly publicised cases in modern history – the 1995 murder trial of football legend O J Simpson – efforts to seat an impartial jury not prejudiced by the near-constant media coverage of the case took nearly two months. During jury selection, jurors were prohibited from reading the papers, watching television or even awakening to a clock radio.[20] In widely publicised cases, courts frequently permit lawyers additional peremptory challenges (beyond the number normally allowed), which allow the lawyer to summarily disqualify a potential juror without providing a reason to the court.[21] During the trial, jurors may be sequestered to protect them from the prejudicial effect of media reporting.[22] In today's day and age, the court may instruct jurors not to read or post information about the trial on social media and other internet forums.[23] A failure to allow for a fair trial or to protect the impartiality of a jury will result in a mistrial.[24]

18 U.S. Const. amend. VI.

19 *United States v. Blanton*, 719 F.2d 815 (6th Cir. 1983) (holding that the court produced an impartial jury and fair trial by, at voir dire, through 'extensive questioning concerning prior media impact and juror associations, coupled with many dismissals based on even hints of possible prejudice, . . . very substantial increases in the number of peremptory challenges available to each defendant . . . [and] reliance on defendants' use of detailed questionnaires concerning all potential jurors coupled with sensitive responses by the court to any of defendants' challenges arising from such use.').

20 http://law2.umkc.edu/faculty/projects/ftrials/Simpson/Simpsonchron.html.

21 See, e.g., *United States v. Campa*, 459 F.3d 1121, 1135 (11th Cir. 2006) (noting that the district court twice granted the defendants' requests for additional peremptory challenges due to the publicity regarding the trial).

22 See, e.g., *United States v. Cacace*, 321 F. Supp. 2d 532, 536 (E.D.N.Y. 2004) (partly sequestering the jurors in a murder trial to reduce the risk that they may be prejudiced against the defendant, the acting boss of the Colombo crime family, by exposure to press reports of both charged and uncharged murders); *Geders v. United States*, 425 U.S. 80, 87 (1976) ('The judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during, and after their testimony.'). The decision whether to sequester jurors is within the 'sound discretion' of the district court; e.g., *United States v. Porcaro*, 648 F.2d 753 (1st Cir. 1981).

23 See, e.g., *Bushmaker v. A. W. Chesterton Co.*, No. 09-CV-726-SLC, 2013 WL 11079371, at *12 (W.D. Wis. 1 March 2013) (instructing the jury not to post on Twitter or Facebook); Judicial Conference Committee, Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate About a Case (June 2012), www.uscourts.gov/file/18041/download.

24 E.g., *Pearson v. Rock*, No. 12-CV-3505, 2015 WL 4509610, at *2 (E.D.N.Y. 24 July 2015) (granting a mistrial after concluding that the jury had been 'incurably tainted').

38.1.4 Discovery of internal corporate communications

Issues of public access affect areas of legal practice other than trials. Even where confidentiality of process and information is assumed, such as in a confidential internal investigation involving potential corporate misconduct, rules governing discovery in civil or criminal cases can lead to the disclosure of internal communications and records, even in sensitive investigations. The Federal Rules of Civil Procedure allow for pretrial discovery that is far more expansive compared to other jurisdictions.[25] Specifically, Rule 26(b)(1) allows parties to conduct discovery of 'any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.'[26] As a result, companies that find themselves subject to class-action or shareholder derivative lawsuits that result from internal investigations are often forced to hand over troves of potentially damaging internal corporate communications. For example, the shareholder derivative litigation against the board of the Walt Disney Company lasted more than eight years, and the extensive discovery produced a damaging factual record about the board's corporate governance practices that ultimately forced Disney CEO and board member Michael Eisner to resign.[27]

Civil discovery is not the only means through which seemingly confidential internal communications and records can become public. Many companies are forced to initiate or expand the scope of internal investigations after a regulator issues a subpoena or civil investigative demand for internal records. Additionally, certain public institutions, such as colleges and universities, are subject to public records laws that may require the institutions to release or publish documents both during and after the investigation.[28] And, increasingly, large-scale document leaks thrust internal corporate documents into the public sphere without warning.[29] The practical reality is that any organisation undergoing an internal

25 See, e.g., Stephan N. Subrin, Discovery in Global Perspective: Are We Nuts?, 52 DePaul L. Rev. 299 (2002).

26 Fed. R. Civ. P. 26(b)(1).

27 Érica Gorga & Michael Halberstam, Litigation Discovery and Corporate Governance: The Missing Story About the 'Genius of American Corporate Law,' 63 Emory L.J. 1383, 1401-1405 (2014).

28 In 2014, after the University of North Carolina at Chapel Hill released a public report of an investigation into academic irregularities at the university, media organisations made requests through the North Carolina Public Records Law for the nearly 1.7 million electronic records that were collected and analysed during the investigation. The University of North Carolina at Chapel Hill, University Responds to Public Records Requests for Legal, Communications Firm Expenses, http://carolinacommitment.unc.edu/updates/university-responds-to-public-records-requests-for-legal-communications-firm-expenses/ (last visited 5 August 2016).

29 For example, in 2007, an employee at HSBC Suisse surreptitiously downloaded client data from approximately 30,000 accounts and provided that data to French authorities. A portion of these files were then obtained through an international collaboration of news outlets and published in 2015 by the International Consortium of Investigative Journalists. See David Leigh et al., HSBC files show how Swiss bank helped clients dodge taxes and hide millions, The Guardian, 8 February 2015, https://www.theguardian.com/business/2015/feb/08/hsbc-files-expose-swiss-bank-clients-dodge-taxes-hide-millions?CMP=share_btn_tw.

investigation must prepare for the possibility that it will have to produce internal documents at some point.

Although a detailed description of all the defensive measures available to companies is beyond the scope of this article, a basic list should include confidentiality agreements to cover sensitive communications with third parties; protective orders (where available) to limit the scope and permitted usage of produced materials; and the careful maintenance of the attorney–client and work-product privilege during investigations.

Consulting a public relations expert 38.1.5

Given the likelihood that the public may become aware of internal corporate communications relating to an investigation, many organisations (and some well-resourced individuals) resort to hiring a public relations expert to assist counsel during the course of an investigation. Public relations experts can serve a variety of functions, including preparing executives for public appearances during investigations, developing communications strategies around key investigation events (e.g., press conferences regarding investigation status), and planning for potential crises (e.g., a witness leaking the preliminary findings of an investigation prior to the investigation's completion). For many organisations, the relentless 24-hour news cycle makes hiring a public relations expert to advise during an internal investigation a foregone conclusion. Volkswagen, for example, hired three public relations firms based in three different countries to advise during its investigation of alleged emissions cheating.[30] During an investigation into potential corporate misconduct, special considerations arise when the public relations specialist works closely with legal counsel for the company. Frequently, questions of whether the attorney–client privilege applies to protect communications between lawyers and public relations experts arise during an investigation. Although the attorney–client privilege normally requires that the protected communication occur between a lawyer and his or her client and exclude third parties, in some circumstances the privilege extends to communications between a non-lawyer consultant and the lawyer's client. In *United States v. Kovel*, for example, the Second Circuit held that communications from the client to a consultant are privileged if they are made in confidence and 'for the purpose of obtaining legal advice'.[31]

Kovel, however, does not create a blanket privilege to protect communications between attorneys, their clients and public relations experts. Instead, after *Kovel*, courts determining whether to apply the attorney–client privilege to communications with consultants such as public relations experts have focused on whether the communications with the consultant were 'imparted in connection with the

30 Danny Hakim, VW's Crisis Strategy: Forward, Reverse, U-Turn, N.Y. Times, 26 February 2016, available at http://www.nytimes.com/2016/02/28/business/international/vws-crisis-strategy-forward-reverse-u-turn.html.

31 296 F.2d 918, 922 (2d Cir. 1961) (protecting the communications from an accountant to the client that were made in confidence for the purpose of obtaining legal advice from the lawyer, not for the purpose of obtaining the accountant's advice).

legal representation.'[32] For example, when Martha Stewart and her attorneys hired public relations consultants to assist them in dealing with the media in her high-profile insider trading case, the court protected those communications under the attorney–client privilege because the communications were made for the purpose of giving or receiving advice directed at handling Stewart's legal problems.[33] Applying *Kovel*, the court explained:

> *[T]his Court is persuaded that the ability of lawyers to perform some of their most fundamental client functions – such as (a) advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions, (b) seeking to avoid or narrow charges brought against the client, and (c) zealously seeking acquittal or vindication – would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers' public relations consultants.*[34]

In contrast, the court in *Haugh v. Schroder Investment Management* found that the attorney–client privilege did not apply to a public relations expert retained for the plaintiff when the plaintiff could not show that the expert's services were 'anything other than standard public relations services' for the client, and were not necessary for plaintiff's counsel to provide the plaintiff with legal advice.[35] The conclusion to be drawn from these two cases is simple. To cloak communications with public relations experts advising clients in legal matters, the lawyer needs to retain the public relations expert, and the communications between the consultant and the client must be intended to assist the attorney in advising his or her client.

38.2 Social media and the press

38.2.1 Social media as an investigatory tool and as evidence

For better or for worse, social media is more than just a tool for friends and family to connect and communicate. The prevalence of social media has created a continuously updated record that is increasingly used to investigate wrongdoing and that can be admitted as evidence in judicial proceedings.

With respect to investigative activities, whether by the government or private parties, social-media users generally do not have an expectation of privacy in the information they post publicly.[36] However, some of the typical features

32 *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).

33 *In re Grand Jury Subpoenas*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003).

34 Id. at 330.

35 No. 02-CIV- 7955, 2003 U.S. Dist. LEXIS 14586, at *8 (S.D.N.Y. 25 August 2003) ('Plaintiff has not shown that Murray was "performing functions materially different from those that any ordinary public relations" advisor would perform.'); see also *Scott v. Chipotle Mexican Grill*, 94 F. Supp. 3d 585 (S.D.N.Y. 2015) (holding a factual report from a human resources consultant to employer's counsel was not protected by attorney–client privilege because the employer did not show that it or counsel engaged consultant for anything more than factual research and to assist employer in making a business decision).

36 *U.S. v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004).

of social media – for example, the fact that social media users generally have password-protected accounts and various privacy settings to control what information other users can view – have created some legal distinctions. Courts have distinguished between public and non-public postings and focused on a user's privacy settings when determining whether Fourth Amendment protections extend to social media content accessed by the government.[37] However, even where a user limited viewable postings to his or her 'friend network', the government is not precluded from seeking co-operation from one of the user's friends authorised to view the user's content.[38] Unlike investigators, private American lawyers are constrained by ethical rules in their use of social media. For example, the New York State Bar Association's Committee on Professional Ethics has ruled that 'friending' an investigatory target or opposing party, or instructing a third party to do so on the lawyer's behalf, is a prohibited act of deceptive conduct or making of a false statement.[39] Accordingly, for private lawyers, care needs to be taken in how social media content is collected and used.

From the standpoint of admissibility as evidence in a proceeding, social media content is not fundamentally different from other paper or electronic evidence. The same evidentiary considerations apply: to be admissible, the evidence must be relevant, have probative value outweighing its potential to unfairly prejudice, and be authentic and free of hearsay.[40] Some courts treat evidence from social media similarly to other types of evidence and require only a threshold showing of authenticity.[41] Other courts require evidence that affirmatively disproves the possibility that evidence from social media was sent or manipulated by anyone other than its putative creator.[42]

Social media and the jury 38.2.2

In jury trials, issues surrounding social media generally fall into two categories: lawyers using social media to screen potential jurors, and jurors using social media improperly during a proceeding.

In the pretrial process, lawyers are ethically permitted to screen jurors based on social media profiles. On 24 April 2014, the American Bar Association issued Formal Opinion 466, which clarified that the act of passively observing a potential juror's public social media information is not improper *ex parte* contact with a juror or potential juror.[43] However, a lawyer may not send an invitation or request

37 See e.g., *People v. Harris*, 949 N.Y.S.2d 590, 592 (N.Y. Crim. Ct. 2012).

38 See e.g., *U.S. v. Meregildo*, 883 F. Supp. 2d 523, 525 (S.D.N.Y. 2012).

39 Robert H. Giles and Jason I. Allen, Will You Be My Friend? Ethical Concerns for Prosecutors and Social Media, Child Sexual Exploitation Program Update (National District Attorneys Association), 9-12 October 2012, at 2, available at http://www.ncdsv.org/images/NDAA-CSPE_WillYouBeMyFriend_2012.pdf.

40 See generally Fed. R. Evid. Authentication of evidence from social media is generally the biggest hurdle for admission, and two approaches are predominant.

41 See, e.g., *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012).

42 See, e.g., *Griffin v. Maryland,* 19 A.3d 415, 423-24 (Md. 2011).

43 ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 466 (2014).

to friend or connect with a potential juror to gain access to the potential juror's information. Social media websites that provide notifications to users when their information is viewed, such as LinkedIn, also do not constitute improper contact as long as the lawyer does not make an active request to view non-public information.[44] If defence counsel learns from internet research that a prospective juror has made misrepresentations during *voir dire*, counsel should bring this misconduct to the court's attention. Failure to do so could potentially result in a waiver, and an impairment of the defendant's right to an impartial jury.[45]

During trial, jurors' use of social media presents a risk of mistrial. To address this risk, counsel may request jury instructions on the use of social media prior to commencement of trial. Formal Opinion 466 also suggests that courts deliver jury instructions on the use of social media 'early and often' and even 'daily in lengthy trials.'[46] This guidance comes as jurors have used social media to publicly discuss trial issues or access witnesses and litigants, which ultimately has resulted in remands, reversals and other judicial inefficiencies.

For example, in *Dimas-Martinez v. State*, in part owing to a juror's tweets during trial, a death row inmate's murder conviction was reversed and remanded.[47] The jury received instructions at the beginning of the trial warning them not to tweet or use social media but a juror nonetheless tweeted at the conclusion of the evidence in the sentencing phase of the trial.[48] The defendant's lawyer notified the court, and the court questioned the juror.[49] The juror admitted to the tweet and promised to discontinue use of social media for the duration of the trial.[50] But even though the juror tweeted at least two more times, the trial court refused a motion for a new trial, finding that the defendant suffered no prejudice from the tweets.[51] The Supreme Court of Arkansas disagreed, concluding that the juror's tweets were impermissible public discussion of the case, and that the insubordination of the juror to the court's instructions contributed to the defendant's denial of a fair trial.[52]

44 Id.

45 See *United States v. Parse*, 789 F.3d 83, 114 (2d Cir. 2015) (holding that defence counsel did not knowingly waive the defendant's right to an impartial jury where, even though a Westlaw report indicated a juror may have in fact been a suspended attorney with the same name, the juror 'lied [so] comprehensively in *voir dire* and "presented herself as an entirely different person"' that defence counsel could have reasonably relied on her representations).

46 Id.

47 385 S.W.3d 238 (Ark. 2011).

48 Id. at 247-48.

49 Id. at 246.

50 Id. at 246-47.

51 Id. at 247.

52 Id. at 249.

Risks and rewards of publicity 38.3

Risks 38.3.1

High-profile criminal cases often generate media attention. And while courts may adopt judicial measures to limit the adverse effects of publicity, it may become so pervasive that it prejudices jurors' opinions regarding the question of guilt. In such cases, a court may declare a mistrial to protect the defendant's Sixth Amendment guarantee to have his or her case decided by an impartial jury.[53]

In other extraordinary situations, defence attorneys may face disciplinary measures – the most severe of which is disbarment – for improperly engaging the media in a manner that prejudices the proceedings.[54] Prosecutors are held to a higher standard than civilian attorneys under the professional rules.[55] For example, in June 2007, Michael B Nifong, the North Carolina prosecutor who pursued a false accusation of sexual assault against three Duke University lacrosse players, was disbarred by the State Bar Disciplinary Commission for making inflammatory statements to the media in violation of Rules 3.6 and 3.8(f) of the State Bar's Rules of Professional Conduct, among other violations.[56]

Unpopular defendants can face extraordinary difficulties in managing publicity while seeking an impartial hearing, which can increase both the cost and complexity of the defence. An example of this situation is the prosecution of Martin Shkreli, a former pharmaceutical CEO and hedge fund manager who was convicted of securities and wire fraud violations stemming from losses suffered by investors in his funds and companies.[57] Prior to his arrest, as the then CEO of Turing Pharmaceuticals, Mr Shkreli unapologetically raised the price of a life-saving drug by 5,000 per cent[58] and became known in the media as 'the most hated man in America'.[59] Mr Shkreli's notoriety generated daily news coverage of his subsequent federal trial which, combined with his ill-advised attempts to personally manage the publicity, required the trial judge to issue orders addressing

53 See *Sheppard*, 384 U.S. at 363; see also *Arizona v. Washington*, 434 U.S. 497, 505-06 (1978) (mistrial is reserved for those special cases in which there is a 'manifest necessity').

54 See, e.g., Model Rules of Prof'l Conduct R. 3.6 (Trial Publicity) (prohibiting a lawyer from making an 'extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter').

55 See, e.g., Model Rules of Prof'l Conduct R. 3.8(f) (Special Responsibilities of a Prosecutor) (prohibiting a prosecutor from making extrajudicial comments that have a 'substantial likelihood of heightening public condemnation of the accused').

56 Id.

57 Superseding Indictment, *United States v. Shkreli*, No. 1:15-cr-637 (E.D.N.Y. 3 June 2016), ECF No. 60.

58 Andrew Pollack, Drug Goes from $13.50 a Tablet to $750, Overnight, N.Y. Times, 20 September 2015, available at https://www.nytimes.com/2015/09/21/business/a-huge-overnight-increase-in-a-drugs-price-raises-protests.html.

59 Phil McCausland, 'Fraud Trial for Martin Shkreli, "Most Hated Man in America," Begins Monday', NBC News, 25 June 2017, available at https://www.nbcnews.com/news/us-news/fraud-trial-martin-shkreli-most-hated-man-america-begins-monday-n776581.

the media's and Mr Shkreli's potential influence on the jury.[60] Mr Shkreli was convicted on two counts of securities fraud and one count of conspiracy to commit securities fraud.[61]

Civil defamation claims may also follow highly publicised cases. When numerous women accused actor and comedian Bill Cosby of sexual assault, Mr Cosby and his team publicly denied the allegations and accused the women of lying.[62] Several of the alleged victims filed civil defamation suits against Mr Cosby. A federal judge in Pennsylvania dismissed one of the suits on the basis that Mr Cosby's statements did not support a claim for defamation under state law,[63] while another defamation suit remains pending in federal court in Massachusetts.[64]

38.3.2 Rewards

When properly executed, tactical media coverage during an investigation or trial can counter negative public impression and alleviate prosecutorial pressure to bring charges. The public relations consultants hired by Martha Stewart in connection with her insider trading case focused narrowly on neutralising the media coverage that reached the prosecutors and regulators responsible for charging decisions so that they could make their decisions without 'undue influence from the negative press coverage.'[65] In ruling on the attorney–client privilege afforded to certain communications among Stewart, her attorneys and the public relations firm, the Court recognised the necessity of developing a communications plan in high-profile cases:

> *Just as an attorney may recommend a plea bargain or civil settlement . . . so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment . . . . A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.*[66]

60 Docket Order, *United States v. Shkreli*, No. 1:15-cr-637 (E.D.N.Y. 5 July 2017) (following Mr Shkreli's courthouse visit with reporters covering his trial, when he remarked on evidence and the credibility of a witness, prosecutors moved for a gag order to prohibit Mr Shkreli from making any public statements about the case. Two days later, the court issued a limited gag order prohibiting Mr Shkreli from making 'comments to the press regarding the case, evidence or witnesses within the courthouse or the courthouse perimeter . . .').

61 Verdict, *United States v. Shkreli*, No. 1:15-cr-637 (E.D.N.Y. 4 August 2017), ECF No. 305.

62 See Mike Nunez, 'Bill Cosby to FLORIDA TODAY: I won't mention allegations', Florida Today, 22 November 2014, available at http://www.floridatoday.com/story/news/local/2014/11/21/bill-cosby-to-florida-today-i-wont-mention-allegations/19367957/.

63 Memorandum Opinion, *Hill v. Cosby,* No. 16-0133 (W.D. Pa. 21 January 2016).

64 *Green v. Cosby*, No. 3:15-cv-30111 (D. Mass. filed 26 June 2015).

65 *In re Grand Jury Subpoena*, 265 F. Supp. 2d at 323-324.

66 Id. (quoting *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 (1991) (Kennedy, J., plurality opinion)).

Given the importance of advocating outside the courtroom, it may also be beneficial for an attorney to exercise the right to reply under the Model Rules of Professional Conduct. Notwithstanding the prohibition at Rule 3.6(a) against extrajudicial statements that are substantially likely to materially prejudice a fair trial, Rule 3.6(c) permits a lawyer to make extrajudicial statements that protect a client from the 'substantial undue prejudicial effect' of recent publicity that was not initiated by the lawyer or the client to the extent that they are necessary to mitigate the adverse publicity.

39

Protecting Corporate Reputation in a Government Investigation

Kevin Bailey and Charlie Potter[1]

39.1 Introduction

Long gone are the days where remaining passive and silent while your client is dissected during a high-profile government investigation was the only sensible approach. You need look no further than the steady stream of such inquiries over the past three to five years to see that persuasive, careful communications – in conjunction with the legal strategy – are the soundest way to preserve and rebuild a company's reputation during a crisis and afterwards.

Of course, no two investigations are the same, and approaches to handling communications around them will inevitably differ according to, among other things, the jurisdictions involved, their media and political culture, and the particular agenda of the investigating authorities. So advice on communications strategy, just like legal advice, must be tailored to the circumstances.

Regardless of the tactics employed, the central objective of both lawyers and communicators is to achieve as successful an outcome to an investigation as possible, namely one that minimises lasting damage to a company's financial position, its reputation and 'licence to operate', and its brand and wider commercial standing. Communicators can work effectively with lawyers to respond to increasingly assertive and sophisticated strategies deployed by government entities, particularly since the financial crisis of 2008.

In that context, some overarching principles can be distilled from the practical experience of acting for companies faced with corporate investigations and crises. These principles are discussed in the pages that follow, addressing the need for close collaboration between communicators and lawyers on worst-case scenarios,

1 Kevin Bailey and Charlie Potter are partners at Brunswick Group LLP. The authors would like to thank Andrew Garfield, their former partner at Brunswick, for his assistance with this chapter.

planning for and executing disclosures about such investigations, the importance of keeping key stakeholders advised as much as possible, and the critical aspects of managing the endgame of an investigation.

See Chapters 37 and 38 on publicity

Planning for the worst 39.2

The right strategy for managing reputational impact through an investigation depends on a range of factors: the nature of the behaviour under investigation, the authority conducting it, the brand profile of the company, the industry in which it operates and any damage to the public or consumers.

Moreover, the history of every company is different, and how an investigation will play out in many cases turns on how it is perceived as a corporate and social actor. Is the fact of an investigation into, say, corruption allegations a complete surprise because of the company's sterling reputation, or will it be seen as the latest misstep of a recidivist? Equally important is appreciating the context of the investigation itself and whether, for instance, it may be enhanced, or even motivated, by the political agenda of a given government entity.

While understanding and appreciating these factors is critical to developing a successful communications strategy in the context of a particular investigation, one principle cuts across the approach to any investigation. In each case, companies that have planned ahead by developing and testing crisis communications plans fare better than those who have not. That is especially true where a company is involved in (and required to respond to) a dramatic, sudden, visually striking or fatal operational disaster, for example, an aeroplane crash or industrial accident, that subsequently triggers an investigation. But it applies equally to the unforeseen announcement of an investigation into issues, behaviour or incidents that may not have been in public view. These are all business-critical events. Knowing what to say and which lawyers and communications professionals to call in those first hours may be the difference between dealing with one crisis (the original incident) and several (the incident plus making up for legal and communications missteps taken in the heat of the moment) for months or even years to come.

Having a well-documented and well-understood crisis plan is also important even where the incident, and subsequent investigation, does not play out dramatically in real time. Investigations around corporate misconduct are an all too frequent example. It also pays to plan out these types of crises. For instance, and because discovery of corporate misconduct often has its genesis in internal investigations, companies typically have time to consider more fully how they will respond when the conduct eventually comes to light, and they should plan and test such scenarios. Even where there is less lead time – perhaps owing to a whistleblower's actions or a required corporate disclosure – there is inevitably some period for strategic preparation. In those moments smart companies turn to communications strategies that have been developed to be consistent with and to support their legal defences.

The 'disaster' scenarios are guaranteed to attract significant media attention and will require regular and active communications by a company. With other kinds of incidents that spawn investigations – such as those involving bribery and

corruption allegations, accusations of misconduct in the manufacturing supply chain, or accounting irregularities – it is often hard to predict at the outset the scale of the impact a company may be facing, making it all the more important to take action as early as possible to plan for different scenarios and to engage the right professional assistance. What may seem like an isolated incident likely to be a 'one-day story' could turn into something far worse if, for instance, deep-rooted company processes, historical conduct involving similar issues, the seniority of individuals involved or multi-jurisdictional problems are at stake.

Needless to say, the more systemic a problem appears to be, the more damage it is likely to cause to the company's reputation. Even minor incidents can become reputational nightmares if they raise questions about the integrity of internal systems, compliance and ethics, culture, or management's control of the organisation. As a result, the tempting choice for management – either to deny there is a problem or to rush to give public reassurance that a problem is limited to one or two individuals – can dramatically backfire.

Likewise, where an incident directly contravenes a company's public image or the reputation of its brand, the stakes are inevitably raised. Fraud, bribery and corruption allegations will be problematic for any company, but all the more so if the company has publicly made a virtue of its ethical conduct.

Large multinational organisations are also always going to be at a disadvantage when it comes to garnering the sympathy of the public, particularly where there are identifiable victims of alleged misconduct or negligence. So, being prepared to get ahead of issues early is a critical aspect of any company's reputational defence.

39.3 Ensuring close integration of legal and communications advisers

Planning for the fallout of a government investigation – whether that is done before the fact as part of crisis simulations or other preparation (which is preferable) or as the matter is unfolding (which is not ideal, but often the reality) – requires close collaboration between the company's lawyers and its communications advisers. Few companies have in-house communicators with backgrounds or expertise in complex legal issues. So, just as a company will turn to outside counsel on major legal matters, it should turn to outside strategic communications advisers in similar circumstances.

The best-prepared clients understand the value of having a fully joined-up approach where the key speakers for a company (lawyers, communications professionals, investor relations teams, government and public affairs professionals) can coordinate regularly to ensure that every angle, stakeholder and perspective is covered. Working together, these individuals can also help ensure that messaging is consistent and disciplined with respect to all strategically important audiences.

The ideal way to proceed in these scenarios is to establish integrated teams that include in-house and external counsel and communications advisers who can work together in preserving or rebuilding reputation as the investigation unfolds. Without an integrated team, there is always the risk that communicators may be tempted to proceed without fully understanding the legal strategy, and lawyers will view the public communications concerns of a company as less important than questions

of legal liability and the eventual adjudication of the matter. These are problems that are only exacerbated where the situation is highly complex, fast-moving and public. Furthermore, without integration, the company's legal strategy may be forever undermined by inappropriate communications or the company's reputation may be lost for an extended period (perhaps even forever) if the company fails to communicate (or miscommunicates) during a crisis solely to preserve the legal arguments. For example, a lawyer not considering the communications aspects of a situation might advise a company to point to legal defences available to a corporation, such as intervening causes, contributory acts of a third party or negligence limited to low-level employees. While all might be valid (and eventually briefed and argued in court), thought should be given to how technical legal defences are heard by the public, by regulators, by investors and even by a company's employees. The goal should be to find ways to preserve the defences while communicating in ways that will be seen more positively by those stakeholders.

The benefits of synthesising communications and legal defence are legion. Communicators and others in regular contact with stakeholders can prove invaluable by providing the legal team with information, context and insights about how the investigation is perceived externally.

In addition to coordination, it is also indispensable to have in place sophisticated media monitoring tools throughout an investigation to track traditional media, social media and digital channels for any comments or interventions by investigating authorities, regulators, political voices and other relevant stakeholders. These include real-time reporting on news stories about the investigation and the company more broadly and monitoring or reporting on social media and blog discussions. Having alerts in place that go to all members of the integrated team to flag relevant developments for legal and public relations assessment is essential.

The key moments in any investigation 39.4

Having planned ahead and established the integrated team, the prudent company will need to prepare communications to manage external scrutiny and reputational impact on a number of occasions, but almost certainly at the following times:

- public disclosure of the investigation, whether that is initiated:
  - directly, by the prosecutor or investigator;
  - indirectly, through actions (such as a dawn raid, arrest or confiscation of evidence) that attract public attention;
  - by the company through legally mandated disclosures (such as in a securities filing) or otherwise; or
  - through a leak (deliberate or accidental) from any of the parties or individuals involved;
- high-profile comment on the progress of the investigation from interested stakeholders (media, analysts, investors, politicians, etc.);
- leaks of key documents or other information during the course of the investigation;

- the announcement of a settlement (or deferred prosecution agreement) and the initial response (which becomes an opportunity for the government to take centre stage);
- parliamentary or congressional hearings in parallel with an investigation;
- final decisions or judgments and the imposition of fines or other penalties; and
- court proceedings following an investigation.

In an ideal world, companies would have reasonable notice of any intention to launch an investigation, and particularly the intention of a regulatory body to comment publicly on proceedings. In practice, that often does not happen, especially where government investigators may perceive public relations benefits in making a surprise announcement.

In other situations, investigations will be launched in reaction to a media story, which means that the investigation, and more crucially the details of the allegations giving rise to it, will be public from the outset, and the affected company will necessarily find itself in a far more reactive mode.

If, by contrast, the company can self-disclose an issue or the existence of an investigation (particularly its own internal investigation), it will have an element of control over communications that is often absent where the government is making the decisions about announcements. Companies deciding to self-disclose may know the basic facts of the situation and have had time to work out the narrative to be presented in conjunction with the announcement. (In certain situations, it may even be possible to reach agreement on and coordinate such announcements with the authorities.) This period is a key window of opportunity for preparing the company's communications messages alongside ascertaining the company's legal position.

Another reputational issue to be considered is whether a company retains an independent investigator to conduct an inquiry into, for instance, ethical standards or compliance procedures, with the goal of having the independent investigator make remedial recommendations in advance of regulatory or prosecutorial authorities concluding their investigations. This step is not without its risks: many companies have found themselves in the position of making changes in the executive ranks because an independent investigator recommended it. But, in the appropriate circumstances, the appointment of an independent investigator can be extremely effective in helping position a company as seizing the initiative and communicating a sense that it is taking proactive steps to identify underlying problems while co-operating with an official external investigation. Should a company decide to proceed in this way, it will be an important moment to plan communications. Among other things (e.g., who to appoint and terms of reference), a company will have to consider whether it will agree to accept the recommendations of an independent agent, and whether it will agree to publish the resulting report, without reviewing them beforehand. In many cases, companies find that they have to do both. There is also the risk that if an investigator's report concludes with predominantly positive findings for the company, it will generate accusations of a whitewash despite the demonstrable independence of the investigator.

The impact of whistleblowers 39.5

Another issue that can have a significant impact on communications strategy is the presence of a whistleblower. Increasingly, whistleblowers go directly to a regulator or a media organisation to expose what they regard as improper conduct or other wrongdoing. In many cases, the company has no warning of the whistleblower's actions and may have had no opportunity to investigate the underlying charges, let alone devise a communications strategy. Moreover, given the disparity in stature of a corporation and a whistleblower, the strengthening of legal protection for whistleblowers in many jurisdictions and the media's tendency to give credence to whistleblower narratives, a corporation often finds itself at a disadvantage when responding to allegations of this sort: being seen to pick on the 'little guy' is never a winning reputational strategy.

Some take the view that, because many whistleblowers are disgruntled employees (or ex-employees), their motives are tainted. Others see whistleblowers as necessary and appropriate watchdogs to hold corporations accountable. Either way, companies must be very careful about deploying aggressive tactics to discredit them. Even where the whistleblower appears to be demonstrably compromised, a full frontal assault can backfire badly and introduce the perception that the corporation is a bully whose instinctive reaction is to lash out rather than accept the possibility that there has been a legitimate exposure of internal failures or wrongdoing by someone brave enough to speak out.

See Chapters 19 and 20 on whistleblowers

For all these reasons, the best (and often necessary) approach in most cases is for the company to respond to the sudden public emergence of a whistleblower with concern about the underlying allegations. The message must be put across clearly that the company is taking swift steps to investigate the allegations, that it takes seriously all allegations of the sort made by the whistleblower and that it has developed robust and effective procedures for dealing with concerns raised by employees.

Managing disclosures by regulators or prosecutors 39.6

Where an investigation is first made public by a government official such as a regulator, legislator or prosecutor, the company will have limited ability to influence the initial news cycle. The focus should turn immediately to trying to ensure that the subsequent reporting is balanced and fairly reflective of all relevant information. Of course corporations will also need to communicate with other stakeholders such as employees, business partners and shareholders through channels other than the media.

After disclosure of the investigation, a first question will be whether to react on the record. In most cases for companies, it makes sense to use a holding statement – even if only to buy time. Telling the media that the company is reviewing the charges, allegations or statements and intends to co-operate with the investigation is not much, but it is better than having no comment because it conveys at least some action on the company's part. Depending on the coverage, that may be sufficient. Where the investigation is making a bigger splash, and particularly where it is proving unsettling to investors, staff and other key

stakeholders, a more substantive response is often necessary once a proper evaluation has been completed.

Public companies may also be under legally binding regulatory disclosure obligations requiring them to confirm otherwise confidential investigations in market announcements. These may be helpful in ensuring the market does not overreact and that the news (with its potential consequences) can be reflected in the share price early. On the other hand, even where more limited disclosures, such as in the legal matters section of regular results releases or the annual report, suffice from a legal point of view, these may not be enough to prepare investors and other stakeholders for the real scale of what may come. The lawyers, communicators and senior leadership of the company should evaluate the best course of action. In any event, the disclosures will need to be kept under constant review.

Where it is clear that the worst has yet to come, it is generally prudent to take the longer view and disclose as much of the information about potential ramifications for the company as rapidly as possible, but with carefully considered language that indicates the company is prepared for and in control of the situation. Although it may seem counterintuitive, presenting the worst case scenario clearly and rationally can take a lot of the 'fear factor' out of market and wider stakeholder reaction.

The reason for this is simple: the media and other interested parties will want to piece together a narrative about the matter, filling in what they don't get from official sources with either their own or other people's speculation. Where it is possible to get the information out early, the company can effectively take the wind out of the sails of the speculation by preventing the drip-feed of details over an extended period, shortening the period of negative media focus. Of course this strategy, if pursued, must always be non-speculative and undertaken in close consultation with legal counsel to ensure that public statements are as narrowly circumscribed as possible to avoid potential damage to the company's legal defence and misleading information reaching the market.

As well as public statements 'on the record', an additional question is the extent to which the company or its communications advisers assist media with 'off-the-record' guidance or conversations 'on background'. These terms refer to the basis on which journalists are given information and are then able to use it. Constructive engagement of this sort with trusted journalists from mainstream media publications can be a useful and effective tool for conveying internally approved (non-privileged) contextual information and trying to ensure that prejudicial or inaccurate material does not make its way into reporting or, if it does, that it is corrected before it gains currency. Whether to engage, and the type of engagement appropriate in any given instance, will vary depending on a host of factors, including the particular jurisdiction.

All of this means that judging the right amount of information to disclose and on what basis is a delicate skill, and the best statements or announcements will always involve considered input from counsel, communicators and executives. This close coordination will help to avoid situations in which company representatives say or do things at an early stage that will look ill-judged in the light of subsequent events.

In addition, companies typically do well to avoid antagonistic or overly defensive reactions to criticism from regulators. Experience suggests that it is often better to be more circumspect, even if the company feels that criticism directed toward it is inflammatory, contentious or unfair. Snap reactions can lead to embarrassing climb-downs, especially when negotiated settlements may potentially be in the offing.

The best principle is to prepare for the worst while hoping for the best. Time spent preparing a toolkit of materials at an early stage will save time later on. If the company has prepared a crisis plan in advance – as discussed above – some of these materials will be readily to hand; others will be specific to the investigation and will typically include:

- process timelines (with trigger points for media and political interest);
- internal and external Q&As;
- script points for customer relations;
- draft statements;
- stakeholder maps (charting the state of engagement with or understanding of influential parties);
- leak strategies; and
- information on the company's contribution to key territories and its broader social purpose.

These materials can always be revised as the situation evolves and should form the basis for any content that the company needs or wants to publish about matters relevant to the investigation or its subject matter. Content is essential in corporate communications, especially given ever increasing demands for information in a fast-paced multi-media environment and the appetite for digitally accessible material. It is the communicators' job constantly to think creatively what materials may be needed for various purposes and for which particular channels, and to work with the legal advisers to ensure the messaging remains consistent with (and not a risk to) the company's legal position.

Legal counsel and communicators need to be sensitive to the complex dynamics in these situations, including the client's state of mind. Often the company's instinct is to push for robust public expressions of innocence and determination to fight the allegations. They may feel they are as much victims as anyone else in the drama, on the grounds of having been let down by subordinates or dragged into a situation they feel they could never be expected to have known about. Equally, too, they may find it hard to go along with the pragmatism of advisers who have more experience of managing these situations.

From a communications perspective, part of the pragmatism is understanding that there are no quick wins when an investigation is announced. It is the start of a potentially long process – a marathon not a sprint, with varied periods of intensity and activity. The company should be prepared for that and to dig in for a prolonged period.

39.7 Communications with stakeholders

It may seem obvious, but paying attention to stakeholders other than the government and media is critical during an investigation. These include senior management, non-executive board members, investors, industry analysts, other government agencies with which the corporation interacts or that regulate it, business partners, suppliers, lending banks, customers or clients, and staff. Investigations can consume large amounts of precious management time, but the business must continue, and be seen to continue, to function day-to-day. Maintaining morale and keeping problems in perspective are vital. Business-as-usual communications are something senior management neglects at its peril.

For that reason, even where there are restrictions on what can be communicated, particularly during negotiations to resolve a matter, it is important to have a properly developed and approved set of messages that can be used to ensure that interested parties have a basic understanding of the situation, and are clear that it is being handled properly and professionally. A well-crafted announcement for internal or select external audiences need not say all that much to pay dividends in creating support and a sense of inclusion at a difficult time.

Negative headlines and unhelpful speculation can adversely impact staff morale and unsettle clients or customers, particularly if certain products or sales practices are under investigation. Equally, there can be an opposite danger – that well-intentioned but misinformed parties feel they are doing the company a favour by weighing in, either through a public intervention or by leaking information without appreciating the implications of their actions. For both these reasons, proactive communications to affected or interested parties are worthwhile.

See Section 39.9

Whatever the type of communication, the essential touchstone is consistency of the message. While particular points may be emphasised more or less for each particular audience (what needs to be highlighted to investors may not be as relevant to clients or government contacts), there must be no contradictions or tensions in the core position of the company. This is again a key reason for coordination between lawyers and communicators: to ensure that the words used are approved for both internal and external use. Inconsistency in the messaging conveyed can cause real difficulty for companies, especially where a specific legal position has been agreed with investigating authorities and external communications are released that conflict with it.

39.8 Managing leaks

Although the substantive findings of investigations in virtually all jurisdictions are likely to be confidential until they have been concluded, leaks can occur for a variety of reasons. Generally, there is little in practical terms one can do to prevent them. In judging what, if any, strategy to deploy in response, it is again important to take a long view. It may not be ideal in the short term for a particular story to run; but coming out strongly against it may not help credibility and can store up problems for later when the company wants to be focused on rebuilding its reputation.

In any event, as set out above, having agreed adaptable leak strategies in place will be an important part of communications planning.

Role of third-party advocates 39.9

During investigations and related crises, third parties can often be helpful sources of commentary and information to articulate the company's point of view – especially where there is media appetite for commentators and 'talking heads'. Media and market analysts often need help understanding complex matters – both the substance and the process – and they frequently turn to industry experts, academics, former executives in the sector or even business partners. Communications professionals can be vital in developing these third-party sources and, in consultation with legal counsel, making sure they understand how to be helpful instead of harmful. In turn, those third parties can be invaluable in shaping coverage and external reaction, ensuring that the company's position is properly understood, and closing down unhelpful speculation before it gains currency and becomes established as 'fact'. In short, it is often useful to have a third party to steer media and other commentators to when it comes to reflecting or defending the company's position.

To fight or not to fight 39.10

At some point in every investigation or subsequent litigation comes the question whether to continue fighting or to settle. Companies, their lawyers and their communicators do not always see eye-to-eye on the right approach, and that will always depend on the circumstances. But companies would do well to understand the difference between what might get results in legal proceedings and what is convincing in the public arena. A perfectly valid legal strategy might actually alienate public opinion if, for instance, it sounds like an attempt to evade sanctions for serious moral or ethical failings by dint of a technicality. In those cases, litigating – even to victory – might do more long-term damage to the company's reputation than an early settlement would have. Which is not to say that the company should not fight – it should just think through the ramifications of doing so.

In some cases, it may be preferable from a reputational standpoint to acknowledge missteps and seek to resolve the matter early. Where this course includes a clear plan for dealing with any wrongdoers and a remediation plan, it can pre-empt the investigation's findings and help to draw a line under the issue. Often such a step can be beneficial in more ways than one, since plans like these are typically required when resolving a government investigation.

The concept of co-operation is obviously also a key element in handling investigations – from both a legal and a communications perspective. Companies may well assert that they have been and are being open, co-operative and transparent with investigators. But difficult issues can arise – especially in criminal investigations – when a company is either directly pressured to disclose material it considers is legally privileged or otherwise feels compelled to do so to demonstrate the extent of its co-operation with the investigation. Public tensions or arguments with investigating authorities about privilege tend to favour the authorities

themselves because it is easier for them to create the impression that the company is being obstructive in refusing to give them the documents they have asked for than it is for the company to explain to the media and other parties why it believes privilege obtains, why privilege matters as a fundamental right and why assumptions should not be made about a refusal to waive it.

The point may be academic in circumstances where, as happens more and more often in the US at least, the government insists on a waiver in deferred prosecution agreements (DPAs) (which have more recently been introduced in the UK) or a criminal plea – although a waiver may not necessarily be a precondition of a DPA.

Ultimately a company will make this decision after careful deliberation based on all the circumstances, including the legal and financial implications of a refusal to waive and the possibility of prolonging or expanding the investigation. But where it feels that it has no real option, the release of privileged documents will then need to be considered in the context of communicating about the investigation.

39.11 The endgame: announcing a settlement

When it comes to positioning a company for announcement of the outcome of an investigation, several factors need to be considered. In the run-up to the announcement, the legal team needs to coordinate closely with communicators to make sure that any public statements are properly aligned with the agreed facts of the case. This is obviously paramount where companies have entered into deferred prosecution agreements with the authorities in which they are bound by prohibitions on making – or authorising lawyers, officers, directors, employees, agents or subsidiaries, etc., to make – any public statements contradicting the agreed statement of facts about the company's conduct. Procedures need to be in place to ensure that anyone speaking on behalf of the company – either in connection with the announcement or in other media or public stakeholder engagements (e.g., financial results presentations) – knows what it is permissible to say.

More broadly, so much of the approach to positioning an investigatory decision depends on the nature of the investigation, the sanctions or remedies imposed and the consequences for the particular company. Key questions will be:

- What are the core communications materials that the authority is itself planning to release or distribute on the day of announcement? Will it just be, for example, a press release with a copy of any relevant decision notices, rulings or agreements?
- How does the authority intend to choreograph it? Will there be a press conference and background briefings? Will the authority's leadership be giving news interviews for print and broadcast media?
- Where an investigation has involved more than one authority (domestically or cross-border), will the lead authority lead the communications? Are the authorities coordinating on communications?
- What is the range of sanctions against the company? Is it just a fine (which is likely to be the media focus)? Or are there other remedies – remedial compensation schemes, disgorgement of profits?

- How do the sanctions compare with other similar high-profile cases in size and scale?
- What are the potential consequences of the sanctions for the company?
- What are the other conditions attached?
- Is there a right of appeal?
- Are there likely to be satellite civil litigation proceedings or criminal prosecutions, perhaps against specific individuals?
- Will there be political reaction to the decision? If so, by whom?

Investigators, prosecutors and regulators know only too well that the opportunity to announce a big settlement against a corporation is their day. Their narrative will be taken to be the definitive account and will stand for official purposes as the public record. Seeking to contest that narrative where appeal is unavailable or unlikely is often not recommended (and may be forbidden), particularly as any attempt to contextualise, mitigate or otherwise play down the gravity of the misconduct is likely to backfire in reputational terms.

Nonetheless, a well-developed plan to position the settlement is a must for the company. A number of factors will need to be considered in the plan. In some cases, regulators will expect the company to issue statements expressing contrition, also perhaps setting out consequences for key individuals. This may entail resignations of senior management or board members. Even where this is not an express condition of a settlement, it is often the only credible response. Media and politicians may also expect there to be financial consequences for management who remain. Whatever the particular case, the company's statement will need to draw a line under the matter by conveying a concerted sense of moving forward. This can usually best be done as much out of the limelight as possible – press conferences or interviews with senior management, for example, can often force the company to go back over the very issues it is trying to put to bed.

Share price movement following an announcement will indicate how the market greets the result for public companies, and the impact may not necessarily be negative. Share price may even go up if shareholders broadly expected or are relieved at the result and welcome an end to the uncertainty of a prolonged investigatory process. But there may nonetheless be genuine questions that investors or other stakeholders will want answered. Given the size of some of the post-2008 settlements in the financial sector, investors have had legitimate questions about financial impacts and funding for the required payments.

In some cases, banks have had to announce capital raising measures to plug gaps left by fines. In these circumstances, companies need to have a clear plan in place for addressing all their key audiences, including (for public companies) capital markets through regulatory announcements. In addition, staff morale and relationships with certain customers may have taken a bad knock and may take concerted efforts by management over a long period to repair. Large customers and shareholders will need contacts at the right level of seniority. The roll-out plan will help to ensure that these conversations are properly sequenced to fit any

public communications as well as internal briefings to both senior staff and line managers, who will in turn have to speak to key stakeholders.

39.12 Rebuilding reputation

Rebuilding a company's reputation actually starts the moment an investigation is first reported and continues throughout, including at the announcement of an outcome and beyond. Regardless of how the media perceives each of these points in the road, difficulties will arise if the company is seen to have failed to address or be addressing issues adequately. In such cases, other voices such as politicians or investors may start to wade into the conversation, raising the pressure on the company. In such situations, the only way to resolve the situation definitively may be to take steps that the company had hoped to avoid and to take them in circumstances where those measures will be seen to have been forced on the company.

Even if the headlines fade quickly, memories tend to linger. Companies care about their brands and reputations, so they will need to devote significant time, thought and energy to repairing damaged relationships and restoring trust. In many cases, the remediation plan will require difficult actions or statements that convey genuine remorse and a desire to change on a cultural level, and potentially some more practical measures to repair specific failings in procedures and controls. The goal will be to move the company from being seen as part of a wider problem and position it as a proactive part of the solution.

To achieve that outcome will require an honest appraisal of the mistakes and a determination to do what is necessary to rectify them. Serious polling and data-driven analysis will help identify where exactly the reputational damage lies and also help track success in tackling those issues and clawing back trust. Crucial and often forgotten is the need for extra vigilance to ensure that the company avoids committing further errors. In the recovery period, even the slightest issue risks being blown up and setting the company even further back. It is important, too, that the chief executive owns the reputation recovery plan and that he or she and everyone else involved understands that actions really do speak louder than words.

39.13 Summary – 10 key considerations

In summary, and drawing on the above, the following is a practical checklist of communications considerations to bear in mind when navigating an external investigation:

1 *Context:* Understand the company's backstory and track record, as well as any political agenda of the investigating entity.
2 *Planning:* Undertake as much advance planning as possible, preferably through crisis exercises, and preparation and planning.
3 *Integrated teams:* Put together a core integrated team to ensure that the legal advisers are plugged into the communications function and other key functions (e.g., investor relations, public affairs).
4 *Active monitoring:* Have in place monitoring tools to track continuously for media coverage, both traditional and on social media channels. Information

about who is commenting on the process or wider debate, influencing opinion and affecting the climate, is essential.

5 *Core content:* Content is king. Put together a core suite of materials that can be continuously updated as events change – process timelines, key messages, Q&A, holding statements, stakeholder lists and general information about the company's contribution to key territories and overseas markets. Consider creation of public-facing content that can be accessed or distributed digitally via the company's communications channels.

6 *Consistency of message:* Ensure there's consistency of messaging – jointly developed by the legal and communications teams (with input from other functions) – around key moments in the investigation, especially the final outcome.

7 *Stakeholder management:* Consider what the company's most immediate key audiences (beyond the media) understand about the investigation and its implications for them, and what the company can say to keep them informed: senior management, non-executive board members, investors, industry analysts, other government agencies with which the corporation interacts or that regulate it, business partners, suppliers, banks, customers or clients, and staff.

8 *Third-party advocates:* Identify third parties who can potentially provide helpful comment about the process or about the company more generally: industry analysts, former executives in the industry and business partners. Equally, know the company's enemies and who might weigh in against the company's interests.

9 *Business as usual:* Convey a clear sense that the company is in control of the investigation and that the leadership is focused on the process of getting on with day-to-day business.

10 *Reputational rebuild:* Consider throughout the investigation what the company may need to do to communicate genuine cultural or behavioural change, using the investigation outcome as a pivot point for building the company's reputation.

Part II

Global Investigations around the World

40

Austria

Bettina Knoetzl[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

In May 2017, media reports revealed investigations over suspected price fixing in the construction sector between 2008 and 2014 relating to more than 20 road-building projects. Pursuant to a search warrant cited in newspaper reports, contracting parties could have suffered damages of more than €100 million. The Central Public Prosecutor's Office for Economic Crimes and Corruption (WKStA) – in co-operation with the Austrian Competition Authority – carried out raids at several offices, including those of STRABAG and PORR at different locations. Both companies announced that they would conduct internal investigations to review the allegations and co-operate with the authorities.

2 Outline the legal framework for corporate liability in your country.

The Austrian legal system distinguishes between civil liability (for breaches of private law), criminal liability (for offences against criminal law) and liability under administrative penal law (for regulatory offences). The main focus of this chapter will be on criminal liability of corporations.

Pursuant to the Law on Corporate Liability (VbVG), corporations are liable for the unlawful and culpable actions of their decision makers and, under more restrictive conditions, also for the actions of their employees, provided that the offence was either committed for the benefit of the corporation or the offence violated duties incumbent on the corporation. An

1 Bettina Knoetzl is a partner at Knoetzl. She thanks Tobias Schaffner for his much-appreciated assistance in the preparation of this chapter.

offence committed by an employee must, moreover, have been either rendered possible or facilitated by the decision makers' failure to take essential precautionary measures, in particular of a technical, organisational or personal character.

By contrast to the liability for criminal offences, corporations are only directly liable for regulatory (administrative law) offences against tax law (section 28a Penal Tax Code). In other areas of administrative penal law there is only an indirect joint liability of the corporation for fines imposed for offences committed by the managing director or other 'persons in charge' (section 9 Administrative Penal Code). These offences are, however, considered offences of the natural person, not the corporation.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

Criminal offences are investigated by public prosecutors with the assistance of the criminal investigation department of the police. Pursuant to section 20a Code of Criminal Procedure (StPO), the WKStA is in charge of prosecuting economic crimes and corruption. The Federal Bureau of Anti-Corruption assists the WKStA in matters related to corruption.

Administrative law is enforced by various administrative authorities, often with sector-specific competences. The most notable examples are the Financial Market Authority, which oversees, *inter alia*, banks, insurance companies and companies listed at the Vienna Stock Exchange, and the Competition Authority, which conducts investigations into possible violations of national and European competition law.

Although competences between criminal and administrative authorities are distinguished *ratione materiae*, situations can arise where different authorities have parallel competence over the same facts. Pursuant to section 15 StPO, criminal courts must autonomously decide preliminary questions pertaining to other areas of law. They may, however, await the decision of a competent court or administrative authority on such preliminary questions if the decision is to be expected in the foreseeable future. Administrative authorities, in turn, may suspend their investigations if a preliminary question forms the object of another proceeding.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

Yes, for the opening of a criminal investigation, an 'initial suspicion' is required. Pursuant to section 1, paragraph 3 StPO, this is the case whenever specific indications give reason to suspect that a criminal offence has been committed.

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

The transnational effect of the *ne bis in idem* principle (which is established in section 17, paragraph 1 StPO) is based on international agreements to which Austria is a party (see Birklbauer in Fuchs and Ratz, *Wiener Kommentar zur StPO*, § 17). Of particular importance for the transnational effect of the principle is Article 54 of the Convention implementing

the Schengen Agreement (the implementing Convention), which prohibits prosecution for 'the same offence', if a person has been 'finally judged' and has already served or is serving a sentence in another Contracting State (note that Austria has made declarations relating to all exceptions enumerated in Article 55 of the implementing Convention).

In the context of Article 54 of the implementing Convention, Austrian authorities apply different concepts of 'same offence' to different situations. For a criminal court, confronted with a previous sentence of another criminal court, the previous sentence deploys a blocking effect in relation to the same factual matrix. This concept is favourable for the accused. By contrast, a criminal court can convict an accused on the same facts if the accused was previously sanctioned by an administrative authority (rather than a criminal court) and the sanction did not fully correct the injustice done.

Article 54 of the implementing Convention speaks of a person who has been 'finally judged'. According to both case law and legal scholarship, the concept of final judgment encompasses all judgments that conclude a main trial, namely both convictions as well as acquittals. No differentiation is made by the CJEU between an acquittal based on a judgment on the merits or a procedural judgment. Moreover, the closure of proceedings by the prosecution authority without the involvement of a court has a blocking effect for the purpose of Article 54 of the implementing Convention if it is the result of an action for compensation (in Austria this is called *Diversion*, see question 38) brought by the person under investigation and the closure is final (*Gözütok/Brügge*, CJEU Judgment of 11 February 2003, C-187/01, C-385/01). Other provisions dealing with previous convictions abroad are section 192 StPO and section 66 of the Austrian Penal Code (StGB).

A further provision entitling criminal prosecutors to refrain from prosecution is contained in section 192, paragraph 1 StPO (which applies in cases falling outside the scope of the implementing Convention or other international agreements) provided that the suspected person is charged with several offences, the person has already been convicted by a foreign court for the offence or the person has made compensation abroad and as a result has been exempted from further prosecution (*Diversion*), and no severer penalty is to be expected in Austria. Finally, pursuant to section 66 StGB, Austrian courts must take into account a punishment for the same crime imposed and served abroad.

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

Austrian criminal law has no general extraterritorial effect (section 62 StGB). Criminal offences committed on an Austrian ship or aeroplane are subject to the StGB, as are certain offences regardless of the criminal law of the place of the offence, including economic espionage, criminal offences against an Austrian official, human trafficking, terrorism, corruption and several other types of major crimes (section 64 StGB).

Other offences committed abroad are only subject to Austrian criminal law (1) if the offence is also punishable under the laws of the place of the offence, (2) if the offender is Austrian or is arrested in Austria and cannot be extradited, and (3) none of the exceptions set out in section 65, paragraph 2, No. 4 StGB applies.

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

The co-operation between Austrian prosecutors and their counterparts in other EU Member States is greatly facilitated by three instruments: the European evidence warrant, the European investigation order (EIO) and joint investigation teams (JITS). Hereafter the focus will be on the latter two. Also of relevance is the Law on Judicial Cooperation in Criminal Matters.

The EIO replaces the classic system of judicial assistance, as it allows the competent authority of one EU Member State (the Issuing State) to order, after validation by a court or public prosecutor of the Issuing State, the execution of most acts of investigation, including coercive measures, in another EU Member State (the Executing State) (Article 2 of Directive 2014/41/EU of 3 April 2014). Subject to certain grounds for non-recognition or non-execution or postponement, the Executing State must ensure the execution of the order as if the investigative measure concerned had been ordered by a domestic authority (Article 9 of Directive 2014/41/EU). The national law of the Executing State may provide that authorisation by a domestic court is required (Article 2(d) of Directive 2014/41/EU). Where this is not the case, the EIO may be directly executed by the executing authority.

JITS are multinational investigations teams based on an agreement between two or more law enforcement authorities in EU Member States and are set up to investigate a specific purpose for a fixed period. The co-operation can be extended to non-EU states if all other participating parties agree.

By contrast, the co-operation between Austrian prosecution authorities and non-EU states (and Denmark) still follows traditional judicial assistance practice based on the principle of reciprocity and governed by international agreements and, where these do not contain a governing rule, the Extradition and Judicial Assistance Law, which only applies in ongoing criminal proceedings in Austria; it does not apply to administrative proceedings. Unless an international agreement provides for direct judicial assistance, the Austrian authorities must request judicial assistance through the Federal Ministry of Justice. Moreover, unlike in an EIO, the public prosecutors must request and obtain court authorisation from the domestic court for coercive investigation measures.

Finally, special challenges arise when investigations relate to countries with strong secrecy rules, for example Swiss banking secrecy.

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

See question 5 as well as paragraph 17 of the preamble to Directive 2014/41/EU regarding the European investigation order in criminal matters, which allows an EIO aiming 'to establish whether a possible conflict with the *ne bis in idem* principle exists'.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

Austrian enforcement authorities must take the corporate culture into account when assessing whether the management adopted the necessary precautionary measures to prevent criminal offences (see question 2). The types of measures required depends on the type, size and

sector of the corporation, the dangers involved, and the education and reliability of employees (see Hilf and Zeder in Höpfel and Ratz, *Wiener Kommentar zum StGB*, 2nd edn., VbVG section 3, n. 42 with reference to the legislative materials).

Further, a robust corporate culture may form the basis for the authority to exercise its discretion to refrain from prosecuting an offence. The public prosecutor must consider the conduct of the corporation before and after the alleged offence (section 18 VbVG, see question 38).

In addition, an employer's directives requiring employees to adhere to the law are recognised as a mitigating factor for sentencing purposes (see question 52).

10 What are the top priorities for your country's law enforcement authorities?

Fighting corruption is an express priority of the current government, more specifically the Austrian Ministry of Justice. Since Austria's ratification of the UN Convention against Corruption in January 2006, a – more or less – constant improvement of the anti-corruption laws could be observed. Most recently, a number of legislative improvements have been implemented to fight corruption, including the creation of the Federal Bureau of Anti-Corruption in 2010 and the WKStA in 2011 (see question 3).

11 How are internal investigations viewed by local enforcement bodies in your country?

The views of local enforcers can vary. Internal investigations may be regarded as helpful, especially if the results are shared with the prosecution, or as a fig leaf, that obfuscates rather than assists the criminal investigation. The sharing of the results of an internal investigation may be taken into account as a factor leading criminal prosecutors to refrain from prosecution (section 18 VbVG, see question 38).

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

Occasionally, allegations of misconduct arise out of tax audits. It is also not infrequent that competitors and victims of misconduct bring unlawful conduct to the attention of the authorities. Other common ways are chance discoveries of an offence, whistleblowers, standard screening processes, suspicious activity reports, internal audits, tax reporting, compliance and media reports.

13 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

With the approval of the court, the public prosecutor may order the search of a specific location – for instance an office building – to collect, temporarily secure or seize evidence, as well as any kind of assets that may serve as evidence, not only for the subsequent phases of

the proceedings but also for the sole purpose of securing civil claims of parties injured by the (alleged) criminal offence (section 119, paragraph 1 StPO). Especially in cases in which there is a risk that by waiting for a court order the evidence may become unavailable, the public prosecutor may order the search of a location and ask for court approval only subsequently (section 120 StPO).

Persons in possession of documents, data carriers or assets that form the object of a request for temporary securing are under a legal duty to comply unless they are suspected of the underlying offence or discharged from testifying, or have a right to refuse to give evidence (section 111 StPO). The public prosecutor can, however, obtain the evidence by coercive means, such as a house search. On the protection of privileged material, see question 14.

In addition to prior or subsequent court approval, house searches are subject to certain prerequisites. Most importantly, there must be a founded suspicion (this threshold is higher than the initial suspicion required to open investigations, see question 4) and the coercive measure needs to comply with the principle of proportionality. A temporary securing or seizure is not lawful if a less intrusive means is available (for instance by photocopying documents, see section 110, paragraph 4 StPO).

Persons against whom a search warrant was issued or whose premises were subject to a house search can file an objection with the competent public prosecutor within six weeks of the measure (section 106 StPO). The public prosecutor can either comply with the objection or, within four weeks, pass the objection to the competent criminal court.

14 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

Attorney work-product and attorney–client communications are protected in several ways. Attorneys (and a small number of other professions) have a legal duty of confidentiality and a right to refuse to give evidence (section 157 StPO). The duty may not be circumvented. This prohibits the seizure of attorney documents and the information contained therein at the attorney's premises and, since November 2016, also at the premises of clients under suspicion or accused in criminal proceedings. The attorney–client confidentiality only extends to the attorney's work-product and attorney–client communications created for the purpose of defending the client and not to previously existing evidence.

Any person subject to or present during a measure of temporary securing may object against the temporary securing of material protected by attorney–client confidentiality (sections 106 and 115 StPO). In case of such an objection, documents and data carriers have to be sealed and presented to a court, which must decide promptly whether the evidence is protected (section 112 StPO).

15 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

Accused individuals or companies have a right to avoid self-incrimination. In the case of a corporation, the managers (persons in charge) as well as the employees suspected of having committed an offence are to be interrogated as accused (section 17, paragraph 1 VbVG). It is

forbidden to use coercive measures (as well as promises or misleading statements) to induce the accused to make a statement (section 7, paragraph 2 StPO). Pursuant to section 166 StPO, compelled testimony is classed as prohibited evidence and null and void.

Relatives of the accused are discharged from the duty to testify (section 156, paragraph 1, No. 1 StPO) and witnesses can refuse to testify if they would incriminate themselves or expose a relative to the risk of criminal prosecution (section 157, paragraph 1, No. 1 StPO). On attorney–client confidentiality, see questions 14 and 26.

Privileges exist for members of certain professions, such as lawyers, auditors, medical doctors, psychiatrists, mediators, priests, reporters (section 157 StPO).

16 What legal protections are in place for whistleblowers in your country?

Whistleblowers can bring alleged offences anonymously to the attention of the WKStA through a whistleblower website, for which a legal basis was created in 2015.

A whistleblower may benefit from the crown witness regulation (section 209a StPO). This regulation concerns serious offences and is available, if the witness confesses his contribution to the offence freely, if the information disclosed is new and not yet part of an investigation against the witness, and if it contributes substantially to the investigation. Subject to further prerequisites (section 209a StPO), criminal prosecutors may terminate the investigations against such a person. Similarly, section 11b of the Austrian Act on the Establishment of a Competition Law Authority also contains a crown witness regulation. Other provisions on whistleblowing are contained in section 48i of the Federal Law on the Stock Exchange (BoerseG).

17 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

Employers have a duty of care towards their employees, including employees in an executive or managerial position (section 1157, paragraph 1 Austrian Civil Code; section 18, paragraph 4 Law on Employees, AngG). Pursuant to this duty, the employer must, *inter alia*, respect the private life of employees, protect their honour and treat them equally. This also has an impact on the conduct of internal investigations. Prior to an interview, the employer (or third party acting for the employer) should, for instance, inform employees that they may be accompanied by their own legal representative at least in situations of a (potential) conflict of interest. For protection provided by other branches of law, see question 35.

A finding of misconduct will frequently destroy the trustworthiness of the employee and justify dismissal. A mere suspicion of a criminal offence is, however, insufficient. Stricter standards apply to employees in executive positions (Decision of the Austrian Supreme Court RS0029652).

18 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

Under Austrian law, an employer may only dismiss an employee without giving notice if the employer exercises this right immediately after becoming aware of the reason justifying such dismissal (Decision of the Austrian Supreme Court RS0029131). Employers forfeit this right if they fail to immediately exercise it (controversial in cases of a suspected criminal offences, see Heinz-Ofner in Reissner, *AngG*, 2nd edn., § 27 n 52). In cases of doubt, the employer can suspend the employee until the investigation yields more evidence.

Employees have a duty of loyalty to their employer and a duty to inform (for the employer's corresponding duty of care, see question 17). Whether this duty gives rise to an obligation to answer the questions of private investigators that may reveal personal misconduct is a matter of controversy in Austrian scholarship. On the one hand, it is recognised that the right against self-incrimination is only applicable as regards state authorities. On the other, it has been argued that an employee must have some right against self-incrimination, if the internal investigation forms a prelude to criminal investigation, since the employee would otherwise be effectively deprived of his or her defence rights in criminal proceedings (see, for example, Ingeborg Zerbes, Strafrechtliche Grundsatzfragen 'interner Untersuchungen', *Jahrbuch Wirtschaftsstrafrecht und Organverantwortlichkeit* 2013, 263, at pp. 271–2). To our knowledge, the matter has not yet been decided by a court.

Commencing an internal investigation

19 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

Austrian corporations follow the international practice of setting out the terms and the personal, material and temporal scope of an internal investigation in a document. The issues usually covered include:

- person acting as internal investigator;
- definition of types of documents and electronic data (correspondence, documents) and method of screening;
- internal or external interviewers;
- persons to be interviewed;
- definition of documents or (provisional) outcomes of the internal investigation with which the interviewees will be confronted;
- channels of communication;
- involvement of accounting department;
- definition of spheres of confidentiality;
- phases of the internal investigation;
- point in time of informing persons whose data is used); and
- treatment of data during and after completion of the investigation.

20 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

In principle, companies are under no legal duty to bring misconduct to the attention of enforcement authorities. Doing so can allow a company to benefit from the crown witness regulation (see question 16) or from gaining 'victim status' (as an injured party) rather than being treated as a suspect in the proceedings. Reporting duties can arise from rules on corporate governance and company law, depending on a company's size and other relevant factors (see notably the requirement of a status report pursuant to section 243 et seq. of the Austrian Commercial Code). Managing directors of public limited companies must report violations, or their suspicions of violations, of significant impact for the company to the president of the supervisory board, and managing directors of limited liability companies have a corresponding duty to report to the shareholders. Finally, see question 60 for the duty of publicly listed companies to issue *ad hoc* notifications.

21 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

See questions 20 and 60.

22 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

Internal reporting duties depend on the form of incorporation of a company. In public limited companies, the management must immediately report to the president of the supervisory board if an important event occurs, including events that receive broad attention in the media (Nowotny in Doralt, Nowotny and Kalss, *Aktiengesetz*, 2nd edn., § 81 n 7). In the case of limited liability companies, the shareholders must be informed.

23 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

As a general rule, anyone is under a legal duty not to destroy material that may become relevant in a legal dispute. Suppression of evidence is a criminal offence (section 229 StGB).

Advisable measures include the search and preservation of relevant data and the drawing up of an internal memo recording the findings. Companies should also review the settings of deletion routine and instruct employees not to delete any emails, nor to destroy relevant data.

24 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

Persons suspected of a crime have a right against self-incrimination (see question 15). However, non-compliance with a notice to produce documents or subpoena to appear before the investigation authority may lead to coercive measures, such as house searches. Such coercive measures can be challenged by means of a complaint, arguing, for example, that the measure violates the principle of proportionality (section 87 StPO). Where documents are

protected by attorney–client confidentiality, an objection to the temporary securing can be filed and the sealing of the documents or data can be requested, to obtain a court decision to release the data (see question 14).

Attorney–client privilege

25 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

If an attorney is conducting the internal investigation or mandates a third party (see question 32), products such as investigation reports are covered by attorney–client confidentiality (see question 13). It is recommended to store attorney work-product so the data continues to belong to the attorney, for example using only a SharePoint provided by the attorney. In this way, objections and challenges in the case of house searches at the client's or third party's premises can be avoided.

26 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

The holder of the confidentiality obligation is the attorney. He or she owes it to the client and the client may release the attorney from the duty. However, attorneys are under no duty to testify. Even if the attorney is released from the duty of confidentiality by the client, he or she still must consider the potential to cause damage to the client when testifying and, if required, refrain from testifying. If on balance a refusal to testify serves an attorney's client's interest better, he or she is under a duty not to testify. The confidentiality obligation applies regardless of whether the client is an individual or a company.

27 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

In Austria, the attorney–client privilege applies only to outside counsel.

28 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

There is a general understanding that waiver of the attorney–client privilege is necessary to obtain co-operation credit. However, no legal rule exists that would render a waiver mandatory. As noted under question 26, attorneys may be under a duty to insist on confidentiality even if their client has discharged them from it.

29 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

It is not possible to limit disclosure of information to the prosecuting authority for the whole duration of the proceedings. The prosecuting authority must share relevant information with

the parties who have access to the criminal file. It can only grant confidentiality for a limited period but will ultimately have to disclose it.

Accused or suspected persons may release their attorneys with regard to certain aspects of the facts only. As explained under questions 26 and 28, attorneys even if released from their duty of confidentiality are under no obligation to testify.

30 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

There is no legal requirement to waive attorney–client confidentiality in Austria. However, if information is in the public domain, it is no longer protected. If information is made part of the criminal file, the prosecution may restrict access only for a limited time.

31 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

Given the fundamental difference between the discovery provisions under Austrian law and those applicable in common law jurisdictions, there is no need for a US-style concept of common interest privilege.

Third parties to whom information was disclosed may not have a duty to keep the information confidential or may not benefit from a right to refuse to testify.

32 Can privilege be claimed over the assistance given by third parties to lawyers?

Where it is necessary for an attorney to resort to third parties (e.g., a forensic or accounting expert) for the purpose of carrying out his or her own mandate, these third parties are considered as assistants of the attorney and information they obtain or the work product they produce is confidential (section 9, paragraph 3 Law on Attorneys; see also Tipold and Zerbes in Fuchs and Ratz, *Wiener Kommentar zur StPO*, §§ 110–115, n 30).

Witness interviews

33 Does your country permit the interviewing of witnesses as part of an internal investigation?

Yes. Based on their duty of loyalty, employees must participate in such interviews (for limitations, see questions 18 and 25). If the interview is conducted by an Austrian lawyer, he or she must refrain from influencing the witness' future witness statements.

34 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

There is no case law confirming that attorney–client confidentiality covers interviews conducted by and reports drafted by attorneys on instruction of their client. Based on the general principles outlined under questions 14 and 25, it must, however, be presumed that such information is protected.

35 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

Any interview has to be conducted within the confines set by law, notably the employer's duty of care towards employees (see question 17), the protection of privacy, substantive criminal law and data protection law. Data protection law requires, *inter alia*, the respect of the principle of proportionality in using data. Recording the interview will in most situations require the agreement of the interviewee, but may also be justified by the prevailing interests of the company (section 8, paragraph 4 Law on Data Protection (DSG)).

Whether further legal restrictions apply, in particular the right against self-incrimination, is subject to debate in Austria (see question 18). As long as the current legal uncertainty persists, it seems advisable to at least inform interviewees of their potential right against self-incrimination and their right to legal representation. There is no duty of care between a company and third parties who are not employees.

If the interview is conducted by an attorney, the attorney will have to comply with the attorneys' code of conduct. This requires the attorney to inform the interviewee about the capacity in which he or she is acting and by whom he or she was instructed. Attorneys conducting interviews are, moreover, required to avoid influencing the witness's future statements.

36 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

Interviews are usually conducted by two interviewers with the help of a questionnaire. It is common that a written record is taken of the interview. Less frequently, interviews are recorded (see question 35). Depending on the circumstances, the interviewee may be presented with documents. Especially in case of a potential conflict of interest between the interviewee and the interviewer or company, an employee may be accompanied by his or her own legal representative (see question 35).

Reporting to the authorities

37 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

There is no legal duty for private companies to report misconduct to law enforcement authorities. There may be such a duty for state companies exercising sovereign power.

38 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

Self-reporting may be advisable in circumstances in which the company can take advantage of a leniency programme, such as through the crown witness regulation (see question 16) or the *Diversion* procedure or to gain victim status in the proceedings (as an injured party) rather than facing the risk of accusation.

Diversion in relation to corporations is regulated in section 19 VbVG. Pursuant to this provision, the public prosecutor must close a criminal prosecution against a corporation if certain requirements are met. These include that the alleged offence is liable to *ex officio* prosecution, the facts of the case are sufficiently established (here self-reporting may be essential), the personal culpability of the accused is not grave, the consequences of the alleged wrongdoing was appropriately compensated by the payment of damages, and the punishment of the corporation is necessary neither for reasons of special nor of general prevention.

Dropping charges pursuant to section 19 VbVG is moreover subsidiary to section 18 VbVG, which entitles public prosecutors to close a criminal prosecution against a corporation if punishment seems unnecessary considering a number of factors, including the conduct of the corporation after the alleged offence (here self-reporting may again be of particular importance), the seriousness of the alleged offence, the amount of the fine to be imposed, and the detriment suffered by the corporation owing to the misconduct.

To take advantage of the leniency programme, it is, *inter alia*, important to self-report before the criminal prosecution becomes aware of the alleged misconduct. The disclosure should include all companies and persons who are to benefit from the leniency programme. Owing to the complexity of the procedural rules, it is highly recommended to engage a local lawyer to secure the benefits of such a programme.

In cases involving misconduct in several countries, the advice will have to take into account the principle of *ne bis in idem*. It is essential to form a strategy considering all countries having criminal or regulatory jurisdiction over the case simultaneously.

39 What are the practical steps you need to take to self-report to law enforcement in your country?

See question 38. In any event, a local lawyer who specialises in business crime law should be engaged before taking any practical steps of self-reporting in Austria. The disclosure can be made anonymously, using for example the WKStA's whistleblowing tool, or openly by providing the name of all involved parties, as is especially the case when seeking leniency.

Responding to the authorities

40 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

Companies should immediately inform their attorney of a notice or subpoena and should, in most cases, seek to enter into a dialogue with the law enforcement authority. This will mostly be initiated by calling the authority to arrange a meeting of the company together with its attorney at the authority's offices.

41 Are ongoing authority investigations subject to challenge before the courts?

The only remedy to challenge an ongoing investigation is a motion to terminate the prosecution (*Einstellungsantrag*), which can be filed with the public prosecutors at the earliest three months after the opening of the investigation (section 108 StPO). The public prosecution

may either close the prosecution or pass the motion to the court, together with an (optional) statement of its position. Generally, this motion has very little chance of success unless it is filed at the perfect time.

42 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

The company may regard the two proceedings as separate and handle them separately. However, a negotiation of disclosure packages with authorities from various countries is advisable, especially if the prosecution teams co-operate closely. In any event, companies are well advised to safeguard consistency.

43 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

Companies are not required to search for and produce material, whether they are located in Austria or abroad. Orders for temporary securing of evidence (see question 13) can extend to documents abroad, but require either traditional judicial assistance or, between EU Member States, a European investigation order (see question 7).

Although there is no obligation, it may be advisable for a company to search for documents and produce them to avoid coercive measures, such as house searches.

44 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

See question 7.

45 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

Austrian officials may not disclose any secret entrusted or accessible to them by virtue of their office (section 310 StGB). In practice, leaks to the public are quite common in Austria as soon as a more extensive number of parties have access to the criminal file (see question 29). In addition, in cases of public interest, the authorities are expressly required to keep the public informed (see also question 57 concerning the Media Decree of the Ministry of Justice). This duty to inform compromises to a certain extent the duty of confidentiality.

46 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

If the company does not want to disclose the document, we would advise the public prosecutors that our client is not entitled to disclose the document. If the company prefers to disclose

the document, we would inform the public prosecutors that they have to resort to coercive measures based on judicial assistance or an EIO to obtain the document in the country where the document is located (see question 7).

47 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?

In Austria, EU regulations on data protection with their usual high standards apply. The General Data Protection Regulation (GDPR), which is directly applicable in all EU Member States, will take effect from 25 May 2018. Until such time, data protection will be governed by the Law on Data Protection (DSG). The DSG covers not only natural persons, but extends also to legal persons. Pursuant to the DSG, data may only be used in accordance with the law and in good faith and only collected for specific legitimate purposes, which would typically obtain in the case of a notice to produce information (section 6, paragraph 1 DSG). The DSG further requires the respect of the principle of proportionality (section 7, paragraph 3 DSG). The use of data may not infringe the legitimate interests of affected persons. This requirement is fulfilled *inter alia* where there is a specific legal authorisation or obligation to use the data, or the affected person has given informed and valid consent, or the legitimate interests of the controller or a third party prevail. A notice to communicate data would be a typical instance of an obligation to use data. Similar requirements obtain pursuant to Articles 5 to 8 GDPR. The GDPR moreover provides for a catalogue of rights of data subjects, including the right to be informed about the processing of personal data (see Articles 12 to 23 GDPR).

Data protection laws are also relevant in deciding a request to access the file of criminal proceedings, requiring the weighing of the interests of all parties whose data is affected.

48 Are there any data protection issues that cause particular concern in internal investigations in your country?

Especially where employers permit the use of computers or email for private purposes, such data must be excluded from electronic searches, except for spot checks. Moreover, data processing as defined in section 4, No. 7 DSG must be registered in the data processing register (section 18(1) DSG). Pursuant to the DSG, a pre-approval by the data protection authority is required if the internal investigation involves processing of data related to suspected criminal offences (section 18 DSG) or if States are involved whose data protection level is inferior to that of the EU (sections 12 and 13 DSG). Under the new GDPR (see question 47), these requirements will be replaced by the duty to record data processing in an internal register, which applies to companies with more than 250 employees or processing of sensitive data.

49 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

Voluntary production of evidence may expose the management and board members who authorised the disclosure to liability, whereas compelled production entails no exposure to such liability.

As explained under question 45, third parties with a duly substantiated legal interest may access the file of criminal proceedings, unless conflicting private or public interests prevail (section 77 StPO). Confidentiality therefore only extends to persons that lack a legal interest. The general public may gain knowledge of information contained in the file through the media. The accused, the defence lawyer, victims and third parties entitled to access the file are subject to regulatory restrictions (section 54 StPO) when passing on information obtained from the criminal file, in particular, when passing it on to the media. The media must take due account of the presumption of innocence when using the evidence and respect data protection laws (see question 47). Officials are under a duty of confidentiality (see question 45).

Global settlements

50 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

Austrian law does not allow for settlements with law enforcement authorities. Under very limited terms it is possible to resolve criminal prosecution by *Diversion* (see question 38) or to benefit from the crown witness regulation (see question 16).

51 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

Pursuant to the VbVG, corporations are subject to fines, which are measured in *per diem* units, as well as to court directives (e.g., to compensate harm done or to implement a proper compliance system). The current maximum fine for companies amounts to €1.8 million (depending on the corporation's earnings). They can moreover be ordered to make redress, most notably in the form of compensation of harm done and charity donations. The corporation cannot be indemnified by directors, officers or employees for fines imposed against the corporation (section 11 VbVG). However, the company may pursue its representatives for damage arising from breach of their employment duties.

Natural persons are subject to the whole set of penalties and other sanctions if they are found (personally) guilty of an offence (section 18 et seq. StGB).

52 What do the authorities in your country take into account when fixing penalties?

Section 5 VbVG contains a non-exhaustive list of aggravating and mitigating factors. Aggravating factors are gravity of harm done by the corporation, benefit flowing from the offence for the corporation, and toleration or facilitation of misconduct by employees. Mitigating factors are preventive measures taken by the corporation prior to the offence, including directives to adhere to the law issued to the employees, the employees being solely responsible for the offence, the contribution to the resolution of the case, compensation of harm done, essential measures to prevent future offences, and significant economic detriment to the corporation. The sentencing of natural persons follows similar principles (section 32 StGB).

53 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

Non-prosecution agreements are not available in Austria. For dropping of charges through *Diversion* and closure of proceedings pursuant to section 18 VbVG, see question 38. A closure of a criminal prosecution by *Diversion* bears the advantage that the corporation is not condemned and no entry is made in the criminal register for corporations. The amount paid as a fine is also inferior to the fine imposed in the case of a conviction for the same offence.

54 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

Pursuant to the Federal Law on Public Tenders (BVerG), a company can be excluded from public tenders if one or more of its managers were convicted for an offence that casts doubt on the manager's or managers' professional reliability. Companies participating in a public tender must provide proof of professional reliability by submitting criminal records issued by their home country (section 72, paragraph 2 BVerG). A company may, however, establish that notwithstanding such a reason for exclusion, its professional reliability is guaranteed, notably by implementing measures preventing future offences.

55 Are 'global' settlements common in your country? What are the practical considerations?

Global settlements are not common in Austria. For the effect of a *Diversion* in EU Member States, see question 5.

56 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

Under Austrian law, private parties may declare a joinder of their civil claims to the criminal proceedings (section 67 StPO). Private plaintiffs who made a joinder declaration may access the criminal file insofar as their interests are affected (section 68 StPO).

Publicity and reputational issues

57 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

Investigations are not public in Austria (section 12 StPO). In cases of public interest, the prosecutor is asked to inform the public about the status of an ongoing investigation through the larger courts' and public prosecutors' media offices. The co-operation of the prosecution authorities and courts with the media is governed by the Media Decree of the Federal Ministry of Justice JMZ 4410/9-Pr 1/2003 dated 12 November 2003.

Main trial and appeal proceedings are public (section 12 StPO), but may neither be broadcast on the radio or TV, nor recorded by audio or visual recording (section 228, paragraph 4 StPO). In cases of public interest, it is common to have online live news ticker

reporting. There are some exceptions to the principle of the public nature of the trial, including for reasons of public policy or to safeguard legitimate interests of the accused, witnesses or third parties.

The criminal file, however, is only accessible to the accused and his or her defence lawyer, victims, private plaintiffs, and parties with a duly substantiated legal interest (section 77 StPO; see questions 49 and 56).

58 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

It is common to use public relations firms. The author strongly recommends using PR firms specialised in litigation PR and crisis management.

59 How is publicity managed when there are ongoing, related proceedings?

The PR strategy should not only focus on managing the criminal trial, but also include all aspects of the legal matter, including (potential) civil liability matters.

Duty to the market

60 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

Pursuant to section 48d BoerseG in conjunction with the Market Abuse Regulation (EU Regulation 596/2014), companies publicly listed at the Vienna Stock Exchange must issue *ad hoc* notifications regarding inside information, namely information that has not been made public and, if it were made public, would be likely to have a significant impact on the price of the company's shares or other related financial instrument. Under certain circumstances immediate disclosure can be delayed, in particular if it would impair the company's interests, the public is not misled and the fact that a settlement has been reached can be kept confidential to the point of its intended disclosure (see Article 17(1) Market Abuse Regulation).

41

Brazil

Isabel Costa Carvalho, Mariana Vasques Matos and Cíntia Rosa[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

The highest-profile corporate investigation in Brazil relates to Petrobras, Brazil's state-run oil company and the largest company in the country. The corruption scheme involving Petrobras started in March 2014 and continues to date. It has linked some of the country's most powerful and wealthy CEOs and politicians, including two former presidents of Brazil, Dilma Rousseff and Luiz Inácio Lula da Silva, and the findings created ramifications involving other public companies. It is expected that this investigation, Operation Car Wash, headed by federal judge Sérgio Moro, will help cleanse the country of recent endemic political corruption.

2 Outline the legal framework for corporate liability in your country.

While corporations cannot be held criminally liable (except for environmental crimes), they can incur civil and administrative liability. Under Law No. 12.846/2013 (the Clean Companies Act), Brazilian companies are strictly liable for corruption crimes, and controlling, controlled or affiliated companies are jointly liable for fines and full reparation of damages. Penalties for corporations under this Act include fines of up to 20 per cent of the company's gross revenue in the preceding year, seizure of assets obtained illegally or an order that the company be shut down.

1 Isabel Costa Carvalho is a partner of Hogan Lovells US LLP and Mariana Vasques Matos and Cíntia Rosa are associates at HL Consultoria em Negócios, an affiliate of Hogan Lovells. The authors would like to recognise former associate Arthur Rodrigues do Amaral's contribution to this chapter.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

In addition to several laws (including the Clean Companies Act, the Civil Code and Law No. 6.404/1976 – the Corporations Law), all companies (including limited liability companies and corporations) are subject to the Department of Corporate Registry and Integration (DREI) and to the Administrative Council for Economic Defence (CADE). Publicly traded corporations are also regulated by the Securities Commission (CVM), the Stock Exchange (B3, formerly known as BM&FBovespa) and other self-regulated organisations, such as the Brazilian Association of Capital and Financial Markets Entities (ANBIMA). Under the Clean Companies Act, the Office of the Comptroller General (CGU) is the authority with powers to prosecute companies. Prosecution rules, however, vary according to the authority.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

There is no minimum requirement for authorities to initiate an investigation; all that is needed is the suspicion of illegal activity (e.g., through a whistleblower). However, authorities must possess sufficient evidence of wrongdoing to obtain legal orders such as for wire-tapping or seizure of documents.

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

The concept of double jeopardy in criminal proceedings does exist in Brazil; however, corporations can only be held criminally liable for violations of environmental law.

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

Brazilian criminal law has extraterritorial effect with respect to certain crimes. In accordance with Article 7 of the Brazilian Criminal Code, crimes (1) committed against the life or liberty of the Brazilian President; (2) committed against the property or legitimacy (*fé pública*) of the Brazilian Union, Federal District, or any Brazilian state, territory, municipality, public company, mixed capital company, authority or foundation instituted by public authority; (3) committed against the public administration, by a public servant; (4) of genocide, when the perpetrator is Brazilian or domiciled in Brazil; (5) that Brazil has agreed to combat by a treaty or convention; (6) committed by Brazilians; and (7) committed in Brazilian aircraft or vessels, either commercial or private, when in foreign territory and that are not being prosecuted in that location.

For the crimes listed in (1) to (4) above, the perpetrator shall be punished in accordance with Brazilian law even if convicted or acquitted abroad; and for the crimes listed in (5) to

(7), the application of Brazilian law will depend on the following: the perpetrator has entered Brazilian territory; the conduct is also punishable in the country where it was committed; the crime must be extraditable under Brazilian law; the perpetrator has not been acquitted or served time abroad; and the perpetrator has not been pardoned abroad or criminal liability has not been extinguished. Furthermore, Brazilian law also applies to crimes committed by foreigners against Brazilians outside Brazil, provided the conditions set forth above are met and extradition has not been requested or was denied; and there has been a request from the Justice Minister.

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

Internal investigations in Brazil are a very recent innovation, and the vast majority of companies are not used to the rules and procedures that govern the process. Brazilian companies and public authorities in Brazil also lack experience regarding anti-bribery cases involving local and foreign prosecutors as the Clean Companies Act only came into force in 2014.

The main challenges faced in cross-border investigations include cultural clashes (fuelled by the use of foreign investigators with no knowledge of Brazilian laws and etiquette), lack of comprehensive internal controls (including backup of information as most companies have not invested in data storage capacity), lack of clear compliance guidelines (this is changing after the enactment of Decree No. 8.420/2015, which regulates the Clean Companies Act and sets forth 16 requirements for an effective compliance programme) and lack of commitment of local employees (as often the local subsidiary's management and employees see the investigation as an imposition from international headquarters instead of something good for them).

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

Brazilian authorities should generally conduct their own investigations to gather the necessary evidence to ensure a conviction, regardless of investigations conducted by foreign authorities. However, it is increasingly common for Brazilian authorities to rely on co-operation agreements with foreign authorities investigating the same or similar matters to provide assistance and increase efficiency. For example, in a big corruption investigation involving Brazilian aircraft manufacturer Embraer, Brazilian, US, Dominican Republic and South African authorities worked together to identify misconduct committed by the company, resulting in a landmark settlement with Brazilian and US authorities and the prosecution of several individuals involved. The settlement also included the first-ever dual monitorship agreement signed with the company, the United States SEC and the CVM. With respect to foreign judicial decisions, in accordance with the Criminal Code, when the application of Brazilian law would produce the same consequences, damages orders, restitution or other civil remedies, or other security measures, can be recognised and enforced in Brazil provided certain requirements are met.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

Yes. According to Decree No. 8.420/2015, which regulates the Clean Companies Act, authorities will take into account how effective a compliance programme is when considering the penalties to impose on a company. According to this Decree, an effective compliance programme shall fulfil 16 requirements, including commitment of senior management (demonstrated by the visible and unequivocal support of the programme), existence of clear rules of ethical conduct and compliance guidelines applicable to everyone, periodical compliance training and the creation of an anonymous hotline for any tips. In addition, CADE recently issued new compliance guidelines whereby companies with an effective compliance programme who are found guilty of anticompetitive conduct could have their fines reduced.

10 What are the top priorities for your country's law enforcement authorities?

Corruption (which is the object of the widely reported Operation Car Wash, the largest corruption investigation in the history of Brazil, involving Petrobras, and most recently Operation Weak Flesh, involving JBS Group, one of the largest meat producers in the world) and tax evasion (which is the object of Operation Zealots, the largest tax evasion investigation in the country's history, also involving the bribery of politicians and tax authorities).

11 How are internal investigations viewed by local enforcement bodies in your country?

Internal investigations are welcomed by local law enforcement bodies and in some cases local authorities ask for the assistance of internal investigators to build up their cases.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

Most allegations come through whistleblowers, either internal or external; internal audits, with the support of external auditors; or investigations by government authorities (e.g., Operation Car Wash).

13 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Yes, search warrants and dawn raids on companies are features of law enforcement in Brazil. Local authorities must secure a search warrant in court before entering the company's premises and must abide by the limitations set forth in the warrant.

14 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

While attorneys can claim privilege over certain materials, in practice, the authority conducting the raid will collect any and all documents it deems relevant, and the subject of the raid could challenge the use of privileged documents or information as evidence before the judge hearing the case. In Operation Car Wash, for example, the presiding judge requested certain documents seized to be delivered to Odebrecht's lawyers (a construction company indicted over bribery allegations) to identify any privileged documents, giving them 72 hours to do so. In this case, the lawyers had to clarify the origin and purpose of the documents and the criteria used to classify them as privileged. In Brazil there is no legal distinction between internal and outside counsel protection. Internal counsel have the same legal professional privilege as those in private practice.

15 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

Under the Federal Constitution, everyone has a right against self-incrimination. Furthermore, unless there is no other way to retain evidence or prove a set of facts or circumstances, family members (including foster members) of the accused are not required to testify. In addition, those with professional secrecy obligations (e.g., lawyers, doctors) should also be excused from testifying, unless they participated in the misconduct.

16 What legal protections are in place for whistleblowers in your country?

Brazil does not have a whistleblower protection law. On 22 February 2015, the CGU issued guidelines on compliance programmes (Compliance Programmes – Guidelines for Private Companies) outlining the elements of an effective compliance programme, as set forth in the Clean Companies Act and further regulated by Decree No. 8.420/2015. The guidelines include a requirement for companies to have a whistleblower channel for their compliance programmes to be considered effective. Although Brazil lacks a specific whistleblower protection law, Brazil has a witness protection programme that can be used by whistleblowers who fear for their life or wellbeing because of their participation in a legal proceeding.

17 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

Brazil has a very established legal framework to deal with employment rights and specialised courts. Brazilian labour laws are complex, and tend to favour the employee. In simple terms, employees of Brazilian companies can be subject to sanctions such as a warning, suspension and dismissal. The same is applicable to directors and officers. However, the extent of these penalties would depend on the case.

18 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

Companies should take steps to reduce their exposure to liability, but they are not required to act (with few exceptions, such as for companies in the financial services industry – see question 37). Best investigation practice recommends suspension (as provided by Brazilian labour laws) of an employee who is a suspect so that an independent investigation can be carried out. This practice has been applied in most large cross-border investigations in Brazil. Employees are expected to co-operate in an internal investigation but should not be forced into an interview, for instance, and they should not be penalised for acting in this manner. An employee can be dismissed without cause under Brazilian law, but companies should be careful of the potential pitfalls of doing so (including litigation – Brazilian labour courts tend to be pro-employee).

Commencing an internal investigation

19 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

It depends on the company and complexity of the investigation, but law firms usually prepare an investigation plan (the level of detail varying depending on the size and scope of the investigation).

20 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

Companies should ensure they collect as much evidence as possible of the wrongdoing, as this can be used in the company's defence (should it face prosecution) or to enter into a leniency agreement (as it requires companies to provide clear evidence of, and to help identify the individuals involved in, the misconduct). It is also advisable to suspend (as provided by Brazilian labour laws) the individuals who may be involved in the wrongdoing. In addition, the Clean Companies Act includes provisions regarding interference with investigations and, therefore, the company should issue a retention notice to all employees advising that no documents or data should be deleted until further notice.

21 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

The decision to publicly report the existence of an internal investigation or contact from law enforcement depends on several factors, including whether the company has shares that are publicly traded. The moment and quality of the disclosure should be analysed case by case.

22 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

Management should notify the board of directors about an investigation immediately upon any suspicions of wrongdoing so that an internal investigation can begin. Contact with law enforcement officials should be made as soon as the company has evidence. Generally board meetings are held on predetermined dates but Corporations Law and typical company by-law provisions would allow for a meeting to be called at any point in time if there is a relevant issue to be discussed. Board members are also subject to fiduciary duties imposed by the Corporations Law.

23 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

Companies should ensure their employees and officers abide by the requirements of the subpoena and refrain from destroying any evidence (obstruction of an investigation – including witness and document tempering – is a felony under the Clean Companies Act and the Criminal Code). Furthermore, companies should retain specialised counsel as soon as they receive the subpoena and not engage the authorities without legal representation.

24 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

The lawfulness or scope of a notice or subpoena from a law enforcement authority may be challenged in court.

Attorney–client privilege

25 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

Brazilian law recognises attorney–client privilege over information provided by a client to an attorney in the course of representation, and attorneys may not disclose such information to third parties (with a few exceptions). Therefore, attorneys may claim the products of the investigation (such as investigation reports and memorandums or interviews) are covered by privilege. To protect the confidentiality of an internal investigation companies should require non-attorneys (who are bound by confidentiality obligations regardless of any other formalities) to sign non-disclosure agreements.

Marking materials as 'privileged and confidential' and informing witnesses of the legal purpose of the investigation are also recommended steps to ensure privilege protection. Marking a document as such may help identify it accordingly and avoid an inadvertent production if it is in fact privileged or work-product material. Only attorney–client communication and attorney-work product should be marked as confidential. Communications – even between an attorney and client – that do not convey or contribute to the provision of legal advice are unlikely to be deemed privileged.

26 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

Privilege covers all information disclosed to an attorney or that the attorney is provided in his or her capacity as legal counsel. Any communications between attorneys and their clients during an internal investigation are also deemed confidential. Attorneys cannot disclose any non-public information received from their clients or otherwise obtained in the context of the attorney–client relationship, regardless of the nature of such information or the manner in which it is disclosed or obtained. Under the Brazilian Attorney Ethics Code, information provided by a client to its attorney in the course of its representation is confidential in nature and, generally, can only be disclosed to third parties if authorised by the client. It makes no difference whether the client is a company or an individual.

27 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

Yes, attorney–client privilege applies to both in-house and external lawyers. In Brazil there is no legal distinction between inside and outside counsel. Inside lawyers have the same legal professional privilege as those in private practice, provided they have been granted the necessary powers to represent the company. As long as the communication involves legal issues and the counsel (inside and outside) is licensed or registered at the competent Brazilian Bar Association, the privilege extends to communications between employees (clients) and counsel.

28 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

There are cases where the waiver of privilege may benefit a company. Within the negotiations of a leniency agreement, for example, it may be necessary to disclose information that is otherwise privileged to secure the benefit. Attorneys may break privilege if they find themselves endangered and with great fear for their life or honour, or when challenged by their client, and they must disclose privileged information to defend the claim.

29 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

A company can request that information delivered to Brazilian courts be treated confidentially; however, the presiding judge has discretion over such a request. In addition, Brazil is a signatory to a number of international treaties providing for the exchange of information between public authorities.

30 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

See question 29.

31 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

See question 29.

32 Can privilege be claimed over the assistance given by third parties to lawyers?

The Brazilian Attorney Ethics Code does not clearly afford this protection to third parties; therefore it is not clear whether attorney–client privilege would cover information prepared by or in possession of third parties.

Witness interviews

33 Does your country permit the interviewing of witnesses as part of an internal investigation?

Yes.

34 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

Assuming all information provided by a client in the course of its representation is confidential and reported to an attorney, witness interviews or attorney reports about it should be covered by privilege. Brazil, however, does not require two-party consent for the recording of private conversations (including witness interviews by the participants of the interview). Therefore, caution is advised in interviews to avoid its content going public.

35 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

Brazilian labour laws and companies' ethical rules must be complied with. In addition, as cross-border investigations usually have some connection with the United States, it is advisable to follow the same rules and procedures applicable to US investigations (e.g., *Upjohn* warning, request that the interview is not recorded and ask the employee to keep the discussions confidential). These requirements are in line with Brazilian law.

36 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

As an internal investigation is not a legal proceeding, employees are not required to have an attorney with them (although they may choose to have one present) and can refrain from answering any questions. There are no specific laws or procedures in Brazil providing guidance on how to conduct employee interviews. As a result, interviews in Brazil usually follow internationally accepted investigation standards, and investigators may produce documents to the witnesses. Interview notes are usually taken by the investigation team and their disclosure to the interviewee should be avoided. In addition, given that Brazilian employment

courts tend to be pro-employee, it is very important that companies ensure that employees suffer no embarrassment or moral harassment during interviews.

Reporting to the authorities

37 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

Generally speaking, private citizens and corporations are not required to report misconduct, but there are some exceptions. For example, public officials may be required to report certain crimes, and individuals and companies involved in financial services must report financial crimes to the Council for Financial Activities Control (COAF), according to the Brazilian Money Laundering Act (Law No. 9,613/98). Upon being given notice by the management of wrongdoing, a board of directors may consider, in addition to commencing an internal investigation, when it will be appropriate to contact law enforcement authorities in view of fiduciary duties imposed by corporate law. It is recommended that any private individual or company reports to the public authorities if they uncover evidence of wrongdoing.

38 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

Companies are advised to self-report when it is in the company's best interests (for example, to enter into a leniency agreement or as part of its defence strategy as a victim of the crime rather than the perpetrator). If a Brazilian company also has legal obligations to report under foreign laws, say because it has American depositary shares listed on the New York Stock Exchange or has a subsidiary in the United Kingdom, then it should consider self-reporting to the public authorities of foreign countries as well.

39 What are the practical steps you need to take to self-report to law enforcement in your country?

The practical steps vary according to the authority with jurisdiction over the misconduct. Companies should retain specialised counsel prior to self-reporting to ensure they get the best deal possible.

Responding to the authorities

40 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

Companies usually contact specialised legal counsel as soon as they receive a subpoena; attorneys should be the ones responsible for all contacts and negotiations with the authorities. While it is theoretically possible to have a dialogue with the authorities, in practice this will depend on the factual circumstances, and the strategy set out by the team running the

investigation. It is not uncommon for authorities to avoid or deny informal contact with suspects or their attorneys.

41 Are ongoing authority investigations subject to challenge before the courts?

If investigations violate any rights of whoever or whatever is being investigated, it is possible to seek judicial relief.

42 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

While there is no legal provision, it is possible to negotiate the simultaneous delivery of information or to get local authorities to agree that information will be shared equally. Practical steps would depend on the case but it is best to treat all public authorities similarly.

43 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

Yes, provided the company has control over the information requested by the authority. For example, in cases where a company has a subsidiary overseas and the authority is seeking information related to the subsidiary, then the company must produce that information. One must, of course, check local laws regarding data access and cross-border data transfer.

44 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

Brazilian authorities do share information with other law enforcement agencies around the world (see question 8). For example, Brazil is a signatory of a number of international co-operation agreements for the exchange of information, including an intergovernmental agreement with the United States to improve tax compliance and implement the Foreign Account Tax Compliance Act, and a member of Interpol. Brazil also recently allowed foreign authorities to set up offices in the country – the FBI has set up an office in Rio de Janeiro, and works alongside Brazilian authorities in cross-border investigations.

45 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

Brazilian authorities routinely share information with each other. Information gathered during the investigative phase (*inquérito*) should be kept confidential by the authorities; however, authorities may use this information to commence a legal proceeding and, if the proceeding is not deemed confidential, this information shall be available to the public. It is also possible for companies to ask for confidential treatment of certain information (e.g., trade secrets). In the case of plea bargains and leniency agreements, for example, where confidential

information is usually disclosed to the authorities, interested parties can request that this information be kept classified.

46 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

While it would depend on the actual case, companies should retain specialised counsel to address their concerns to the requesting authority.

47 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?

While Brazil does have laws covering the protection of personal information such as banking and tax data, companies must comply with legal notices or subpoenas regardless of such statutes. Attorney–client privileged information can be kept confidential by challenging subpoenas in court.

48 Are there any data protection issues that cause particular concern in internal investigations in your country?

Brazil falls below the standards of the United States and certain European countries in this regard. Brazil does not have a general data privacy law. General principles and provisions on data protection and privacy are included in the Federal Constitution, the Brazilian Civil Code and laws and regulations that address certain industries (e.g., financial institutions, health and telecommunications) and the treatment and access to documents and information handled by the public sector. As part of a bigger effort towards regulating civil rights on the internet (which included the enactment of the Brazilian Civil Rights Framework for the Internet), a draft Data Protection Bill No. 5,276/2016 was submitted to the National Congress on 13 May 2016 and is currently under discussion. Brazilians tend to exchange all sorts of information via insecure mobile applications and also tend to store information in weak environments (e.g., networks with Wi-Fi capabilities and weak or no password protection). In addition, most exchanges of information are carried out with personal devices, and therefore cannot be accessed by internal investigators unless authorised by the user. All of these pose a series of concerns and limitations that should be addressed by the internal investigators from the onset. Finally, it is important that companies have employment contracts clearly stating that all devices provided by the company belong to the company even if individuals use them for personal purposes.

49 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

Public authorities appreciate voluntary production of material. Confidentiality will depend on whether a criminal proceeding is confidential or not.

Global settlements

50 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

Companies should conduct any negotiations or settlements through their attorneys to secure the best possible outcome.

51 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

Under the Clean Companies Act, companies are subject to strict liability and may face fines of up to 20 per cent of their gross revenue for the preceding year, disgorgement of assets, rights or profits, suspension of interdiction of its activities, dissolution of the company and prohibition from receiving public incentives and funds from public institutions, as well as from participating in public tenders. Controlling, controlled or affiliated companies are jointly liable for fines and full reparation of damages. Individuals may face fines and imprisonment of up to 12 years.

52 What do the authorities in your country take into account when fixing penalties?

Courts take into account a series of factors when fixing criminal penalties, including the level of guilt of the parties involved, criminal priors, social conduct, personality, motives, circumstances and consequences of the crime. Courts will also look into a company's compliance programme to assess how effective it is and if it complies with local regulation.

53 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

There are various Brazilian statutes that provide for the entering of leniency agreements with the authorities. While the particular requirements may vary depending on the authority, companies usually must cease the illegal conduct and assist with the investigation, including by presenting clear evidence of the wrongdoing that will allow the authorities to prosecute the actual offenders.

54 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

Under the Clean Companies Act and Law No. 8.666/1993 on public tender and administrative contracts, companies that are found guilty of conducting certain crimes (including corruption and crimes related to public tenders) may face suspension from participating in public tenders or of entering into public contracts, as well as from continuing business for a certain period and, in more extreme cases, companies may be required to be dissolved.

55 Are 'global' settlements common in your country? What are the practical considerations?

The Clean Companies Act was enacted in early 2014, and it provides no clear guidance on the possibility of, or requirements for, global settlements. However, Embraer, a Brazilian aircraft manufacturer, entered into a landmark settlement with Brazilian and US authorities in late 2016. According to a US Department of Justice release of 24 October 2016, Embraer entered into a three-year deferred prosecution agreement (DPA) to resolve the case. In accordance with the DPA, among other measures, Embraer will retain an independent corporate compliance monitor for three years, to report to both the US and Brazilian public authorities, which is the first time a dual monitorship has been applied to a Brazilian company. Additionally, Embraer agreed to pay a criminal penalty of $107,285,090, since the company admitted its involvement in a conspiracy to violate the FCPA's anti-bribery and books and records provisions and to its wilful failure to implement an adequate system of internal accounting controls. The Odebrecht group, Brazil's largest construction company, has also entered into a global settlement with the DOJ, SEC, CVM and the public prosecutors in Brazil, and the Swiss authorities over bribery allegations in connection with the Car Wash investigation in which they agreed to pay a US$3.9 billion penalty. As Brazil has global companies and there is an increased trend towards global co-operation between international public authorities, it is expected that more global settlements will take place. It is important to consider which jurisdictions are involved in an internal investigation so that all agencies and countries come to the table to discuss any settlement early in the process.

56 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

It is possible for private parties to seek compensation for damages incurred because of illegal actions. However, the possibility of private parties gaining access to authorities' files would depend on whether the criminal proceeding is confidential or not.

Publicity and reputational issues

57 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

The investigatory stage should be kept confidential by the authorities; however, authorities may use information gathered during this stage to commence the criminal case. Most criminal cases are public in Brazil, unless the presiding judge rules it to be classified (for example, should minors be involved). With respect to information from the investigatory stage, once it is included in the court records it can be accessed by anyone (unless the records are sealed).

58 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

Larger companies usually rely on public relations firms to handle external communications and publicly traded companies have dedicated investor relations departments that deal with

these matters. Given the massive media attention on corruption cases in Brazil, we recommend companies to obtain investor relations (in the case of a listed company) and public relations advice to help manage the corporate crisis.

59 How is publicity managed when there are ongoing, related proceedings?

Companies should be aware of the downfalls of disclosing and of not disclosing information related to ongoing investigations. Attorneys should always be involved when defining a course of action to avoid an increased liability to the company or any individuals.

Duty to the market

60 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

This will largely depend on the actual circumstances of the case, including whether the company has shares that are publicly traded and whether the settlement will have a material impact on the company's business or financials.

42

China

Kyle Wombolt and Anita Phillips[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

China has a unique enforcement environment and corporate investigations take many forms. The local domestic market is dominated by state-owned enterprises (SOEs), and President Xi Jinping's anti-corruption campaign has targeted SOEs, with large-scale investigations in the energy, infrastructure, telecoms, finance, insurance, metallurgy and automotive industries. However, these have generally resulted in prosecutions and disciplinary actions against senior management personnel, not the SOEs themselves. Of these, China Mobile Group has probably been the subject of the highest-profile investigations. In recent years, 27 members of its senior management have been investigated and prosecuted, with three further senior managers put under formal investigation in April and May 2017 for corruption. This coincides with an uptick in enforcement activity within the telecoms sector as a whole.

In relation to multinational corporations (MNCs), the recent conviction of Crown Resorts employees, for soliciting Chinese citizens to gamble overseas, has achieved a significant profile outside China. However, the highest-profile corporate investigation in recent years is that of British pharmaceutical giant GSK in 2014. The trial resulted in GSK itself, as well as senior executives of its China branch, being found guilty of bribery. GSK was fined US$492 million by a Chinese court by way of penalty.

According to data collected by Stanford University's Foreign Corrupt Practices Act Clearinghouse, activity in China has been the focus of more US corporate enforcement actions than conduct in any other country since the enactment of the Foreign Corrupt

1 Kyle Wombolt is a partner and Anita Phillips is a professional support consultant at Herbert Smith Freehills.

Practices Act in 1977. And in the last three to four years, US-driven investigations into MNCs' operations in China have led to an increased number of concurrent or follow-on investigations by China's criminal law enforcement authorities and regulators.

2 Outline the legal framework for corporate liability in your country.

Corporate entities can be held criminally liable. Corporates may be found criminally liable for giving bribes to state personnel (and persons closely associated with state personnel), non-state personnel, foreign officials, and state entities and enterprises. Under the Anti-Unfair Competition Law (AUCL), 'business operators', which includes corporates, can be found liable for civil bribery offences if they give, solicit or accept bribes concerning individuals or entities for the purposes of selling or purchasing goods or for-profit services.

Corporate criminal liability generally attaches where the relevant misconduct is an exercise of 'corporate will' (i.e., the decision to engage in misconduct was a group decision or was made by the relevant personnel in charge). For example, in the high-profile GSK prosecution, GSK was found guilty on the basis that its management encouraged bribery of doctors, hospitals and other institutions for the benefit of the corporate entity.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

The main bodies are the Central Commission for Discipline Inspection (CCDI), the Supreme People's Procuratorate and people's procuratorates (People's Procuratorates) and the Ministry of Public Security and public security bureaus (PSBs). While not technically a law enforcement body, the CCDI is the disciplinary arm of the Communist Party of China (CPC). By virtue of its control over SOEs, the CPC is an omnipresent participant in the enforcement arena, and the CCDI is therefore the most significant anti-corruption enforcement body in China. The People's Procuratorates and PSBs are organs of state and constitute the prosecution service and the police and investigative arms respectively.

The CCDI often carries out investigations of suspected bribery by SOEs and state personnel before referring cases to PSBs and People's Procuratorates for potential criminal investigation or prosecution. PSBs investigate, via the economic crime investigation units set up within PSBs, criminal bribery offences, fraud, other financial crimes, and crimes related to food and drug safety. People's Procuratorates, as prosecuting bodies, enjoy their own investigatory powers but are primarily responsible for prosecutions.

Distinct from law enforcement, other bodies exercise investigative, disciplinary and regulatory powers over corporates. For example, the State Administration for Industry and Commerce (SAIC) investigates potential violations of the AUCL and sanctions civil bribery. It is not unusual for multiple agencies to be involved in a single matter.

The Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security have issued guidelines that prescribe minimum monetary thresholds for commencing investigations for certain financial crimes, including minimum thresholds for investigation of corporations. The authorities have published no other policies specifically relating to the prosecution of corporations.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

The Criminal Procedure Law contains a general provision that investigative authorities should 'promptly examine the materials provided by a reporter, complainant or informant, or any voluntary confessions by any suspect'. After initial examination and preliminary investigation, if they consider there are facts indicating criminal liability, they should initiate a formal criminal investigation. The Criminal Procedure Law contains no other insight on the threshold of suspicion required to trigger a formal investigation. In practice, the authorities have considerable leeway in initiating investigations, both procedurally and substantively.

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

Chinese law does not expressly recognise the concept of double jeopardy or a similar concept, even for domestic criminal proceedings. In fact, under article 242 of the Criminal Procedure Law, even if a case has been closed, it can be retried where there is new evidence suggesting that the facts relied on in the original judgment or sentencing were incorrect. In practice, it is not uncommon for a defendant to become a suspect again in respect of the same allegations after a court has delivered a not-guilty verdict.

China is unlikely to recognise the double jeopardy concept in international criminal enforcement actions. The government tends to consider criminal enforcement actions a matter of sovereignty, and is unlikely to defer to other governments' enforcement authorities when it believes that crimes have been committed within its jurisdiction. Nor are we aware of informal negotiation and co-operation to afford corporate defendants relief in the face of enforcement actions in multiple jurisdictions.

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

Generally speaking, the Criminal Law of the People's Republic of China of 1979 (as amended) (the Criminal Law) applies where either the act or the consequence of the crime occurs within China. Further, individuals located in China, regardless of nationality, are subject to the Criminal Law, and Chinese nationals who commit crimes outside China are subject to the Criminal Law provided the punishment is more than three years' imprisonment.

The Criminal Law applies to companies organised under Chinese law, including joint ventures, representative offices of non-Chinese enterprises and wholly foreign-owned enterprises.

The bribery of foreign public officials by individuals and entities was criminalised in 2011 through an amendment to the Criminal Law. This has not been prosecuted in practice.

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

In practice, cross-border investigations involving conduct in China are typically triggered by the US authorities (the DOJ or SEC). The principal challenge is how to deal with Chinese laws on issues such as data privacy, state secrets and the absence of privilege, while seeking to co-operate with US enforcement authorities. The movement of evidence from China is particularly problematic. The divergence in both procedural and substantive law in these areas means that what the US authorities expect from a corporate investigation, and what the corporate can do and provide within the purview of Chinese law, are often at odds. This in turn leads to tension between complying with Chinese law and demonstrating co-operation.

While challenges are most often encountered in the context of US cross-border investigations, similar tensions may be encountered in relation to other jurisdictions who may be investigating corporate conduct in China.

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

Decisions of foreign authorities may be influential for a number of reasons. They may draw the attention of the Chinese authorities to the matter. They may also serve to make the issue 'newsworthy' and therefore exert political pressure on the Chinese authorities to escalate the matter themselves.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

Chinese law does not expressly identify corporate culture as a factor in assessing a company's criminal liability. However, for certain criminal offences, corporate culture would be relevant in considering whether there is 'corporate will' in the misconduct, which is necessary to establish corporate liability. In addition, corporate culture could be one of the few discretionary factors that Chinese courts may take into account on sentencing.

In practice, any enforcement authority in China will take corporate culture into account when assessing whether to criminally charge an entity. A company that encourages compliance but is undermined by a couple of rogue employees is far less likely to be criminally charged than a company that has actively or passively permitted more systemic breaches.

10 What are the top priorities for your country's law enforcement authorities?

Recent criminal cases against corporations highlight tax evasion, corruption, fraud and product safety as the key areas of focus.

11 How are internal investigations viewed by local enforcement bodies in your country?

Internal corporate investigations, particularly SOE audits, are common in China. They are seen as normal from business and cultural perspectives.

What is quite unusual in China is self-reporting to local enforcement bodies on the back of an internal investigation. Usually, internal investigations identify remedial steps that are actioned by the company and this concludes the matter. The notion of self-reporting does not generally arise unless it is in the context of foreign enforcement bodies, and parallel reporting to Chinese law enforcement may then be considered. See questions 38 and 39.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

Whistleblower reports (either internally to a compliance officer or colleague, or externally to a regulatory or enforcement agency) often trigger allegations of corporate misconduct. Internal audits may also identify misconduct. To a lesser extent, complaints by competitors, which may be channelled through media reports, can also cause allegations of misconduct to surface. Inspections (annual, *ad hoc* or unscheduled) by external bodies such as SAIC or regulatory authorities may also flag issues.

13 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Search warrants and dawn raids are a common feature of law enforcement in China. Pursuant to the Criminal Procedure Law, a search warrant released by a chief prosecutor of a People's Procuratorate or the head of a PSB is normally required before conducting a search in criminal investigations. However, in emergency situations, including where the person under investigation may conceal, destroy or transfer evidence of a crime, a search may be conducted without a search warrant. The Criminal Law authorises investigators from People's Procuratorates and PSBs to conduct wide searches and to seize property and documents found during a search to prove a crime. Other authorities (e.g., SAIC and antitrust law enforcement authorities) may also conduct searches within the scope of their competence and functions.

Chinese law imposes few limitations on authorities executing search warrants other than the requirement that the search should be witnessed and recorded. Corporations subject to investigation may challenge before the courts the authorities' decisions or action during a search (e.g., restriction of personal freedom, sealing up, seizing or freezing of property).

14 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

Privilege in the common law sense is not recognised under Chinese law. Authorities therefore have wide powers to seize documents and, in practice, may demand documents that would be protected from disclosure in other jurisdictions. There is no right to resist the disclosure of legal advice or other categories of evidence.

While lawyers in China owe their clients duties of confidentiality, this does not assist if documents are sought directly from a corporation as opposed to its lawyer. Moreover, this duty may be overridden in the context of investigations. The authorities have a general power

to collect or obtain evidence from relevant entities and individuals concerned with a case pursuant to a search warrant or court order.

15 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

There is no right to privilege over documents (see question 14). Article 50 of the Criminal Procedure Law explicitly prohibits a suspect from being compelled to give evidence to prove his or her own guilt. This protection was introduced in 2012. It is ambiguous (article 50 only limits the measures interrogators can take to force interviewees to talk; they still have an obligation under the Criminal Procedure Law to answer truthfully all relevant questions put to them). Owing to its imprecise scope and an apparent continued enforcement of the previous law, which afforded no such protection, this right is likely to be of limited use in practice.

16 What legal protections are in place for whistleblowers in your country?

Under the Provisions of the People's Procuratorates on Reporting of Crimes 2009 (strengthened in 2014), whistleblowers who report crimes to the enforcement authorities are entitled to protection, anonymity and a right of appeal in the face of refusals to investigate. There is also a reward mechanism for whistleblowers who report crimes to People's Procuratorates, and various other financial reward schemes are scattered in sector-specific regulations. The Criminal Procedure Law also contains several measures that protect the personal safety of witnesses giving evidence in legal proceedings and their families, including keeping personal information of witnesses confidential, and adopting protective measures so that the witnesses' appearance or voices are not made public.

An employee who is dismissed for blowing the whistle would need to commence an action for wrongful dismissal against the employer, claiming either reinstatement or compensation. Retaliation by employers against whistleblowers in certain circumstances may be offences under the Criminal Law and Chinese labour laws. In such cases the employee should report the matter to the People's Procuratorate and labour authority as applicable.

17 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

Chinese labour laws are generally employee-friendly. In the course of an internal investigation, an employee must continue to be paid in accordance with his or her contract (salary and position are key terms that may only be altered with mutual consent of the employer and the employee). If an employee is subject to a criminal investigation by a prosecutor of a People's Procuratorate, the employer may 'suspend' the employment contract. If the employee is not convicted of a crime, he or she may ask for state compensation for lost salary, and may request reinstatement. If the employee is convicted and sentenced for a crime, the employer may unilaterally terminate the employment on the sentence date.

During an internal investigation, an employee may submit a dispute to the Labour Dispute Arbitration Commission for resolution. If the employee does not accept the arbitral award, the employee may generally institute court proceedings.

Officers and directors enjoy the same rights as employees. However, the employer may sue officers and directors in a civil action for breach of fiduciary duty separate from an employment claim. The employer, however, cannot be compensated twice for the same damage.

18 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

Generally speaking, as long as an employee continues to be paid his or her basic salary, the company can suspend the employee pending an investigation. As regards dismissal for refusing to participate in an internal investigation, an employer cannot terminate at will. It must have permissible legal grounds, such as a 'serious' violation of company policy by the employee, or where his or her misconduct has caused 'material' damage to the company. Generally, if an employee refuses to participate in an internal investigation, this is not of itself a sufficient ground for summary dismissal. In practice, terminations are generally agreed privately on the basis of a payment to the employee. Liability for wrongful dismissal is twice the statutory severance.

Commencing an internal investigation

19 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

This will likely depend on the nature of the company. If it is a Chinese company, while investigations are not unusual, management is unlikely to conduct its investigation in such a structured fashion. Being a domestic company, management and the company's lawyers are also likely to be less concerned about issues such as protecting privilege or procedures for transferring data and state secrets overseas. Such matters are likely to be of far less relevance. If, on the other hand, the company is an MNC, the China branch or its lawyers will generally prepare a document setting out the scope of the investigation, which is likely to include such issues. The scope of any investigation plan will depend on the type and complexity of the issues being investigated, the level of detail needed to brief members of the board or management about the investigation, and the preferences of the company and professionals running the investigation. Generally, it will address who comprises the investigation team, its external lawyers ot third-party experts (if any) and the objectives and scope of the investigation. The latter would cover who needs to be interviewed, and the document types and date ranges to be searched (addressing privilege and dealing with state secrets and data transfers as appropriate).

20 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

China's culture is largely a collective, hierarchical one, and so it is likely that those within the company will internally report up, but reporting externally is a different matter.

As part of the company's internal investigation, any duty to report the matter to law enforcement authorities or regulators (in the case of a regulated entity, see below) should be kept under review.

There is a general duty on individuals and entities under the Criminal Procedure Law to report suspected crimes to the PSB, People's Procuratorate or the court. However, there is no specific penalty for a failure to do so. Therefore, the provision lacks 'teeth' and the obligation does not tend to be observed in practice.

If the company is a regulated entity, for example a financial institution, trading house, insurer or food and drug company, notification requirements will very likely apply. If it is a domestic, non-regulated entity, it is unlikely that the company will report the issue externally.

In respect of MNCs operating in China, there may be more structured processes in place for reporting internally, as well as an awareness and culture of reporting externally. This may also be influenced by the approach of the lawyers representing the entity.

21 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

Privately owned companies and unlisted SOEs are generally not required to make public the existence of an internal investigation or contact from law enforcement.

Under applicable securities laws, issuers and listed companies (including relevant SOEs) must observe their respective information disclosure obligations pursuant to applicable laws. Major investigations and litigation are generally required to be disclosed in annual and interim reports of listed companies. In addition, listed companies must generally immediately disclose any major event that may cause great impact on the trading price of its securities.

22 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

This will depend on the nature of the company and the circumstances. If it is a privately owned company, management should inform the board in a timely fashion, before any external intervention (e.g., from the local authorities or the press). This will hinge on the severity of the issue. If the company is regulated, listed or an SOE, it is likely that the board should be informed quickly in light of possible reporting requirements and interventions from regulators or state organs.

23 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

Under article 52 of the Criminal Procedure Law, an investigating authority may request evidence from relevant entities or individuals. In practice, evidence collection might be

accomplished by broad document seizure authorised under a seizure permit. However, it is also possible for an enforcement authority to issue notices for the provision of certain documents or data (especially when the person receiving the notice is not the direct target of the criminal investigation).

There are no strict rules regarding the preservation of documents or electronic data, or the issuing of litigation holds. However, intentional destruction or tampering with evidence is prohibited. Given that a domestic enforcement action could easily attract the attention of enforcement authorities in other countries, it is preferable that a proper litigation hold notification is issued and implemented.

The government is unlikely to allow the entity being investigated to propose its own custodians or search terms. Instead, it might ask the defendant to 'freeze' all electronic data on the system, and it will conduct its own review of the data collected.

24 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

Assuming that the investigating authority is properly authorised to issue the notice, it is unlikely that a person will have a valid ground to challenge the notice given that the concept of privilege is not recognised under Chinese law. Challenges to procedural issues may be raised, but such issues can usually be resolved through government actions (e.g., issuance of an amended notice with proper authorisation). In addition, even if a person refuses to produce documents, the investigating authority has broad power to search and seize evidence during an investigation.

Attorney–client privilege

25 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

No. However, if the conduct in question is, or is likely to be, investigated in a common law jurisdiction, the company and its lawyers should conduct themselves in such a way as to maximise privilege.

26 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

No concept of attorney–client privilege exists in China. A lawyer owes a duty of confidentiality to his or her client, but this is not akin to legal privilege in the common law sense. In any event, this duty of confidentiality does not apply to communications aimed at or involving criminal acts causing harm to state security, public security or persons and property. This is widely interpreted, rendering the scope of confidentiality protection limited in practice.

27 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

No concept of attorney–client privilege exists in China.

28 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required (e.g., to obtain co-operation credit)?

No concept of attorney–client privilege exists in China.

29 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

No concept of attorney–client privilege exists in China.

30 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

No concept of attorney–client privilege exists in China.

31 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

No concept of attorney–client privilege exists in China.

32 Can privilege be claimed over the assistance given by third parties to lawyers?

No concept of attorney–client privilege exists in China.

Witness interviews

33 Does your country permit the interviewing of witnesses as part of an internal investigation?

Yes, this is common in practice.

34 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

No concept of attorney–client privilege exists in China.

35 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

In China, there are no strict rules relating to the conduct of interviews (e.g., the requirement to give an *Upjohn* warning). However, the interviewer could be criticised for not explaining the situation and being transparent (e.g., if the investigation is likely to involve contentious

labour law issues). Therefore, from a practical perspective, it is advisable to give something similar to an *Upjohn* warning.

36 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

Interviews will usually be conducted at the company's offices, with in-house counsel and external lawyers present. The interview usually involves a chronology covering employment history, the alleged events, and the employee's recollections of the events. Assuming they are available, documents will be shown to the employee.

Generally speaking, the question of the employee's legal representation will turn on whether the investigation relates to an MNC or a domestic company. An MNC is likely to allow employees to have their own representation, from cultural and risk perspectives (potential exposure in another jurisdiction would militate in favour of allowing separate legal representation for the employee).

Reporting to the authorities

37 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

Yes, see question 20. Under the Criminal Law, crimes should be reported, but this is not really observed in practice. Reporting of misconduct to regulators and to law enforcement authorities, as appropriate, will be mandatory in most regulated sectors in China.

38 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

Self-reporting in China is often regarded as a confession; indeed the terms are regularly used interchangeably in a way they are not in the West. The assessment of whether to self-report is generally driven by the risk that a third party may disclose the matter to the authorities. The Confucian ideology underpinning Chinese society means that the risk of an individual disclosing the matter to Chinese law enforcement authorities is lower than in the West. In practice, and where the matter raises potential liability overseas, a report is usually made to law enforcement in that jurisdiction before it is done in China (e.g., for the purposes of leniency or co-operation credit). Disclosure to foreign law enforcement generally raises the concern that the matter will become public. This in turn may prompt disclosure by the company to the Chinese authorities. Self-reporting is viewed by the Chinese authorities as highly unusual.

39 What are the practical steps you need to take to self-report to law enforcement in your country?

Self-reporting can be challenging in practice. Finding the right person to report to and documenting the report (e.g., for mitigation purposes) is not straightforward. Law enforcement officials may approach the concept of self-reporting with some doubt (see question 38), and

may in turn be reluctant to sign documents or officiate the process. Moreover, it is very unusual in China to involve external lawyers when dealing with regulatory or criminal authorities before charges are laid, partly for reasons of face.

Responding to the authorities

40 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

It is possible to enter into a dialogue with the investigating authority to clarify the scope of evidence sought, or even to further limit the evidence. Such dialogue can be conducted through formal or informal channels, with or without lawyers. However, the investigating authority may choose not to accommodate any such request.

41 Are ongoing authority investigations subject to challenge before the courts?

A person or company subject to investigation may bring administrative proceedings against an authority's decision or actions. Pending litigation, the authority's action (e.g., seizing or freezing property) is not usually suspended. In exceptional cases, where non-suspension would result in irretrievable damage or if the relevant administrative authority deems it necessary to suspend the action, the court may, upon request, order suspension of the alleged action. The newly amended Administrative Procedure Law lowered the threshold for bringing an administrative proceeding. However, from a practical perspective, the courts may lack sufficient muscle to deliver judgments without interference from government departments.

Aside from recourse before the courts, an individual may file a petition or complaint to PSBs and People's Procuratorates against unlawful exercise of certain powers in an investigation. These do not tend to be rigorously reviewed.

42 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

The Chinese authorities are unlikely to limit the scope of their review in consideration of foreign laws. Indeed, since China does not recognise the concept of privilege, the potential scope of disclosure to the Chinese authorities is far broader than under a notice issued by the authorities of common law countries. The company should seek to comply with each notice, ring-fencing and curtailing disclosure pursuant to applicable laws by asserting legal rights. Issues may arise in China in relation to the transfer of personal data, state secrets and trade secrets overseas. Any appraisal of notices received from another country should ensure that such data and documents are only transferred out of China in accordance with the limited exceptions provided under Chinese law.

43 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

In practice, when a search is conducted and the information sought is located overseas, Chinese authorities have not generally expected companies to search outside mainland China and its Hong Kong and Macao special administrative regions (SARs). The authors are aware of a limited number of circumstances when material on servers in Singapore has been sought and provided, but this is rare.

Technically, while investigating authorities may seek to impose such a requirement, they may not generally directly search and seize data overseas. Treaties on mutual legal assistance in criminal matters have been signed by China with around 40 jurisdictions but these are of limited practical assistance in requiring a company to produce documents located overseas. In practice, the investigating authority might use other means (e.g., an administrative penalty) to seek to force a company to comply if the data located overseas is regarded as highly important.

44 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

The scope of assistance under the bilateral legal assistance agreements includes mutual assistance in taking evidence, executing search and seizure warrants, and producing documents. In this regard, People's Procuratorates and PSBs do conduct enquiries into corruption-related matters in response to requests from overseas law enforcement organisations and judicial authorities and *vice versa*. Most bilateral agreements on legal assistance contain provisions for tracing, restraining, confiscating, sharing or repatriating the proceeds of crime.

Currently, China's authorities co-operate with SAR enforcement authorities (Hong Kong's Independent Commission Against Corruption, Macao Public Prosecution Office) in tackling cross-border corruption mainly through a Mutual Case Assistance Scheme and practice between the enforcement authorities on the mainland and in the Hong Kong and Macao SARs.

45 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

People's Procuratorates or PSB investigators must keep the following information confidential: the identity of the person who makes the complaint; the identity of any suspects; the identity of any witnesses; and any state secrets, trade secrets and matters of personal privacy or personal information. These provisions are intended to contain dissemination of information to third parties.

An investigation should be kept confidential. By disclosing matters about an investigation to a third party, a person may fall foul of article 50 of the Law on Penalties for Administration of Public Security. This article punishes those who obstruct a functionary of a state organ (which includes the various investigating bodies) from performing their duties.

46 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

It is not typical for Chinese law enforcement authorities to request documents located overseas from a Chinese company (see question 43). If they do, and to comply would violate the laws of the other country, this should be explained. The Chinese authorities will generally respect this. Though this should not be necessary, the company could seek a legal opinion setting out how disclosure would violate such laws.

47 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?

Historically, there have been no uniform rules about cross-border transfers of personal data. Instead, requirements have been arranged in a patchwork of legislation and industry-specific regulations (e.g., in the banking, healthcare and securities sectors). The Cybersecurity Law, which came into force in June 2017, attempts to harmonise rules. The data protection provisions cover any data that is generated, collected or processed in China by network operators, which includes both domestic Chinese companies and MNCs. In principle, personal data and important data collected and generated by the operators of critical information infrastructure must be stored within Chinese territory and can only be transferred subject to a security assessment. The government is drafting and implementing comprehensive measures in relation to the Cybersecurity Law, including the scope of security assessments. The latest draft measures provide a grace period of 18 months for companies to comply with the new rules. Since the Cybersecurity Law has significant implications for Chinese companies and MNCs operating in China, the new rules should be kept under review, while businesses should remain cognisant of laws and industry-specific rules that will continue to operate in parallel.

A related point, in the context of foreign notices or subpoenas, concerns state secrets. State secrets are defined very broadly. Therefore the content of documents may be classified as a state secret under Chinese national security legislation. Given this broad definition, there is a risk that an investigation of Chinese documents may implicate state secret issues. This will impact the ability to transfer such documents overseas in response to a notice or subpoena.

48 Are there any data protection issues that cause particular concern in internal investigations in your country?

Investigations should always be conducted in compliance with applicable data privacy legislation. See question 47.

49 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

Disclosure to the Chinese authorities is generally compelled in an investigation. While a producing party can assert that confidentiality attaches to the investigation conducted by the

Chinese authority, whether that assertion will create an effective shield from disclosure will depend on the relevant Chinese and foreign laws. For example, documents containing state secrets should not be disclosed to a third party pursuant to Chinese law.

Confidentiality requirements in China are very general and are unlikely to prevent the sharing of documents provided that disclosure is within the purview of Chinese law. Once documents have been shared with law enforcement authorities, a company cannot guarantee that they will not be shared with third parties. It is important for the company to assert its legal rights pursuant to the laws of the relevant jurisdictions so as to limit contagion issues.

Global settlements

50 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

No settlement scheme exists under Chinese law.

51 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

A corporate entity found guilty of misconduct will generally be sanctioned by a fine and confiscation of assets. The personnel in charge of the company and other personnel responsible for the crime may also face criminal liability (imprisonment, fines and confiscation of assets).

As regards bribery offences, the April 2016 Judicial Interpretation to the Criminal Law introduced a new imprisonment regime linked to the severity of the offence. For those in the private sector, sentences generally range from one to 10 years' imprisonment. Corporates committing bribery offence are liable on conviction to fines ranging from 100,000 yuan to twice the amount of the bribe. For civil bribery offences under the AUCL, a corporate entity and its officers and employees may face administrative fines and the confiscation of illegal gains.

52 What do the authorities in your country take into account when fixing penalties?

Under the Criminal Law, the Chinese courts should take into account factors including the nature of the crime, circumstances related to the criminal conduct and the damage caused to society. Circumstances relating to the criminal conduct include aggregating or mitigating factors, such as whether it is a first or repeat offence, self-reporting, etc. Additionally, the courts may also exercise discretion in considering other circumstances such as motive, the surrounding circumstances and whether there was any confession.

Regarding criminal bribery offences, both the ninth amendment to the Criminal Law (November 2015) and the April 2016 Judicial Interpretation provide clarification on the impact of self-reporting and co-operation. Generally, where the crimes are relatively minor or where the offender has 'played a key role in investigating or solving a major case', self-reporting may mitigate or even exempt the offender from liability. Otherwise, offenders who self-report should be entitled to lenient treatment, but cannot expect to be exempted from liability.

53 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

No such settlement scheme exists in China.

54 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

There is no nationwide government contractor management system. Government procurement is conducted by local government under the general guidelines set out in the Government Procurement Law. Serious illegal conduct in the past three years should disqualify an entity from participating in government procurement under article 22 of the Government Procurement Law. However, there is no national registry of 'qualified' government contractors.

55 Are 'global' settlements common in your country? What are the practical considerations?

We are not aware of any concluded global settlement that involved China.

56 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

Technically, yes. Practically speaking, given the domestic litigation environment, this is rarely encountered. Nor would the documents and files of the authorities be made available for a civil action. Procedurally, there are no class actions, derivative actions or analogous procedures to deal with broader issues of corporate fraud.

Publicity and reputational issues

57 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

At the investigatory stage, a confidentiality requirement is imposed through a general provision in the Criminal Procedure Law. Through disclosing confidential matters about an investigation, a person may fall foul of article 50 of the Law on Penalties for Administration of Public Security. See questions 15 and 45.

Once a case is before a court, the trial should technically be conducted with full public access unless state secrets, trade secrets or issues attracting privacy rights are implicated. Judges often take a very conservative approach, and access to the court by journalists and the general public is limited in practice. Although there is no general restriction on publicising a case during the trial process, this is rare in practice and parties to litigation are generally not advised to make public statements during trials.

Chinese media outlets are, for the most part, state-controlled. As such, investigations and trials involving SOEs or broader public industry issues, are not fully reported in China

(in contrast to overseas or Hong Kong media). On the other hand, the major private sector criminal investigation into GSK was reported in both China and overseas.

58 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

The way in which corporate communications are managed will depend on the nature of the company (e.g., is it an SOE, a privately owned Chinese company, or an MNC with operations in China?). For the most part, it would be unusual for a public relations firm to be retained. However, this has occasionally been seen in high-profile matters involving MNCs or large multi-jurisdictional investigations involving the US authorities.

59 How is publicity managed when there are ongoing, related proceedings?

Related proceedings may be in the public domain and therefore could attract more publicity. Generally, statements to the press about ongoing litigation should be limited, and contagion issues should be managed carefully throughout. Leaks to the press are not advisable; the parties should focus on the issues within the public court arena.

Duty to the market

60 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

There is generally no such mandatory disclosure requirement under corporate laws. Disclosure obligation to shareholders is governed by the relevant securities laws, and securities laws do not have a black-letter rule on this issue.

43

France

Stéphane de Navacelle, Sandrine dos Santos and Julie Zorrilla[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

After an investigation into allegations of tax fraud, the first major guilty plea bargain in France was agreed to by the National Financial Prosecutor's office (PNF), investigating magistrates and a Swiss bank, which agreed to pay €2.8 million and admit guilt to end the investigation. In the previous month, two executives from the bank were found by the specialised financial investigating magistrates to have not committed an offence, which suggests there will be an increasing use of the plea bargain as a 'procedural tool' in major financial matters. In a separate matter involving negotiations over a substantially larger amount, the defendant, investigating magistrate and prosecutor failed to reach an agreement and the defendant was remanded to court for trial. Following a complaint by French fiscal authorities, the PNF initiated investigations into Google Ltd and McDonald's separately on grounds that they were abusing EU regulations and concealing actual French income to avoid paying taxes in France. Charges include tax fraud and money laundering as part of a conspiracy. In addition to several million euros in fines, companies face potential back payment of taxes of over €1.6 billon for Google Ltd and several million euros for McDonald's. In an unprecedented show of force, the PNF raided the offices of the companies within the same week in operations involving over 50 expert officers from the financial police squad. Following requests for co-operation from foreign authorities in several investigations of French corporations, the French authorities either opened their own investigations or provided co-operation after a clear review of the request on the merits. These cases reflect both prosecutorial discretion and

1 Stéphane de Navacelle is a partner and Sandrine dos Santos and Julie Zorrilla are associates of Navacelle.

resources allocated to addressing tax-related violations by both international corporations and wealthy individuals.

The specialised financial investigating magistrates at the Paris Tribunal have also shown their ability to work with other authorities in France (the Financial Market Authority (AMF), the banking regulator (ACPR) and the Consumer Competition and Fraud branch of the Finance ministry (DGCCRF)) and abroad (with raids, interviews and requests for co-operation from foreign authorities) in a case concerning the deregulation of financial markets in the EU and web-based service providers. The investigation purports to identify tens of thousands of French victims and to take down an industry now considered illegal. Charges include illegal financial solicitation, fraud, money laundering and conspiracy to carry out all the above.

The PNF currently has over 15 prosecutors and is handling over 20 matters involving international corruption.

2 Outline the legal framework for corporate liability in your country.

Corporations can be held liable on both civil and criminal grounds. Corporate criminal liability is subject to 'offences committed on [companies'] account by their organs or representatives', namely for actions committed by persons who exercise direction, administration, management or control functions, or by persons who act on behalf of an identified delegation of power that meets specific criteria. Thus, corporate liability does not exclude individual liability.

On several occasions since 2006, the Criminal Division of the French Supreme Court has found corporations liable without identifying an organ or representative, relying instead on facts that reflect an endorsement by company management. The underlying facts of each case tend to show that this trend is one based on a *contra legem* fairness standard, which could open a Pandora's Box for corporate liability.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

Enforcement authorities include judicial, independent administrative and administrative authorities. Mostly, jurisdiction between the authorities is subject-matter-based with numerous opportunities for co-operation – and competition – between authorities.

Each superior court has jurisdiction over offences committed within its territory or based on the headquarters' location. Specialised interregional courts have jurisdiction over economic and financial matters of some importance or complexity and whose scope involves several jurisdictions. Some particular fields fall within the scope of specialised sections of the prosecution authorities in Paris; for example, terrorism, war crimes and human rights, health and safety, and the environment. The PNF, mentioned above, was created in 2013 to deal with major complex financial, economic and tax prosecutions.

Alongside judicial authorities, the main independent administrative authorities with jurisdiction over corporations are the AMF (mainly with regard to market abuse, investor protection generally and functioning of the financial markets), the Competition Authority (sector inquiries, antitrust activities, merger control, publication of opinions and recommendations),

the ACPR (regulates, investigates wrongdoing, issues warnings and sanctions French banks) and the Tax Authority within the Finance Ministry. Each administrative authority has its own enforcement policies.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

There is no real minimal standard for a prosecutor to request inquiries to be carried out; prosecutorial discretion is considerable. If the matter is particularly complex, prosecutors may turn it over to an independent investigating magistrate to carry out a comprehensive investigation into the facts and give an opinion as to guilt. Investigating magistrates can also be required to investigate pursuant to a specific complaint filed by alleged victims including, under specific conditions, NGOs.

Procedures can arise from authorities' detection of suspicious activities within their material jurisdiction, if mandated by a foreign authority upon a report from a whistleblower or an alert turned over by TRACFIN, the anti-money laundering branch of the finance ministry. Several categories of professionals – including banks – have an obligation to report suspicious activities to TRACFIN.

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

Within the European Union, judicial co-operation has led jurisdictions to apply the *ne bis in idem* principle to defendants already prosecuted in another Member State. French criminal law upholds the double jeopardy defence except in cases of territorial jurisdiction, namely when there is a sufficient nexus to French territory.

The principle of double jeopardy is also enshrined in article 14.7 of the International Covenant on Civil and Political Rights of 19 December 1966, and article 50 of the Charter of Fundamental Rights of the European Union.

On 26 February 2016, in a decision regarding the Oil-for-Food Programme, the Paris Appeal Court refused to apply the double jeopardy provision of the Code of Criminal Procedure to a US DPA. Conversely, the Court gave a cross-border application to article 14.7 of the Covenant, on the grounds that a separate provision of the Code of Criminal Procedure did not distinguish between national and foreign jurisdiction in enforcing double jeopardy. This apparent contradiction is to be reviewed by the Supreme Court.

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

The extraterritorial effect of French criminal law may be based on the nationality of the perpetrator or of the victim. It is applicable to any felony (*crime*) committed by a French national outside French territory. It is also applicable to a misdemeanour (*délit*) committed by French nationals outside French territory if the conduct is punishable under the legislation of the

country in which it was committed (double criminality). French criminal law also applies to any felony, as well as to any misdemeanour punishable by imprisonment, committed by a French or foreign national outside French territory where the victim is a French national.

The extraterritorial reach of French criminal law will also extend to certain limited circumstances, including when fundamental interests of the nation, diplomatic or consular premises are targeted.

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

To a large extent, pressure to increase enforcement on international financial and corruption issues comes from the United States, and co-operation with the United States usually works well in those matters, although there have recently been growing signs of tension. Co-operation with other EU countries is generally smooth.

The main concern arises from the blocking statute that kicks in when a foreign authority is involved. The purpose of the statute is to prohibit compelled communication of virtually any information of commercial value without some involvement of French authorities. It carries both a fine and a prison term for violations. Appropriate contact with French authorities should be made to mitigate risks.

EU-wide data protection and privacy rules are enforced by the data protection authority (CNIL) and the right of privacy of individual employees and the management of personal information should be properly addressed. Although burdensome, both can be dealt with effectively by addressing the privacy issue as a firm policy and complying with data protection rules by obtaining appropriate authorisations from the CNIL or working with enforcement authorities.

Although this is a rapidly changing area, most legal practitioners lack a proper understanding of the purpose of internal investigations (and compliance programmes) and improperly address the usual issues relating to investigations, including the right to representation and attorney–client privilege (which does not apply to in-house counsel). Also, the judiciary is suspicious of private investigations.

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

See question 5. In a nutshell, foreign court decisions are usually given full weight by French jurisdictions.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

White-collar crime enforcement authorities – except for some individuals within senior enforcement bodies such as the PNF and the Paris Financial Prosecutor's office – tend to dismiss internal efforts to avoid violations of criminal law. This is likely to change rapidly, notably with the enactment and implementation of the Sapin II law (National Assembly, TA No. 830 of 8 November 2016), which imposes an obligation on medium-sized and large corporations to implement compliance programmes and provides for liability of executives

who knew about the misconduct, or with the implementation of the duty of care of parent and contracting companies law (National Assembly, TA No. 399 of 27 March 2017), which imposes an obligation on companies to implement monitoring measures.

10 What are the top priorities for your country's law enforcement authorities?

The two main priorities of enforcement authorities are tax evasion – for individuals and corporations – and corruption. Since its inception in 2013, the PNF has aggressively moved to fight tax evasion, including in instances when the tax authorities themselves have decided not to impose sanctions, by relying on money-laundering offences.

The PNF currently has over 100 open corruption cases, over 20 of which involve international corruption. The 2016 Sapin II law created a new anti-corruption agency (the French Anti-Corruption Agency) – headed by a senior former investigating magistrate – and includes provisions on requirements for companies to have anti-corruption compliance programmes and a French DPA equivalent: the judicial public interest agreement.

11 How are internal investigations viewed by local enforcement bodies in your country?

Although far from being embedded in the legal culture, internal investigations are generally accepted by specialised financial investigating magistrates as a necessary evil. Extra caution should nonetheless be taken if a judicial investigation is likely as speaking to potential witnesses could be regarded as subornation and obstruction of justice – a crime in itself.

In a legal culture where negotiating a deal with a prosecutor or an investigating magistrate is uncommon, and as in-house counsel has no legal privilege, attorney–client privilege should be a main concern in internal investigations.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

Whistleblowers are an increasingly common source of disclosure of misconduct within corporations. The Sapin II law of 2016 provides a specific framework to protect whistleblowers and provide them with financial support.

As some specific professions – including financial institutions – are required to report to TRACFIN any suspicious activity, anti-money laundering reports have generated several high-profile cases.

The Sapin II compliance requirement will likely create a new compliance culture. The transitional phase will likely reap its share of new matters.

Extensive freedom of the press and protection from disclosure of journalists' sources have led mostly web-based media to reveal facts resulting in prosecution of key political figures in recent years.

NGOs that have existed for a sufficiently long period can initiate criminal procedures that are within the scope of their by-laws. Several landmark corruption investigations have been initiatied by NGOs in recent years.

13 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Dawn raids are a keystone of enforcement and evidence gathering in an overwhelming majority of cases by judicial and administrative authorities. During the raid itself, there is little that a corporation (or individual) can do if the raid is within legal hours and the scope of the request set by the investigating magistrate. Outside counsel should, however, be contacted immediately.

Corporations should ensure they identify everything that is being seized, request to be able to make copies and specifically identify material that is attorney–client privileged or otherwise protected by law. If privileged materials are taken, they should be put under seal. Also, any incident should be reported on the minutes of the dawn raid and the minutes should not be signed if there is a disagreement as to content. Subsequently, if the legal requirements of a dawn raid have been violated, nullity of procedural steps can be obtained.

14 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

Legal privilege attaches to any advice provided by outside counsel. There is no in-house counsel privilege. Attorney–client communications cannot be seized. Very often, privileged materials will be seized along with other material and a specific request must subsequently be filed to have the materials returned to the corporation.

15 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

An individual and (at least in theory) a company can refuse to answer based on the right against self-incrimination. An individual or company can refuse to answer a question on the basis that the information is privileged. A witness (against whom no charges can be made) can be compelled to testify.

16 What legal protections are in place for whistleblowers in your country?

The first legal protection for whistleblowers dates back to 2007 and has developed since to target specific areas, including corruption and risks to public health or the environment. The 2016 Sapin II law provides for a general whistleblower protection but submits the whistleblower to a three-tier process, which is challenging to meet in the absence of a robust compliance system.

17 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

Data protection and privacy laws apply to all employees regardless of allegations of wrongdoing. Prior to gathering or reviewing employee materials, counsel should check company policy with respect to the use of company computers (and other storage materials) and, unless already specified that the use of company computers is strictly for professional purposes, obtain individual employee consent. In any event, folders marked 'personal' should be treated as such.

Officers and directors of companies who are subject to board decisions have to be fired using similar procedures. In some positions subject to authorisation by a regulatory authority, removal of the authorisation can lead to termination.

18 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

If the misconduct is confirmed, an employer has a large set of tools to sanction the employee, including releasing the employee from his or her duties until completion of the investigation. An employee can be sanctioned if refusing to participate in the internal investigation is considered by the labour courts as a sufficiently severe fault.

Commencing an internal investigation

19 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

It should be considered good practice to prepare a document setting out the investigatory scope, especially when judicial review seems likely.

20 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

There is no obligation to report back to authorities nor is there a leniency programme. The company should assess the scope of the facts and the likelihood of a leak as soon as possible without creating unnecessary internal awareness.

21 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

Other than obligations attached to publicly traded companies, there are no obligations as to when a company must disclose the existence of an internal investigation or contact from law enforcement.

22 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

Board briefing by management is highly dependent on the materiality of the investigations, the overall operations of the company and on the seniority of the individuals involved.

23 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

It is very likely that the enforcement authority would collect documents or data directly by raiding the company, having gathered sufficient information from third parties to ensure they are able to collect relevant information. If a company has any reason to believe a raid is likely, it should immediately anticipate by making sure copies of relevant documents can be made in a way that privilege attaches and consider providing separate representation to key employees.

Administrative authorities, for example the AMF, ACPR, Competition Authority and Ministry of Economy, can request communication of data and documents from corporations under review or directly from third parties.

24 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

It is unlikely that an enforcement authority would use a notice or subpoena to maintain or collect documents or data. There is little ground for challenging such a request if it is within the scope of the authority's prerogatives. The company may argue against communicating data and documents that are covered by attorney–client privilege or medical secrecy.

Attorney–client privilege

25 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

There is no attorney–client privilege for communications with in-house counsel in France. For privilege to attach, the internal investigation should be carried out by outside counsel, namely French lawyers admitted to the Bar. Interviewed employees are bound by contractual obligation to confidentiality, which cannot successfully put forward to refrain from answering an investigating magistrate or police investigator's questions. The Paris Bar released an opinion restating that professional secrecy does apply between the lawyer and his or her client, but does not apply to the relationship between the lawyer and the employees of his or her client when the lawyer interviews them.

Professional secrecy applies to conversations between lawyers whether or not there is a common interest between their clients. Providing separate counsel to individuals may be a good way to facilitate communications safely.

26 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

The principle of the attorney–client privilege was set down in article 66-5 of the Law of 31 December 1971, modified by the Law of 7 April 1997 and by article 226-13 of the French Criminal Code.

These provisions expressly set out that an attorney may not disclose information that contravenes professional secrecy. Article 226-13 of the French Criminal Code states that disclosure of secret information by a person entrusted with such a secret, either because of his or her position or profession, or because of a temporary function or mission, faces one year's imprisonment and a €15,000 fine.

The holder of the privilege is the attorney's client, either an individual or a company.

27 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

No privilege attaches to communications with in-house counsel.

28 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

Waiver of the attorney–client privilege is not specifically considered as a co-operative step in France. At this stage, there is little to no reliance by enforcement authorities on internal investigations.

29 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

This concept does not exist in France.

30 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

Privilege can be maintained in France after a limited disclosure abroad. Co-operation between enforcement authorities would likely make the privilege moot.

31 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

Common interest privileges do not exist *per se* in French law. However, it is possible, for the purpose of defending a client, to share some privileged information with other attorneys – whether the clients share a common interest or not – and retained experts, namely forensic accountants.

32 Can privilege be claimed over the assistance given by third parties to lawyers?

The scope of professional secrecy is very large and lawyers are expected to rely on experts. That being said, it is usually safer to have the information collected and processed within the law firm's offices.

Witness interviews

33 Does your country permit the interviewing of witnesses as part of an internal investigation?

There are no clear rules when it comes to internal investigations and interviews with individuals who are not employees of the company should be regarded with great caution. If the underlying facts amount to an offence under French law, such an interview would likely be considered obstruction of justice. The proper alternative is to rely on outside counsel.

34 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

There are competing doctrinal opinions as to whether or not internal interviews are covered by attorney–client privilege. Attorney reports are covered by attorney–client privilege as long as the attorney is providing legal advice.

35 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

Interviews of third parties should be ruled out unless specific precautionary steps are taken. The Paris Bar council recently issued recommendations according to which attorneys should explain the purpose of the interview and its non-coercive nature to employees and inform them that their exchanges are not covered by professional secrecy (equivalent of *Upjohn* warnings). Employees should also be informed that they can be assisted by an attorney, but only when it appears that they may be blamed for their actions at the end of the investigation.

36 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

Assuming outside counsel carries out the interview, they should explain both whom the attorney–client relationship is with and how the privilege rule works. In-house counsel is usually present at the interview. Independent counsel should be provided to interviewees if there is any sense they might be involved in any wrongdoing. Documents are usually provided ahead of time when counsel for the employee is involved, through counsel for the company to avoid *de facto* waiver of privilege.

Reporting to the authorities

37 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

Except for specific crimes that are inchoate and can be avoided, only civil servants have a general obligation to report crimes they become aware of in the context of their employment. There is no requirement to self-report.

38 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

Except for antitrust issues, only in very limited circumstances does a corporation have an interest in reporting wrongdoing to enforcement authorities. It should first determine the scope of the wrongdoing and the responsibilities of those involved to assess potential corporate criminal liability. If the wrongdoing is carried out by a current or former employee, it should weigh the pros and cons of filing a criminal complaint against the perpetrators to deter others, show commitment to compliance and shield itself from prosecution by acquiring the status of victim.

Self-reporting outside France should be based on a decision tailored to that country's laws and enforcement policies. Should the corporation decide to self-report in a foreign jurisdiction, reporting the facts to French authorities should also be considered. Arguments to weigh up include potential interest of French authorities in the underlying matter, where the facts occurred, whether they are still ongoing and how closely national and foreign authorities work together.

In its over 300 ongoing matters, the PNF is working closely on trying to address cases at the preliminary inquiry phase of criminal investigations before an investigating magistrate is appointed, namely, the instruction phase, which limits the leeway for plea bargaining and considerably extends the length of procedures.

39 What are the practical steps you need to take to self-report to law enforcement in your country?

There is no specific procedure to self-report and no legal requirement to do so. Informal contacts should be made, through outside counsel, with the competent authority, at the appropriate hierarchical level, after a thorough cost/benefit analysis. This will probably change over time with the implementation of the Sapin II law.

Responding to the authorities

40 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

There is no common practice by enforcement authorities of providing advance notice to corporations that may become defendants in criminal procedures. Contact should be made with

the police investigator, prosecutor or investigating magistrate depending on the status of the investigation. Challenges can be made against requests beyond the scope of the instruction from the judicial authority.

41 Are ongoing authority investigations subject to challenge before the courts?

Yes. Ongoing authority investigations are subject to challenge before the courts.

42 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

The company should answer all the authorities involved separately as the questions that can be raised by different authorities could vary, and it should be borne in mind that authorities communicate with one another. When dealing with foreign authorities, blocking statute, privacy and data protection issues should also be addressed.

43 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

The collection of material abroad will have to be carried out in compliance with the applicable foreign law. However, national authorities will only be concerned about the actual answer to the production request.

44 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

There is extensive co-operation with foreign enforcement authorities both in the EU and abroad, through MLATs, agreements between regulators and enforcement authorities and EU co-operation agreements.

45 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

Except where the law provides otherwise and subject to the defendant's rights, the inquiry and investigation proceedings are secret. Any person contributing to the investigation is bound by professional secrecy, and the disclosure of secret information is punishable with one year's imprisonment and a €15,000 fine. In practice, information is often leaked by people who are under no legal obligation and leaks to the press in sensitive matters occur very frequently.

46 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

The company should retain outside counsel to explain to the requesting French authority the other country's law and work with the French and foreign authorities for the production to be carried out appropriately, likely pursuant to co-operation agreements.

47 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?

France has both blocking and data protection and privacy statutes. As discussed above, neither would have an impact on domestic enforcement but both should be properly addressed when responding to a foreign authority.

48 Are there any data protection issues that cause particular concern in internal investigations in your country?

The use of personal information must not impinge on individuals' right to privacy. Databases containing any kind of personal information must be established in accordance with European and French rules (most notably the EU's Data Protection Directive, transposed in French law as the Loi informatique et libertés) under the supervision of the French Data Protection Authority (CNIL). Companies operating in France must generally submit a plan to the CNIL for the maintenance of databases and transfer of information from French databases outside France must also meet specialised procedures and practices. Personal data can only be transferred to countries outside the EU and the EEA when an adequate level of protection is guaranteed in the foreign country.

49 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

Voluntary production is limited to very specific circumstances, mostly when foreign authorities are involved, or when, in an ongoing investigation, there is a strategic interest to do so. Criminal files are accessible to all parties involved, including victims and other defendants. Although legally covered by secrecy rules for legal professionals, parties themselves are free to share information – not documents – from the file with third parties. Information from high-profile cases is regularly leaked to the press.

Global settlements

50 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

There is an extremely limited track record of guilty pleas in France and none for NPAs or DPAs. The Sapin II law provides for DPAs limited to instances of corruption and 'probity offences'. Companies should move swiftly to settle if possible as both procedures provide

for, and will likely include, strong involvement of alleged victims who will pursue their own interests. If the case may involve foreign jurisdictions, companies should assess the consequences of admitting guilt in France.

51 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

Corporate liability does not shield individuals from liability. In an overwhelming majority of cases (as required by law) the courts have to identify the individual or organ acting on behalf of the company. The individuals involved are therefore likely to have committed the offence themselves.

Penalties for individuals include fines, imprisonment, payment of civil compensation to victims within the same criminal procedure and prohibition from specific managerial positions in addition to publication of the decision in the press. Except for imprisonment, penalties for companies include all the above, as well as dissolution and debarment for certain specific offences.

52 What do the authorities in your country take into account when fixing penalties?

Although laws provide for very high penalties, including those based on a percentage of overall revenues for companies, penalties will be based on net worth, income, personality and *mens rea*. Although not recognised as such by law, deterrence appears to be a growing component of the decision as to penalties.

53 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

NPAs and DPAs are not part of the legal culture. However, the recently enacted Sapin II law provides for a DPA procedure limited to corruption and 'probity offences', known as a judicial public interest agreement.

54 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

If a criminal conviction has been pronounced in the previous five years for a limited number of offences, for example, including corruption, fraud, breach of trust and breach of professional secrecy, a judge can also hand out a debarment from government contracts sanction. Access to public contracts can also be imposed on candidates who are not up to date with their social security or tax obligations.

Based on criteria discussed above, the company should determine the likeliness of involvement of French authorities when determining whether to settle in another country, particularly the territorial competence of French courts for double jeopardy reasons.

55 Are 'global' settlements common in your country? What are the practical considerations?

Multiple authorities often investigate the same facts at the same time. There is no particular procedure for global settlements as relationships vary from co-operation to competition and sometimes lead to a race to a decision. A prior sanction or decision on the same facts will be taken into account by the other authorities involved.

56 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

Parallel private actions are possible. In most instances, alleged victims will join the criminal procedure as civil parties and will, as such, be granted full access to the file and be able to submit requests for investigative steps to investigating magistrates. Also, alleged victims can start a criminal investigation by filing a specific complaint to that effect.

Private parties do not normally have access to administrative authorities' investigation files.

Publicity and reputational issues

57 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

Secrecy at the investigatory stage is required by law but applies neither to defendants, victims nor the press. In effect, especially if victims are involved in the procedure, it is very difficult to keep communication and information taken from the criminal file private.

58 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

It is very common to have press releases, communications and crisis management strategies prepared, and, when appropriate, public relations firms assisting. The spokesperson is often a lawyer on the case, especially when individuals are involved.

59 How is publicity managed when there are ongoing, related proceedings?

Publicity is part of the overall strategy, especially in high-profile matters that attract political attention and that have numerous civil parties.

Duty to the market

60 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

Unless otherwise specifically requested by an agreement, there is no obligation to disclose settlements to the public. In anti-corruption matters, the Sapin II law makes disclosure compulsory. Any settlement in criminal matters will have to be approved by a judge in a public hearing. Administrative authorities communicate on sanctions and settlements on their websites.

44

Germany

Sebastian Lach, Nadine Lubojanski and Martha Zuppa[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

European regulators have been and still are investigating various automobile manufacturers around alleged irregularities with NOx emissions of diesel engines.

In this regard, we observe in particular the following aspects:

- increased focus on regulatory topics;
- rise of individual liability;
- interest of German authorities in cross-border investigations;
- more aggressive investigative measures by German criminal authorities, such as search of law firm offices; and
- more stringent prosecution in case of non-cooperative behaviour of corporations during criminal proceedings against individuals.

2 Outline the legal framework for corporate liability in your country.

There is no corporate criminal liability under German law. However, the same result is often achieved through the Law on Administrative Offences. On the grounds of a breach of supervisory duties the management board can be held liable under this law for administrative or criminal offences committed by an employee. The company can then face a maximum fine of €10 million and additional disgorgement.

1 Sebastian Lach is a partner and Nadine Lubojanski and Martha Zuppa are associates at Hogan Lovells International LLP.

For years, there has been a discussion about implementing a corporate criminal law in Germany. However, draft bills have not yet been implemented.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

Several law enforcement authorities regulate corporations in Germany, including the public prosecutor's office, administrative authorities and regulatory offices. Jurisdiction is allocated by territory and there are specialty departments.

We are not aware of any binding policies governing the prosecution of corporations. There are guidelines for criminal and administrative fines proceedings (RiStBV). These constitute supplementary administrative provisions that shall ensure a consistent approach by German prosecutors' offices. However, the guidelines do not have any binding external legal effect and are mainly addressed to the public prosecutor's office. Among others, the guidelines govern authorities' co-operation and information obligations in particular cases, such as administrative cartel offences.

In addition, public prosecutors' offices may issue or communicate internal instructions defining an aligned strategy in this regard. However, these internal guidelines are not published and generally have no binding external effect.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

As soon as the public investigator obtains knowledge of sufficient factual indications for a criminal offence (initial suspicion), he or she must initiate investigations. For some exhaustively listed offences, an investigation may only be initiated if a demand for prosecution has been made.

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

In general, double jeopardy is prohibited under German law, although this depends on the countries involved. However, this prohibition does not apply *per se* to administrative sanctions – and therefore not to corporations. A corporation that faced administrative or criminal sanctions in another country can in addition be fined by German authorities based on the same set of facts. However, German authorities in general take into account whether a corporation has already incurred sanctions from a foreign authority, in which case the fine or disgorgement in most cases will be reduced as part of an overall assessment.

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

In general, German criminal law shall only apply to acts committed on German territory. However, there are several exceptions to this principle. The Criminal Code regulates the so-called principle of active and passive personal jurisdiction. German criminal law applies to offences committed abroad against a German (principle of passive personal jurisdiction) and to offences committed abroad by a German (principle of active personal jurisdiction). In addition to this general principle, particular offences have an extraterritorial effect. The sections governing bribery, for example also apply to acts in competition abroad and to acts with the involvement of foreign public officials. Recently, the term 'European public official' was also implemented in the Criminal Code, thereby expanding particular criminal offences in their scope.

Beyond that, extraterritoriality, in its narrow sense, is governed by the International Criminal Code, containing crimes such as crimes against humanity and war crimes.

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

The principal challenges stem from data privacy and labour laws.

Data privacy laws not only apply to transfer of data abroad, but also to any processing of data. This includes securing, collecting and reviewing data, and the creation of work-product such as interview file notes and final reports. An early assessment of the local data privacy laws and the documentation of the steps taken is therefore crucial.

Labour laws pose challenges during and after an investigation. During the investigation, they may require the involvement of a works council. After an investigation, German labour laws are very strict when it comes to sanctions.

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

Investigations of foreign authorities generally do not obstruct investigations of German authorities. German authorities must assess relevant cases independently, if necessary, with the assistance of a foreign authority. However, factually the scope of an investigation may be reduced, as authorities increasingly take the approach of co-operating with foreign authorities and aligning investigative measures. This in particular applies between authorities of EU countries.

As regards the effect of decisions of foreign authorities on decisions of German authorities, see question 5.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

Corporate culture is relevant from a legal perspective. Liability of management for lack of supervision can be derived from a poor tone at the top. In addition, corporate culture is considered a crucial tool for the implementation of a compliance system. The implementation of a compliance system– as opposed to the mere existence of a compliance system on paper – is relevant for removal or reduction of liability.

In addition, corporate culture is generally taken into account in the overall assessment when determining fines.

10 What are the top priorities for your country's law enforcement authorities?

Fraud and embezzlement cases are getting more and more important, in particular, investigations around fraud relating to regulatory questions and individual liability of companies' management and board members. Another focus lies on improper use of company assets by management.

11 How are internal investigations viewed by local enforcement bodies in your country?

German authorities increasingly take the approach that internal investigations can supplement their own investigations. Especially in larger cases, an investigation could sometimes not be completed in due time without participation by the companies.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

Allegations mostly come to light through whistleblowers, standard internal reviews and tax audits. Whistleblower reports are mostly directed to the company. However, there are also many cases in which whistleblowers approach authorities, business partners, customers and the press.

13 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Both search warrants and dawn raids are common features of law enforcement.

There are various formal and material requirements stipulated by law. In particular, the search warrant must be issued by a court and in writing. Only in case of imminent danger can it be issued by the prosecutor. In addition, there must be sufficient factual indications that a crime or offence was committed. Most importantly, all measures during a dawn raid must undergo a balancing of interests test.

We observed a significant increase in dawn raids in the context of investigations around alleged regulatory irregularities and corresponding fraud and market manipulation allegations,

in particular in the automotive industry. The Munich prosecutor's office even conducted a search of law firm offices as part of an investigation against a car manufacturer.

14 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

German privilege rules are very narrow.

Communication with and documents created by inside counsel in general are not privileged under German law. The courts have in some cases provided higher privilege protection to documents prepared by inside counsel, holding that documents prepared by inside counsel can be protected if drafted for the purpose of defence by outside counsel. However, before the case law becomes settled law, there is at least a significant risk that documents created by inside counsel are not considered to be privileged.

With regard to documents created by and communication with outside counsel, the following applies: documents in the custody of external counsel are generally protected; documents in the custody of the company are only protected in limited cases.

15 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

Under German law, both witnesses and suspects may be assisted by a lawyer.

Nobody is obliged to give testimony to the police. Only when questioned by the prosecutor or a judge is there an obligation to testify, in which case testimony can be compelled, in particular by imposing fines and imprisonment for up to six weeks. Exceptions from the obligation to testify are stipulated in cases of self-incrimination, or family relations between witness and suspect, or if the witness is a person subject to professional secrecy or an assistant of such a person.

16 What legal protections are in place for whistleblowers in your country?

Despite different initiatives and draft bills, there is no specific law governing whistleblower protection.

However, German labour law allows dismissals and other sanctions only under narrow circumstances. According to case law, if an employee makes a testimony to fulfil legal duties, this cannot be considered reason for an instant dismissal. According to other case law, however, a dismissal with immediate effect may be justified if the employee discloses information to authorities or the public before disclosing internally. Such an internal disclosure may not be needed in particular cases, for example, where the employee would have faced charges if he or she had not reported the misconduct.

17 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

It is broadly accepted that employees must co-operate with their employer under the employment contract as far as the facts relate to activities conducted or perceptions made as part of their work. If unrelated to their work, a balancing of interests test will decide whether or not a duty to co-operate exists. The employee's position in the company (e.g., an auditor versus a production site employee) may also be a relevant factor. In addition, a balancing of interests test needs to be applied if the employee would incriminate himself or herself by the co-operation. However, even then, a duty to co-operate is generally assumed.

Whether employees have a right for counsel to attend has not yet been fully settled in case law.

18 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

Refusing to participate in an internal investigation could be seen as misconduct only if the employee were obliged to participate in the investigation (see question 17). Furthermore, a dismissal for misconduct generally requires an employee to have received a formal warning first and then violating the same or similar contractual obligations again.

Commencing an internal investigation

19 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

We consider it crucial to prepare an investigation plan at the beginning of an investigation. An investigation plan describes the scope, approach, timing and the responsibilities for the individual items. In general, it also indicates the measures that need to be taken to secure data, the soft copy and hard copy that needs to be reviewed and the interviews that need to be conducted. It might also outline the steps relating to the communication and disclosure approach.

20 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

As part of its supervisory duties, management has certain investigation duties. The extent of these duties depends on the individual case. Whether a company has a duty to report should be assessed at the beginning of each investigation.

In most cases there is no obligation to report conduct to the criminal prosecutor. Reporting obligations may arise if an imminent criminal offence could be stopped. This does not apply to the detection of past criminal offences.

Depending on the case there might be reporting obligations to other authorities, in particular regulatory and tax authorities, for example if product safety issues arise or if past tax evasions were detected. The respective authorities might, in turn, inform the criminal prosecutor.

Other potential reporting duties can exist in particular towards the advisory board, shareholders, investors, banks, insurers, customers and the works council.

21 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

In most cases, there is no duty to publicly disclose the mere existence of an internal investigation.

However, companies listed on the stock exchange must sometimes publish specific information publicly, so called *ad hoc* announcements, if there is a certain impact on the company, in particular if it is of substantial relevance to capital markets.

22 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

There is no legally defined point in time when this has to occur. This will depend on the individual case. It is generally done very early.

23 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

In general, this decision depends on the individual circumstances of the case and the nature of the request.

If authorities have issued a binding request, companies should in general co-operate, unless there are indications that the request is not effective or if the right to refuse testimony may apply (see question 15). In such cases the company should decide if a potential refusal shall be communicated via external counsel or the company itself.

In the case of a non-binding request, it has to be decided based on the individual case whether co-operation appears to be advisable. The company may decide to co-operate, in particular for strategic reasons.

24 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

As regards criminal proceedings, the lawfulness and the scope of a search warrant as well as the production of documents or electronically stored information may be challenged before courts. Subpoenas regarding summoning of witnesses, however, are not challengeable themselves. In these cases only the resulting court decision may be challenged.

Attorney–client privilege

25 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

The company should consider involvement of outside counsel. As communication with and documents created by inside counsel are generally not protected (only by very limited case law, see question 14), an investigation is only placed under greater protection if conducted by outside counsel.

Furthermore, privilege protection will more likely be granted if the advice is provided in relation to a (potential) investigation by authorities. To show this, ideally a separate engagement letter should be set up for this investigation.

To further ensure privilege it is advisable to keep work-product on outside counsel's servers instead of sending them to company-owned premises.

Privileged documents should be labelled accordingly to prevent investigators from accidental access. However, the mere placing of the label does not automatically entail privilege.

26 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

The client of the outside counsel and thus the company is the holder of the privilege. There are no significant differences when the client is an individual. However, if the client is only a witness, the privilege claim can most likely not be made.

27 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

Communication with and documents created by inside counsel in most cases are not privileged under German law. There is only individual case law that also provided higher privilege protection to documents prepared by an inside counsel (see question 14). It should be noted, however, that even documents created by outside counsel are not necessarily privileged if in the custody of the company.

28 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

Submitting privileged documents to authorities is in general regarded as a co-operative step that can result in a reduction of the fine by contributing to a positive overall assessment. At the same time, owing to the generally limited privilege protection, the relevance of this question is not as great as in the United States or the United Kingdom. There is also no general concept of waiving privilege under German law. The effect when disclosing documents is, however, factually the same: as privilege depends on who has custody of the document, documents disclosed to non-protected persons may lose privilege.

29 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

The concepts of waiving privilege and of disclosure between civil parties do not exist in Germany. Therefore, submitting documents to an authority does not result in an obligation to submit them to a third party. However, third parties may, under certain circumstances, inspect the authority's files.

30 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

Waiving privilege in another country has no direct legal effect on privilege claims in Germany. However, waiving privilege in one country by submitting documents to third parties can factually result in a loss of privilege (see above).

31 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

The concept of common interest privilege does not exist in Germany.

32 Can privilege be claimed over the assistance given by third parties to lawyers?

Privilege can be claimed over the assistants of lawyers as well – with the limitation that protection is very limited if work-product is in the custody of the company.

Witness interviews

33 Does your country permit the interviewing of witnesses as part of an internal investigation?

Yes. Interviewing witnesses is a common tool for information gathering during an investigation.

34 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

The underlying facts to the content of a conversation cannot be rendered privileged, even if the interview is conducted by outside counsel.

As regards the written description of the conversation, courts have ruled on which minutes taken by outside counsel can be subject to seizure.

Practical approaches to protect the written description of the information provided by interviewees are detailed lawyer file notes (instead of 'protocols' or 'minutes' that might be under disclosure obligations) created by outside counsel who attended the interview. Such notes can be stored on the servers of outside counsel and provided to the client online via an extranet on the servers of the external law firm.

35 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

Interview proceedings should be tailored to the individual requirements of a case.

In any case, steps should be taken to ensure that the statutory timelines for disciplinary measures (e.g., for written warnings or terminations) are not triggered by the interviews. To this end, and for cultural reasons, interviews with employees should not be referred to as 'interrogations' (*Befragungen*) or 'hearings' (*Anhörungen*). By using the term 'interview' (*Gespräch*) or 'meeting' (*Besprechung*) instead, the risk of incorrect interpretation can be reduced.

As to the information about legal rights, there is no general and statutory obligation to instruct employees about the legal circumstances and their rights. Nevertheless, it is advisable to consider the following elements as part of an introductory explanation. Many companies in Germany also consider these explanations to be ethically required:

- a brief description of the background of (internal) investigation and subject matter;
- the role and status of lawyers present, confidentiality obligations (including an *Upjohn* warning if relations to US law exist);
- the labour law duty to co-operate and to answer work-related questions truthfully and completely;
- possible privilege against self-incrimination;
- documentation, storage and use of information and documents provided (e.g., for reports, for disclosure); and
- a data privacy waiver.

36 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

The general set-up will be determined case by case.

Employees have no strict legal right for their counsel or other parties such as a representative of the works council to attend. However, to reduce risks of escalation and to have a fair set-up (equality of arms), companies often allow employee representatives to attend.

Reporting to the authorities

37 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

There is generally no obligation to report conduct to the criminal prosecutor. As regards reporting duties of other authorities, see question 20.

38 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

This will depend greatly on the individual case, weighing duties, risks and benefits.

39 What are the practical steps you need to take to self-report to law enforcement in your country?

This will depend on the case. Usually outside counsel makes contact with the prosecutor to set up a meeting. In the meeting the relevant facts are then described, including the available relevant evidence. If the investigation is ongoing the next steps are then discussed jointly. The prosecutor will often want to hear certain witnesses in person.

Responding to the authorities

40 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

In Germany, it is usual to enter into a dialogue with the authorities. This is often done verbally first. Subsequently, German regulators often request written submissions, including attachments with evidence for their files.

41 Are ongoing authority investigations subject to challenge before the courts?

Under German law, it is only possible to challenge individual measures taken in the process of an investigation, for example, seizure of documents. The investigation itself can in general not be challenged before courts. Although the accused may file a request to the prosecutor to stop proceedings, the subsequent decision of the prosecutor in most cases may not be challenged before the courts. Still, in very exceptional cases of arbitrary decisions by the prosecutor, a complaint may be possible.

42 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

When communicating with different authorities the key is to do so consistently. At the same time, the authority should not be given standard answers that do not entirely fit. This could be perceived as lack of co-operation and result in unexpected enforcement actions. In addition, while being consistent, local specifics – from a legal and cultural point of view – should be considered.

43 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

In general, the company may only be obliged to produce material if the documents were requested by means of a binding request (see question 23). This applies accordingly to material located outside Germany.

However, the obligation may not apply if producing a piece of evidence from a foreign country would violate the law of the country where the material is located. This would be the case particularly if the production of material would violate local blocking statutes.

44 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

As part of several international treaties, German authorities closely co-operate with foreign authorities. For example, there is a network for secure communication to ensure fast and secure exchange of information relating to specific cases. International databases make information accessible for different authorities. Furthermore, there are bilateral agreements with Germany's neighbouring states governing a close co-operation of police. In addition, international co-operation continues to be on the rise.

45 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

Generally, public officials, including prosecutors, are subject to confidentiality obligations regarding official matters they become aware of during or as a result of their official duty. Breaches of the confidentiality obligations may to some extent even be subject to criminal sanctions. However, there are exceptions to this principle as regards providing information to other authorities and private individuals. This includes provisions governing the right of inspection of files in the German Code of Criminal Procedure.

46 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

This will greatly depend on the case and on the legal risks of providing such information on the one hand and the benefits of co-operating on the other. Generally, violating applicable laws is not an option.

47 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?

Germany does not have a blocking statute regime. Its data protection statutes are based on European legislation.

Any communication with authorities can trigger applicability of data protection laws. Often, the request of the authority will be a sufficient justification for the disclosure. In more critical cases, it can be advisable to await a written formal request with the announcement of enforcement from the authority instead of acting on a merely voluntary basis after a verbal request.

48 Are there any data protection issues that cause particular concern in internal investigations in your country?

Companies must observe data protection requirements when conducting internal investigations. The collection and use of personal data from employees during internal investigations requires compliance with national data protection laws. These have strict requirements. The collection, processing and use of personal data have to be, *inter alia*, necessary and legitimate for the purpose of its use. German data protection law further requires a balancing of interests. In addition, the collection, processing and use of personal data can be permitted if the employee has consented. However, the consent is only effective when based on the data subject's free decision. Therefore the employees need to be, *inter alia*, informed of the purpose of collection, processing or use to its full extent.

In addition, personal data may not be transferred freely to any other country. This is a very challenging aspect, in particular in the context of cross-border investigations. Documents including personal data may require, for example, redactions prior to further distribution.

49 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

Voluntary production can generally not be challenged before court. As regards discoverability, the right of third parties to inspection of files is not necessarily easier to obtain if the content of the file is based on voluntary disclosure.

Global settlements

50 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

Various legal and strategic considerations need to be made. The risks and benefits of proceedings must be weighed against those of a settlement. The company should be aware of the scope of the settlement and make sure that it is defined comprehensively. The international implications should also be reviewed.

Prior to agreeing to settlement payments, the companies must follow the internal decision processes – also to avoid any allegations of misuse of company funds.

51 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

Individuals may face sanctions for their own misconduct depending on the individual criminal or administrative offence. These may include imprisonment, fines or official debarment from their profession.

Moreover, under administrative law, directors may face sanctions for misconduct of company employees in case of failure to implement sufficient supervisory measures.

Based on criminal or administrative offences by individuals, companies may face different sanctions, in particular fines, disgorgement and exclusion from subsidies and public contracts.

52 What do the authorities in your country take into account when fixing penalties?

Before a penalty is fixed, authorities consider the circumstances for and against the individual or the company. The aspects taken into account are, in particular: motives, attitude reflected in the offence, degree of violation of duties, consequences of the offence, prior history, financial circumstances, degree of co-operation, and whether or not there is a positive forecast.

53 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

In contrast to criminal proceedings against individuals, there are no non-prosecution or deferred prosecution agreements available under German law.

54 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

Corporations may be suspended from government contracts if they appear to be unreliable. Such unreliability can be the result of different forms of misconduct, for example if they are subject to insolvency proceedings or if taxes have not been paid. An applicant in general has to be suspended from government contracts when the corporation or one of its official representatives has been found guilty of certain criminal offences, including corruption, and has received a fine of a certain amount.

This year, a draft bill was introduced to implement a nationwide competition register. The register shall serve as an information source for authorities to identify violations and to decide upon suspensions of companies, in particular in public tenders. The register shall be implemented in 2018 and be available as an electronic database in 2019.

55 Are 'global' settlements common in your country? What are the practical considerations?

So far there have been no explicit global settlements with the involvement of a German authority. However, there are examples of factual global settlements where the German authority took into account the sanctions imposed on the company by foreign authorities.

56 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

Parallel civil actions are allowed. However, the court may decide to suspend civil proceedings until the criminal proceedings have been terminated. Private plaintiffs may also inspect the criminal files under certain conditions (see question 29).

Publicity and reputational issues

57 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

The investigations are generally not public, with rather restrictive rules on the right to inspect the files by third parties.

Criminal trials, however, generally have to be public. An exception arises if the accused is underage or if certain private interests of the accused deserve protection. In the context of white-collar crime, these exceptions rarely apply.

58 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

To avoid a negative impact on reputation, external communication should follow a well-planned strategy. It should be borne in mind that the relationship with the media is two-sided: on the one hand it can be collaborative, thereby using the media to present the situation of the company in a more positive light; in the case of negative media coverage, on the other hand, it might be necessary to take a more reactive and combative approach, possibly including filing legal actions. Such legal actions must always be weighed against the risk of a further escalation of the situation, as follow-up coverage can cast the company in an unfavourable light.

The appointment of a public relations adviser is common. The public relations adviser should develop a strategy together with the relevant stakeholders and experts as well as legal consultants as early as possible. It is important that all employees know who is responsible for dealing with the media and that no other person shall make public statements.

59 How is publicity managed when there are ongoing, related proceedings?

Public communication in case of ongoing proceeding must undergo a detailed strategic and legal analysis. The strategy should in particular stipulate how the company will act in cases where an accusation against a particular employee has been made.

In cases where a criminal investigation is pending with files opened, the company may in certain cases file a criminal complaint if the media quoted from these files and made them publicly available.

Duty to the market

60 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

A disclosure to the market depends on the nature of the settlement and other factors, such as the relevance of the underlying facts to the capital markets (see question 21).

45

Greece

Ilias G Anagnostopoulos, Jerina Zapanti and Alexandros Tsagkalidis[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

Over recent years, major investigations were conducted in relation to multinational companies that have reportedly been systematically giving money to public officials to secure awards of multimillion-euro government contracts, in respect of advanced communication systems, medical supplies and military expenditure (Siemens, Johnson & Johnson/De Puy, HDW/Ferrostaal, STN). Investigations have also targeted acts of corruption of former government officials in relation to facilitating payments and tax fraud schemes through real estate deals.

2 Outline the legal framework for corporate liability in your country.

Criminal liability is an exception when referring to a legal entity because under Greek law, only an individual may be liable for a criminal act. However, harmonisation with international corporate standards, and the need to bring internal legislation in line with European and international instruments, has led to provisions for liability of entities in the form of administrative measures and fines, etc.

Corporate conduct may be punishable in certain cases. Usually (e.g., in the context of anti-corruption, anti-money laundering and anti-cartel legislation) company conduct is punishable when it is linked with positive gains or advantages. The company is liable as an entity – notwithstanding individual liability of employees – when there is some type of profit, gain or advantage to the company. Severity of punishment in these cases (in the form of

1 Ilias G Anagnostopoulos, Jerina Zapanti and Alexandros Tsagkalidis are members of Anagnostopoulos.

administrative penalties or fines) usually depends on the type of profit or gain, as well as the annual turnover of the company.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

The responsibility for investigation of corporate conduct lies with regulatory and prosecuting authorities (depending on the subject of investigation) but responsibility for criminal prosecution of corporate conduct always lies with the Prosecutor's Office (the Prosecutor). Regulatory authorities may investigate – within their scope – corporate conduct (e.g., the Competition Commission for cartel offences or the Capital Market Commission for insider dealing or market abuse), and any findings related to criminal offences are forwarded to the Prosecutor to decide on further proceedings.

It is most common for the Economic and Financial Crime Unit (SDOE) to undertake necessary preliminary investigations, evidence gathering, reports, etc. following a prosecutorial order. In cases of money laundering, the Greek FIU gathers all necessary information and evidence, and if it believes there is enough to support a criminal case, it forwards the case to the Prosecutor's Office.

The Prosecutor opens a case against the natural person or officers of an entity, following standard criminal procedure, namely conduct of a preliminary investigation, filing of charges and referral to investigation (conducted by an investigating judge). It is not unusual in serious and complex cases (e.g., corruption, large-scale money laundering and fraud) for enforcement agencies and the Prosecutor to take action to secure evidence (by issuing a warrant for search and seizure or issuing freezing orders) before the actual filing of charges and before persons of interest are called for questioning.

Companies are not criminally prosecuted because they are not criminally liable but sanctions are imposed against them in the form of administrative penalties for actions of individuals held liable for criminal acts from which the companies have benefited.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

A preliminary investigation is initiated by the Prosecutor following a *notitia criminis*, namely a criminal complaint (by an individual or entity, usually the victim of a crime) against certain persons, or information submitted to the Prosecutor's Office by another authority or even information that has come to the knowledge of the Prosecutor's Office through the press or any other sources and it is usually the very first stage of the proceedings. It is ordered by a prosecutor, unless an agency or enforcement authority may by law gather evidence and information through a preliminary inquiry and submit a request to the Prosecutor for further investigation. All preliminary investigations – apart from regular tax reviews – are supervised by the Prosecutor.

The standard of proof to open a preliminary investigation is low. Even slim evidence of an alleged criminal offence (e.g., unconfirmed press reports or anonymous information) may justify a preliminary investigation.

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

The rules of double jeopardy or *ne bis in idem* are not directly applicable to entities as they are not the subject of a criminal prosecution. These rules may be indirectly applied (through examination of individual criminal liability) but this is a disputed matter.

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

As a general rule, Greek law does not have extraterritorial effect. Enforcement and sanctions imposed by the Greek authorities are not effective in other jurisdictions unless they meet the requirements of mutual assistance in criminal matters and mutual recognition of judgments through bilateral and multilateral treaties.

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

Cross-border investigations and co-operation with other countries' law enforcement or prosecutorial authorities has become common practice in large-scale investigations. Special law enforcement agencies such as the SDOE have entered into agreements with similar agencies from other countries, which has enabled a more efficient and faster exchange of information. Agreements between agencies usually follow framework agreements or treaties between countries. In the case of Greece, most aspects of international co-operation are treaty-based. There are two sets of rules applicable to this prosecutorial co-operation. One applies to co-operation with Member States of the EU (in these cases all procedures and functions are simplified and faster). In all other cases, provisions for mutual assistance apply (for investigating acts or requests for information).

Greek legislation has undergone a series of amendments to fully comply with international treaties and the obligations arising from Greece's participation in international organisations, etc. The introduction of new legislation and measures not totally compatible with existing procedures and practices has, however, prevented smooth integration of new measures with traditional prosecutorial and investigative practices. Also, efforts to adjust legislation to international instruments as much as possible (especially in combating corruption and money laundering) have led, in many instances, to powers of different law enforcement agencies overlapping, and there is no general rule or central authority to resolve such issues and propose necessary adjustments.

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

Foreign decisions are usually taken into account by Greek courts in relation to the findings regarding the merits of the case, but they do not bar Greek proceedings from advancing. The

Greek state, in practice, applies its law to companies for conduct within the country or for acts that have effects within the country. In this respect Greek authorities seek to impose the law on companies either registered in Greece or active in the Greek economy (e.g., companies with registered offices in other countries that have agencies or subsidiaries in Greece).

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

Because criminal investigations are opened into individuals there is no standard as to how the authorities address corporate practices. They are taken in account, though, as the background against which the alleged misconduct has taken place and also at the stage of imposing sanctions.

10 What are the top priorities for your country's law enforcement authorities?

Detection and prosecution of corruption is one of the main goals of prosecuting and enforcement authorities. Legal provisions in respect of acts of corruption have been amended thrice in the past three years to conform with international instruments. Greece has ratified all major EU and international conventions and has passed internal legislation to comply with them. On the other hand, continuous amendment of existing legislation creates legal uncertainty and poses complex issues in respect to pending investigations or ongoing trial hearings. More generally, it is apparent that an integrated anti-corruption policy is needed, including better coordination of various legal instruments and anti-corruption agencies.

11 How are internal investigations viewed by local enforcement bodies in your country?

Internal investigations are welcomed by the law authorities, when they are conducted in a manner that leads to direct evidence gathering, preservation and referral of evidence to the authorities. However, the absence of a clear legal framework regulating internal investigations poses complex issues in relation to the protection of affected individuals.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

Allegations of corporate misconduct most often come to light through investigations conducted by regulatory agencies such as the Competition Commission, the Capital Market Commission and the Financial Intelligence Unit in respect of breach of regulations within their competence. The authorities regularly receive (officially or unofficially) related information from a number of sources, including whistleblowers. Self-reporting by companies is still rather unusual.

13 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

In the majority of cases the authorities will send a written request to a company to forward certain information or documents. In principle a company must co-operate with the authorities, at least in terms of providing requested information and documentation, etc. Failure to comply with such a request usually has no direct consequences (unless otherwise provided for by law) but may lead to an unfavourable report by the authorities or an on-site search and seizure to obtain requested material.

In all cases the company may object to handing over certain documents or material (e.g., privileged commercial information or correspondence) and refer to the Prosecutor to resolve the issue. In practice, when an on-site search is in progress the company may not refuse to hand over material but may raise its objections as to the nature of the material taken (e.g., privileged information) when signing the confiscation documents, in which case the material is sealed and taken by the agency pending resolution of the issue by the courts.

On some occasions (depending on the scope and nature of investigation) the company may be requested to submit its views in respect of the issues under investigation or to offer evidence in its defence (of any type: witnesses, bank records, correspondence, etc.) contesting the views of the investigating authority (usually included in a draft report).

Dawn raids may take place in emergency situations (to secure evidence, etc.) and home searches are conducted in the presence of a prosecutor or a magistrate.

14 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

According to Article 212 of the Code of Criminal Procedure (CCP), information in the possession of clerics, lawyers, doctors, pharmacists and military diplomatic officials is considered privileged. During a search of the company premises, the company may declare that certain documents are privileged information pursuant to Article 212 of the CCP. If the investigating authority contests this assertion, they confiscate the documents, seal them without acquiring knowledge of their content and request the competent professional association to decide on the confidentiality of seized documents. The general rule is that documents containing privileged information may not be included in the confiscated documents. This restriction is not applicable when the person protected by privilege (lawyer, doctor, cleric, etc.) is under investigation as an accomplice in the criminal act. Personal documents of employees are protected to a certain extent, depending on the specifics of each case.

15 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

All authorities with the power to conduct investigations in their field (e.g., the Prosecutor, the Police, the Financial and Economic Crime Unit, the Capital Market Commission) may request that individuals give statements following an order by the Prosecutor or in accordance

with specific legal provisions. In cases of serious business crimes the Prosecutor usually orders a specific person to give a statement either as a witness or as a suspect (witness under caution) while the actual questioning is most commonly conducted by the Police or the Financial and Economic Crime Unit (which is an agency supervised by the Ministry of Finance and has powers similar to the Police, e.g., conducting investigations, examining witnesses, performing inspections on site).

If the individual is called as a witness, he or she appears before the authority that has received the Prosecutor's order and gives a statement under oath. Persons called as witnesses to provide testimony must appear before the authority, which conducts the investigation, and answer the questions. Witnesses have the right to avoid self-incrimination.

Individuals called as suspects have the right to request copies of the case file and time to prepare for questioning. At this preliminary stage suspects are also entitled to a defence attorney who may be present during questioning, and to file written submissions in their defence.

In all cases where questioning of individuals as suspects is involved, relevant provisions of the Greek Code of Criminal Procedure apply, namely the right to avoid self-incrimination, the right to an attorney, time to prepare one's defence, the right to remain silent, etc. (Articles 100–104, 240 and 241 of the CCP). The structure of pre-trial procedure is such that a suspect may have full representation by a defence attorney and full protection of his or her rights.

16 What legal protections are in place for whistleblowers in your country?

Greece does not have a systematic legislation protecting whistleblowers in either the public or the private sector. Whistleblowers may be considered as witnesses in the public interest, which results in complete protection from criminal prosecution with respect to offences such as disclosure of privileged information or filing a false complaint relating to the information the whistleblower provides to the authorities, according to the newly introduced Article 45B CCP.

17 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

Local employment law does not grant special rights to employees under investigation. Nevertheless, employees must be treated with respect to their personality and the investigation should be conducted in accordance with data protection and labour law. If there are serious signs of misconduct, the employee is usually notified in case he or she wishes to have counsel present; it is for the employee to decide on the presence of counsel.

The same applies for the directors of the company.

18 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

The company's policy in cases of individual liability depends on the type of misconduct (negligent or deliberate), the seriousness of the actions, the position of the individual, etc. It is customary for a company to coordinate with the individual's counsel when the action occurred as a result of his or her position in the company (e.g., administrative proceedings or criminal proceedings against a managing director for an environmental offence).

Termination of an employee's contract is something that the company has to decide after reviewing the whole case and assessing possible consequences for the entity. Where the employee has acted against the company's best interests and the actions are the reason the government seeks to impose liability, the company may have no option but to terminate the contract to protect its interests, privileged information, etc. In the end it is a strategic decision for the company unless the particulars of the case leave no option other than to terminate the employment. This is especially the case when the employee is involved in large-scale and serious violations of duties, has deliberately acted against the company's interests, or engaged in fraudulent activity against the company itself, clients or the public.

The obligation of an employee to participate in an internal investigation depends on the terms of the employment contract and the applicable law. Refusal to participate in internal proceedings could eventually lead to dismissal.

Commencing an internal investigation

19 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

As previously mentioned, no special statutory rules regulate internal investigations. Thus, the way an internal investigation is conducted varies. Usually, the department of a company that will conduct the investigation decides how to proceed.

20 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

There is no general rule or obligation for self-reporting. A series of legislative measures have been passed to enable enforcement agencies to detect misconduct with or without the co-operation of the companies. In this respect accounting officers must report any suspicious activity (related to tax evasion, money laundering, etc.) if there are indications of misconduct.

There are, however, special provisions in numerous laws and regulations that stipulate self-reporting of internal wrongdoing and cover most aspects of business activity. In some fields or industries, provisions for self-reporting are more stringent (e.g., banking and financial services), while in others there is no explicit provision for self-reporting (most commercial activities in the private sector); however, rules for reporting criminal acts to the authorities

(as a general legal obligation) may apply, and this might, to some extent, lead to a kind of 'self-reporting'.

There are specific industries or fields where self-reporting is a prerequisite to obtaining the benefit of leniency measures or for immunity provisions to apply in cases of violations of competition law, exposure of corrupt practices of public officials, organised crime and terrorism.

In any of these procedures the authorities can choose to impose lesser penalties or grant complete immunity. These provisions may apply to corporate entities only, to individuals only, or entities and individuals alike. Considering that in the majority of cases involving serious corporate misconduct the authorities may impose administrative penalties and measures affecting the company's ability to continue and develop its activities, as a rule participation in a leniency programme is considered the better option for a company and implicated individuals.

Where leniency or immunity measures are provided for (e.g., cartel offences, corrupt practices or money laundering), the extent to which they apply depends on the type of information provided to the authorities. As a rule, effective and complete exposure of illegal practices may lead to lesser penalties or immunity from criminal prosecution or administrative sanctions. Immunity would usually be granted when reporting of illegal practices is of such significance that it contributes substantially to the exposure of illegal activity or perpetrators.

21 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

Such general obligation is not provided for by Greek law but in certain fields (e.g., competition regulation) corporations are given motives for self-reporting through provisions for leniency and or immunity programmes. Listed companies must disclose relevant information to the public following the existing regulations.

22 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

It varies depending on each company's by-laws and internal procedures.

23 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

Notify the legal department regarding the nature of the notice or subpoena and consult on how to proceed next. Retrieve requested documents or data. Evaluate the possible implications from a criminal as well as an administrative perspective in relation to the requested document or data. Decide whether and how to comply with the request.

24 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

The prosecutor or the investigating judge who supervises the investigation should be informed regarding the objections raised against a notice or subpoena. Also, in case of a disagreement between the defendant and the prosecutor or the investigating judge regarding

the above-mentioned matters, the validity or lawfulness of a notice or subpoena could be challenged before the Judicial Council, according to the provisions of the CCP.

Attorney–client privilege

25 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

Attorney–client privilege may be asserted at any time. It is not always easy, however, to determine what falls under this protection. Apart from the obvious privileged information (e.g., correspondence between an attorney and his or her client), there are other forms of communication (e.g., memos, drafts of letters or other documented material) that may contain privileged information.

The company is not expected to waive its rights or privileges (especially the attorney–client privilege) as part of its co-operation with the authorities. The company may, however, choose to waive its rights in whole or in part with respect to such privileges if it becomes necessary for the purposes of its defence in regulatory or criminal procedures. For documents and material protected by special legislation (e.g., patents) the company is entitled to deny access or give limited access or request that the material be handled by the competent authorities in accordance with special legal provisions.

26 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

Attorney–client privilege is considered to be of paramount importance and is well established in Greek legislation. Sources of such privilege are to be found in the Lawyer's Code of Conduct, the CCP, the Criminal Code and the Code of Civil Procedure. Attorney–client privilege is broad and covers any type of data (verbal, written, electronic, etc.) obtained from the client, regardless of whether the client is a natural or legal person. Attorney–client privilege may be invoked even after the termination of the relationship between the attorney and the client.

27 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

Yes. In Greek law there is no distinction between inside and outside counsel in this respect.

28 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

Waiving the attorney–client privilege is not common practice in the legal system and is not provided for as a mandatory or required step in any context.

29 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

When a company is requested by the authorities to produce privileged information (and has decided to comply with the request), it is common practice to provide limited information relating only to the scope of the request. However, no effective safeguards are in place as to how the information provided could be used by third parties, including other authorities, agencies, etc.

30 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

Yes. Waiver of privilege is valid only when it is conducted according to the provisions of Greek law.

31 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

There is no special rule regarding common interest privilege. It falls under the attorney–client privilege.

32 Can privilege be claimed over the assistance given by third parties to lawyers?

There is no explicit legal provision or relevant case law covering said matter. Privilege can be claimed over the documents in possession of the lawyer. However, it is doubtful whether privilege would apply to communications between lawyers and third parties or in relation to documents in the possession of third parties.

Witness interviews

33 Does your country permit the interviewing of witnesses as part of an internal investigation?

Yes.

34 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

Yes.

35 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

See questions 11 and 17. Third parties are not obliged to testify as witnesses in corporate internal proceedings.

36 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

There is no established protocol for conducting internal interviews of witnesses. It is usually decided by the department of the company that will conduct the investigation. In cases of alleged serious misconduct, the employee is usually notified in case he or she wishes to have counsel present; it is for the employee to decide on the presence of counsel.

Reporting to the authorities

37 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

A business may conduct its own internal investigation on any occasion. Whether the results should be shared with the authorities depends on the results and the nature of the case, since there is no general rule for self-reporting – with the exception of certain aspects of business activities usually related to regulatory rather than criminal provisions.

38 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

If there is evidence of serious wrongdoing, the company may be left with no choice but to refer all gathered information to the authorities. It is important to keep in mind on all occasions that any report to the authorities by the company, especially in relation to its employees or clients, should be done carefully to avoid any possibility of it being held liable for filing false accusations. It is not expected, of course, that a case be presented to the authorities proven beyond any doubt, but care should be taken to forward information that indicates with some certainty that serious misconduct has taken place.

Self-reporting may extend to third countries, when there is favourable legislation regarding self-reporting from which the company could benefit (e.g., if the company could reach a leniency or immunity agreement under certain conditions).

39 What are the practical steps you need to take to self-report to law enforcement in your country?

- Gather and secure all evidence regarding the alleged wrongdoing.
- Draft a detailed report explaining, with some certainty, that serious misconduct has taken place.
- File the report with the Prosecutor or other competent authority.

Responding to the authorities

40 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

In principle a company must co-operate with the authorities, at least in terms of providing requested information and documentation, etc. Failure to comply with such a request usually has no direct consequences (unless otherwise provided for by law) but may lead to an unfavourable report by the authorities or an on-site search and seizure to obtain requested material.

In practice the company's attorney (in-house counsel or an independent attorney) liaises with the authorities and informs them whether or not the company will comply with the notice or subpoena and requests additional information regarding the scope of the investigation and their intentions.

41 Are ongoing authority investigations subject to challenge before the courts?

Although it is not common, the validity of investigative actions such as searches and seizures may be challenged before the Judicial Council, according to the provisions of the CCP.

42 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

When multiple jurisdictions are involved, an international instrument or treaty may be applicable in the first instance. If the relevant jurisdictions are all EU countries, EU law is applied; this is very similar to Greek law on the basic elements of procedure. If a bilateral or international treaty is in force (in relation to other countries), the provisions of the treaty are primarily applied. Treaties usually have specific provisions on how to handle privileged information or private data, but in some cases Greece reserves the right to refuse to forward requested information if it is against Greek law, or may reserve the right to forward it subject to approval from the competent authority (e.g., dealing with private data protection).

In large-scale investigations involving more jurisdictions, all investigations are usually carried out locally in accordance with Greek law and regulations. Exceptions may apply in cases involving national security or relating to Greece's diplomatic relations, in which case different rules (set out in international or bilateral treaties) may apply.

A company can always notify the authorities in different jurisdictions of the ongoing investigation in Greece, to avoid multiple prosecution or sanctions and a potential breach of the *ne bis in idem* principle.

43 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

See question 42.

44 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

Co-operation with other countries' law enforcement or prosecutorial authorities has become common practice in large-scale investigations. Special law enforcement agencies such as the SDOE have entered into agreements with foreign counterparts, which has enabled a more efficient and fast exchange of information. Agreements between agencies usually follow framework agreements or treaties between countries. In the case of Greece, most aspects of international co-operation are treaty-based.

In the past few years there has been a marked increase in the co-operation of special prosecuting and investigating task forces with the corresponding authorities in other countries (especially in Germany and Switzerland) by adopting more flexible and quick procedures.

There are two sets of rules applicable to this prosecutorial co-operation. One applies to co-operation with Member States of the EU (in these cases all procedures and functions are simplified and faster). In all other cases, provisions for mutual assistance apply (for investigating acts or request for information).

Greece is party to numerous international and European conventions and bilateral agreements covering all aspects of cross-border judicial co-operation such as:

- the European Convention on Mutual Assistance in Criminal Matters (1959);
- the Convention of the Council of Europe on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990);
- the UN Convention against Transnational Organized Crime (2000);
- the UN Convention against Corruption (2003);
- the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005);
- the European Convention on the suppression of terrorism (1977); and
- bilateral agreements with the United States, China, Poland, Mexico and other countries.

Local courts co-operate with those of other EU Member States through the Eurojust agency.

45 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

Under the Greek Code of Criminal Procedure investigation proceedings are confidential, and this confidentiality applies to all information gathered by the enforcement authorities. Only the person under investigation and the authorities have access to this information. Information gathered is not disclosed to third parties unless they have a specific legitimate interest to obtain such information, following special authorisation by the prosecuting authorities.

46 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

The company should inform the Greek authorities that complying with such a request would be illegal under the laws of that third country. Thus, the Greek authorities would decide whether to obtain the evidence through official channels (such as filing a request for mutual assistance).

47 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?

According to Article 212 of the CCP, information in the possession of clerics, lawyers, doctors, pharmacists and military diplomatic officials is considered privileged. If an individual under investigation declares that certain documents are privileged information pursuant to Article 212 of the CCP and the investigating authority contests this assertion, the documents confiscated are sealed without the latter acquiring knowledge of their content and a request is submitted to the competent professional association to decide on the confidentiality of said documents.

This restriction does not apply if the person protected by privilege is under investigation as an accomplice to the criminal act.

Data protection statutes (Law 2472/1997) are not applicable in criminal proceedings.

48 Are there any data protection issues that cause particular concern in internal investigations in your country?

Internal investigations are not regulated by special legal provisions, so the general rules concerning data protection and privileges apply. As a general rule, employees must be loyal to the company they serve, handle sensitive information with care and avoid activities conflicting with the company's interests. On the other hand, the company, as an employer, must respect and protect its employees' sensitive personal information as well as personal communication. It is common practice, also recognised by the Greek courts, for the employer to have access to the employees' business communications, such as emails, calls or text messages circulated through the company's communication infrastructure (servers, backup storage, etc.). In most cases, this type of access is provided for in the company's internal work regulations and is also agreed by both parties in the employment contract.

49 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

As a general rule, material requested by the prosecuting authorities during the conduct of a criminal investigation must be produced. If part of this material contains privileged information, there are procedures under the CCP for handling this information accordingly. Most privileges do not apply in investigations for corruption acts. The Anti-Corruption Prosecutor, Financial Crime Prosecutor and some agencies such as SDOE may have full access to most

of the privileged information. Production of material by third parties is also taken into consideration if they have legal access to it and it is not gathered or accessed through violation of criminal provisions (e.g., illegal recording of conversations, illegal access to personal data information).

Global settlements

50 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

Prior to any settlement with a law enforcement authority, a company should consider whether the settlement agreement could be used as evidence against individuals (i.e., directors or employees of the company) or even against the company itself in any type of proceeding (i.e., criminal, administrative or civil proceedings). Also, the company should thoroughly negotiate with the authorities the wording of the settlement agreement to avoid any indirect admission of wrongdoing that is not covered by said agreement.

51 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

Depending on the nature of the misconduct, a broad variety of administrative sanctions may be imposed against a company, such as fines, licence revocation, a permanent or temporary ban from public tenders or state funding, or temporary suspension of the operation of the company.

Individuals may face criminal penalties if they are found guilty of a criminal offence. Such penalties may include imprisonment and monetary penalties.

It should be noted that crimes related to an entity may be committed by members of the entity, mainly managers, officers and directors. These individuals are personally liable in any case, but they could not be held liable for criminal acts 'committed' by the entity if they do not meet the criteria (objective and subjective) of the relevant legal provision. In some types of offences, for example, tax offences, there are special provisions as to which persons are deemed liable under the relevant law. These legal provisions may expand or restrict liability to individuals holding certain positions in an entity.

52 What do the authorities in your country take into account when fixing penalties?

When imposing sanctions (in the form of administrative penalties) on a corporation, the competent authorities consider the following factors: entity size and annual turnover, seriousness of the offence, damage caused, the amount the company benefited from the conduct, and prior misconduct. The fine is imposed through the competent authorities (usually the Revenue Service). Apart from a fine, the competent authority may impose other measures as well, for example, prohibition of business activity for a period, revocation of licences and registrations, a ban from public tenders or investment programmes, etc. Judicial control of sanctions is always available to affected parties.

53 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

No.

54 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

Suspension and debarment of a company from government contracts in Greece is an administrative penalty that can be found in various laws:

- According to Article 52 of Law 3691/2008 regarding money laundering, failure to comply with the anti-money laundering provisions of said law may lead to prohibition of the corporation from carrying out certain activities, establishing new branches in Greece or abroad, or increasing its share capital; or in case of serious or repeated violations, may result in final or provisional withdrawal or suspension of authorisation of the corporation for a specific time or prohibition from carrying out its business.
- According to Article 28, Paragraph 5 of Law 1650/1986 (as amended by Article 7, Paragraph 4 of Law 4042/2012) regarding the protection of the environment, a company may be banned temporarily or permanently from public tenders if it is found liable for polluting or degrading the environment in order to gain illicit profits.
- According to Article 24 of Law 3340/2005 for the protection of the capital market from actions of persons that possess inside information and market manipulation, the activities of a company found violating the provisions of the aforementioned law may be suspended.

The company should primarily examine whether the intended settlement in another country concerns facts that have taken place in Greece and evaluate the risk of said settlement being used in future proceedings in Greece.

55 Are 'global' settlements common in your country? What are the practical considerations?

No. In certain cases, Greece has entered into a settlement in the context of *ad hoc* agreements with the companies under investigation. Such settlements do not cover the criminal liability of individuals, such as directors or employees of the company.

56 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

Yes, private actions seeking damages in the course of civil proceedings are allowed. Private plaintiffs may gain access to authorities' files, provided that they can adequately prove their legitimate interest in obtaining the files to support their civil claims against the company.

Publicity and reputational issues

57 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

According to Article 241 of the CCP, the pre-trial stage of the proceedings, which includes the preliminary inquiry and the main investigation, is conducted in secrecy, not publicly.

However, in highly publicised cases it is not unusual that information (including documentary evidence, witness statements, etc.) is leaked to the media during the investigation phase.

After a case has been referred for trial, all procedures including the trial hearing are, as a rule, public according to Article 329 of the CCP.

58 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

There is no standard corporate communication protocol in Greece, thus companies would usually follow the international standards regarding communications in crisis management. However, it is common for companies to have their own public communications and media department. In some cases companies also use public relations firms to manage corporate crisis.

59 How is publicity managed when there are ongoing, related proceedings?

Companies decide on how to manage publicity case by case. Crucial factors that help to develop the company's strategy are the nature of the proceedings, and the company's involvement regarding the facts under investigation and the investigated persons.

Duty to the market

60 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

No, but it may be advisable in some circumstances.

46

Hong Kong

Wendy Wysong, Donna Wacker, Richard Sharpe, William Wong, Michael Wang and Nicholas Turner[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

Several global banks have been under investigation by the US Securities and Exchange Commission for potential violations of the US Foreign Corrupt Practices Act (FCPA) for hiring children and other relatives of government officials for the purpose of winning business, particularly in China. Under the FCPA, nearly anything of value, including jobs and internships, can constitute a bribe if made for a corrupt purpose.

The Hong Kong Securities and Futures Commission (SFC) has also been active in pursuing alleged corporate misfeasance among listed companies, such as Hanergy Thin Film Power Group Limited. The regulator has recently obtained disqualification orders and court orders against the former chairman and the current directors following suspicious trading patterns of its stock.

1 Wendy Wysong is a foreign legal consultant (Hong Kong) and a partner (Washington, DC), Donna Wacker is a partner, Richard Sharpe and William Wong are consultants, Michael Wang is a senior associate, and Nicholas Turner is a registered foreign lawyer at Clifford Chance.

2 Outline the legal framework for corporate liability in your country.

The law of Hong Kong has followed the common law of England and Wales in ascribing corporate liability for criminality, and has developed two main techniques for attributing to a corporate the acts and states of minds of the individuals it employs:

- the 'identification principle', whereby, subject to some limited exceptions, a corporate entity may be indicted and convicted for the criminal acts of the directors and managers who represent its directing mind and will, and who control what it does; and
- vicarious liability, under which a corporation is liable for criminal acts of its inferior employees or agents under statutory offences that impose an absolute duty on the employer.

A number of offences in Hong Kong legislation target corporates and regulate business activity. They include offences provided in the Companies Ordinance, the Securities and Futures Ordinance, the Trade Descriptions Ordinance and the Theft Ordinance.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

Corporations are subject to investigation or regulation by a number of authorities, including the Hong Kong Police Force (HKPF), the Independent Commission Against Corruption (ICAC), the Customs and Excise Department, the Companies Registry, the Inland Revenue Department, the SFC, the Hong Kong Monetary Authority (HKMA), the Competition Commission and the Office of the Privacy Commissioner.

Hong Kong's Department of Justice has overall responsibility for conducting criminal prosecutions; the other authorities named above conduct investigations (and sometimes carry out prosecutions depending on the offences involved).

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

In general, criminal authorities must have reasonable grounds to suspect that a crime has been committed before starting an investigation. The threshold of suspicion is relatively low.

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

In Hong Kong, the right of an accused to advance double jeopardy is found in the Hong Kong Bill of Rights Ordinance (Cap 383) (HKBOR) and the Criminal Procedure Ordinance (Cap 221). This protection extends to corporations convicted or acquitted of an offence abroad.

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

The primary basis of criminal jurisdiction in the Hong Kong Special Administrative Region is territorial, and the courts apply a strong presumption against construing statutes as having extraterritorial effect.

The Criminal Jurisdiction Ordinance (Cap 461) (CJO) deals with Hong Kong's extraterritorial criminal jurisdiction. The offences to which the CJO applies are divided into 'Group A' offences, which cover offences such as theft, fraud, deception, blackmail and offences relating to false instruments, and 'Group B' offences, which cover conspiracy, attempting or incitement to commit a Group A offence, and the offence of conspiracy to defraud.

The CJO allows Hong Kong courts to exercise jurisdiction over Group A and B offences in the following circumstances:

- where any one of the constituent elements of the offence occurs in Hong Kong;
- where there is an attempt to commit the offences in Hong Kong, whether or not the attempt is made in Hong Kong or elsewhere and irrespective of whether it has an effect in Hong Kong;
- where there is an attempt or incitement in Hong Kong to commit the offences outside Hong Kong; and
- where the substantive offence was not intended to take place in Hong Kong, as regards a conspiracy to commit a Group A offence, or conspiracy to defraud, jurisdiction depends on proof that the pursuit of the agreed course of conduct would involve conduct punishable under the law in force in the place where the conduct was intended to take place. The prosecution must also prove that:
    - a party to the agreement constituting the conspiracy, or a party's agent, did anything in Hong Kong in relation to the agreement before its formation; or
    - a party to it became a party in Hong Kong (by joining it either in person or through an agent); or
    - a party to it, or a party's agent, did or omitted to do anything in Hong Kong in pursuance of it; and
    - the conspiracy would be triable in Hong Kong, but the parties to it had not intended the offence or fraud to take place in Hong Kong.

In relation to conspiracies to commit all other offences, Section 159A of the Crimes Ordinance (Cap 200) enacts the general common law rule limiting extraterritorial jurisdiction in conspiracy cases and provides that a conspiracy entered into in Hong Kong is triable in Hong Kong only if the agreement is to commit a substantive offence triable in Hong Kong. Conspiracies entered into abroad to commit substantive offences in Hong Kong would be triable in Hong Kong, even before any acts were carried out in Hong Kong in furtherance of the conspiracy. However, a conspiracy entered into in Hong Kong to commit offences abroad would not be triable in Hong Kong.

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

Under Hong Kong's data privacy regime, and those of other countries in Asia, employee or customer consent may be required prior to disclosing certain protected information. Cross-border investigations involving China should be conducted in compliance with the PRC Law on Guarding State Secrets and the new PRC Cybersecurity Law. In certain cases, investigators may need to undertake their work on site in China, with strict protocols in place to prevent the prohibited export of information to Hong Kong or elsewhere.

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

The Hong Kong authorities generally try to co-operate with their counterparts in foreign jurisdictions and on mainland China. For example, in October 2014, the SFC and the China Securities Regulatory Commission (CSRC) entered into a memorandum of understanding on strengthening cross-boundary regulatory and enforcement co-operation, with a view to tackling market manipulations in China and Hong Kong. In addition Hong Kong has mutual legal assistance agreements with a number of countries and a number of international treaties provide for cross-border co-operation.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

The two main factors considered by the Hong Kong Department of Justice in its decision to prosecute are sufficiency of evidence and public interest. Depending on the seriousness of the offence, evidence of ethical corporate culture is considered a factor that may militate against or reinforce a decision to prosecute, or be considered as a mitigating or an aggravating factor in sentencing.

10 What are the top priorities for your country's law enforcement authorities?

The HKPF's priorities for 2017 are violent crime and domestic violence; triad, syndicated and organised crime; dangerous drugs; public safety; and the prevention of terrorism. The HKPF is also prioritising cybersecurity and technology, particularly criminal groups engaged in internet and telephone fraud. The SFC's enforcement priorities include corporate misfeasance by listed companies, insider dealing, market manipulation, unlicensed dealing, intermediary misconduct and international co-operation. The HKMA's priorities include strengthening supervision of liquidity, technology, fintech and credit risk, boosting consumer protection, anti-money laundering and counterterrorist financing.

11 How are internal investigations viewed by local enforcement bodies in your country?

In most cases, the authorities recognise the need for, and welcome, at least initial or preliminary internal investigations carried out by corporations. Those corporations licensed by the SFC have a regulatory duty to self-report where there is a material breach (or suspected

breach) by their employees of any rules administered by the SFC. Particular care must be taken to avoid 'tipping off' whereby corporations are prohibited (except with the authorities' consent) from disclosing the existence of the authorities' investigations to a third party, which may include the employees.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

Whistleblower complaints, both internal and external, are a frequent source of allegations of misconduct leading to investigations, particularly with respect to bribery and corruption. In Hong Kong, the ICAC plays a critical role in receiving and investigating complaints made against individuals. Inquiries from the ICAC made to companies regarding their employees' conduct will often lead to an internal investigation to identify potential breaches of internal policy, even where there is no corporate liability under the law. Regulatory reviews by the SFC, HKMA or other regulators are another source of allegations of misconduct.

13 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Dawn raids are a feature of law enforcement in Hong Kong and are used by the SFC and HKMA in the context of regulatory investigations; by the ICAC in bribery investigations; and by the HKPF in relation to the commission of any offence. Dawn raids may also be used by the Competition Commission in investigating offences under the Competition Ordinance (Cap 619). They can take place with a warrant issued by a magistrate or without a warrant in limited circumstances.

14 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

Generally, privileged material cannot be seized during a dawn raid or in response to a search warrant. To protect privileged material from seizure, a claim of privilege should be made; and where there is a dispute over whether certain material is privileged, it should be sealed until the dispute is resolved. However, privilege may be overridden by a court order. Privilege will also not attach to materials created for the purpose of committing a crime.

15 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

Privilege against self-incrimination is recognised in Hong Kong. A person may decline to provide information in an investigation that may tend to incriminate him or herself.

An exception is that authorities such as the SFC and the HKMA may issue a notice under relevant statutory provisions compelling a witness to answer questions or produce documents; and self-incrimination is not a reason for non-compliance. However, the information provided by a person compelled by the notice can be inadmissible in evidence against the person in criminal proceedings except for certain offences such as perjury.

16 What legal protections are in place for whistleblowers in your country?

Hong Kong currently does not have a comprehensive regime to protect whistleblowers. However, listed companies are encouraged to adopt a whistleblowing policy as 'recommended best practice' under the Hong Kong Exchanges and Clearing Code Corporate Governance Code.

Under the Employment Ordinance (Cap 57), an employee giving evidence in proceedings or inquiries in connection with the enforcement of the Employment Ordinance, work accidents or breach of work safety legislation is protected from dismissal and discrimination. Other ordinances covering race, sex, family status and disability, also protect individuals who act against discrimination or assist with investigations against victimisation.

Hong Kong law protects individuals who disclose suspected money laundering or other crimes by preventing such disclosure from being treated as a breach of any restrictions imposed by contract, enactment or rule of conduct.

The Competition Commission in Hong Kong has also published a Leniency Policy that is designed to encourage companies that may have engaged in illegal activity, such as bid rigging or price fixing, to report it in exchange for leniency.

17 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

Employees have limited rights under local employment laws if a company conducts an investigation and may be suspended with pay if the employment contract so provides. Employees are protected against wrongful, unreasonable or constructive dismissal under local legislation.

Employees have the right to a disciplinary hearing if the company handbook, manual or policy provides for such in relation to employee misconduct. Employees of government or public bodies have the right to a fair hearing.

Executive directors owe additional duties under the Companies Ordinance (Cap 622), the company's articles and common law. In addition to rights they have as an employee of the company, directors also have rights under the Companies Ordinance and articles with respect to the potential threat of removal or disqualification in the case of breach of directors' duties.

18 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

There are no statutory requirements for companies to take disciplinary steps when an employee is suspected of misconduct. However, companies' internal policies and employment contracts

may adopt disciplinary procedures for their employees. Companies in regulated industries may be required to suspend or take disciplinary action against employees who carry out regulated activities. Aside from their mandatory obligations, companies may take disciplinary action or steps to investigate misconduct as part of the company's proper internal controls and good corporate governance.

Commencing an internal investigation

19 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

It is common practice for an internal investigation to begin with the drafting of an investigation plan detailing the objectives, scope, and roles and responsibilities for the investigation. A clearly defined communications plan and protocol for maintaining legal professional privilege are also essential from the earliest stages. Increasingly, scoping documents will also identify data custodians and outline procedures for electronic document review.

20 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

Depending on the nature of the issue, necessary internal steps could be managed by a company's compliance or legal department, in less serious cases, or senior management and the board of directors, in the most serious cases. Under the supervision of legal counsel to ensure the protection of legal professional privilege, a company should gather and secure any relevant documents and data, and interview key employees to ensure the continued availability of critical information. Corrective action plans or disciplinary measures should be adopted to address gaps or breaches in compliance controls, which may earn a company mitigation credit in any related enforcement actions.

21 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

There is no general duty to publicly disclose the existence of an internal investigation or contact from law enforcement, except in the case of a listed company where such facts would constitute price-sensitive information, as defined under the Securities and Finance Ordinance, unless exempted or where the SFC has granted a waiver (e.g., in cases involving disclosure restrictions imposed by a foreign government authority). There are strict prohibitions against publicly reporting details of investigations by the ICAC, for both listed and unlisted companies.

22 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

Senior management should advise the appropriate committee of the board of directors, or the full board, immediately upon learning of facts evidencing a likely violation of law, or of an

external investigation, involving the company, its officers, directors or senior management. Where responsibility for handling such matters has been delegated to management or outside counsel, the board or a designated committee should receive timely and periodic updates regarding the status of the investigation.

23 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

Ideally, a company should have an established protocol for responding to law enforcement requests, subpoenas or dawn raids, including procedures for the preservation of relevant documents and data. The legal department should issue a preservation notice to all relevant employees immediately upon receiving a law enforcement request, or upon a belief that such a request or legal proceedings may be forthcoming. Paper documents and electronic data on servers, laptops, mobile devices or other media should be collected from relevant custodians and logged under the supervision of legal counsel and the company's IT department. Privileged communications should be segregated and clearly stamped to help prevent accidental disclosure.

24 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

A challenge to a search and seizure warrant or production order, and a request to exclude evidence gathered as a result, can be made based on scope, the grounds on which the order was obtained, legal professional privilege or public interest grounds through an application to the Hong Kong courts.

Attorney–client privilege

25 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

Legal professional privilege can be claimed over various aspects of an internal investigation.

Recent case law held that the whole process of obtaining and giving legal advice should be privileged. Therefore, internal communications (including those between employees of a non-legal function) and materials generated during the information-gathering process of an internal investigation (such as meeting minutes, interview notes) for the dominant purpose of obtaining and giving legal advice could be privileged. Legal advice privilege will not, however, attach to communications with, or materials prepared by, a third party (unless such communications or materials are for the dominant purpose of obtaining or seeking legal advice), nor will it cover legal advice given by persons who are not legally qualified (e.g., tax accountants).

During an internal investigation, confidential communications or documents prepared for the dominant purpose of obtaining information or evidence for use in actual or reasonably contemplated litigation – even if such communications are merely for the purpose of establishing facts – will be covered by litigation privilege. To protect privilege, the company should:

- involve lawyers (whether in-house or external counsel) as soon as it is apparent that legal advice is likely to be required;
- avoid creating unnecessary records (where there is no prospect of litigation) that summarise, quote or amend legal advice received;
- limit circulation of privileged documents on a strictly need-to-know basis;
- manage documents effectively by separating privileged and non-privileged documents; and
- ensure that all documents that are considered to be protected by legal professional privilege are clearly marked 'privileged and confidential'.

26 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

Under Hong Kong law, legal professional privilege falls into two categories:

- Legal advice privilege attaches to communications between the client and his or her legal adviser for the purposes of giving and receiving legal advice.
- Litigation privilege attaches to confidential communications between the legal adviser and the client; or communications between the legal adviser or the client and a third party if three conditions are met: a litigation is in progress or reasonably in contemplation; the communications are made with the sole or dominant purpose of conducting the actual or anticipated litigation; and the litigation is adversarial, not investigative or inquisitorial.

The privilege belongs to, and can only be waived by, the client and not his or her legal adviser.

In the corporate context it is advisable to identify the employees authorised to act for the company to seek legal advice for the purposes of claiming legal advice privilege, as English and Hong Kong law have diverged in recent years on this issue.

27 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

Legal professional privilege applies equally to internal and external counsel. However, privilege will only cover communications made by an in-house lawyer acting in a legal (not a managerial) capacity.

28 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

Waiver of legal professional privilege (usually limited) is generally regarded as a sign of co-operation by authorities in a regulatory investigation although it is not mandatory.

29 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

The Court of Appeal has confirmed that a waiver of privilege with regard to one party does not automatically mean that privilege has been waived at large and that privilege is not waived because a privileged document has been disclosed for a limited purpose. The scope of the

waiver is determined by the party waiving the privilege. Where privilege is waived for a limited purpose, it is important to ensure that the terms and scope of the limited waiver are clear.

30 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

Generally, privilege will not be lost because a privileged document has been disclosed for a limited purpose.

Whether privilege can be maintained if it has been partly waived in another country will depend on a number of factors, including but not limited to:

- whether the concept of limited or partial waiver is recognised in the country where privilege has been waived;
- the scope and terms of the waiver; and
- whether any statutory provision overrides privilege.

31 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

Common interest privilege exists in Hong Kong. Privilege will not be waived where privileged material is disclosed to a third party who shares a common interest in the subject matter of the privileged material. Common interest must exist at the time when the privileged material is disclosed to the third party.

32 Can privilege be claimed over the assistance given by third parties to lawyers?

Communications between a third party and the lawyer (or the client) are protected from disclosure by litigation privilege if they are made for the dominant purpose of obtaining information or evidence for use in actual or reasonably contemplated litigation. However, legal advice privilege will generally not apply to communications with third parties (see question 25).

Witness interviews

33 Does your country permit the interviewing of witnesses as part of an internal investigation?

Yes. There is no general prohibition under Hong Kong law against interviewing witnesses as part of the information-gathering process in an internal investigation.

34 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

Legal advice privilege is often claimed for the records of internal witness interviews. Recent case law suggests that a corporation may argue that legal advice privilege exists over such records if the interviews are conducted (or the reports are compiled) for the dominant purpose of obtaining and giving legal advice during the internal investigation. This is in contrast to the position in England.

Litigation privilege may only be claimed if it is established that the witness interviews are conducted for the dominant purpose of use in an actual or reasonably contemplated litigation.

35 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

Whether the interviewee is an employee or third party, it is recommended that they be informed that:

- the interview is part of a fact-finding exercise;
- the lawyer conducting the interview represents the company, and not the interviewee;
- the interview is protected by legal professional privilege belonging to the company, which can choose to disclose the contents of the interview to third parties, including regulators and authorities, without the interviewee's permission;
- the interviewee may provide personal information covered by data protection laws, which will only be used for the fact-finding or review exercise; this exercise may involve sharing the interviewee's personal information with other advisers working for the company, regulators and authorities; and
- the contents of the interview are confidential and should not be shared with any other person (including other employees).

36 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

The internal interview will typically be attended by in-house legal counsel and any specialised investigation team, with or without external counsel (depending on the nature and seriousness of the issues involved). There is no legal requirement in Hong Kong that employees have their own legal representation at an internal interview, and this is not common in practice.

Reporting to the authorities

37 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

Generally, a person is under no positive obligation to report crimes or provide assistance to law enforcement authorities, aside from suspicious transaction reports under AML laws, which are mandatory, and certain exceptions for licensed corporations and financial institutions.

38 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

While there is no formal arrangement or mechanism for deferred prosecution agreement in Hong Kong, it may be advisable for a company to self-report with a view to demonstrating its proactive and full co-operation with the authorities, which may militate against a decision to prosecute or be considered as a mitigating factor in sentencing.

Whether the self-report should extend to foreign countries will depend on the nature and extent of the issues involved, in particular whether it has a cross-border, regional or global element.

39 What are the practical steps you need to take to self-report to law enforcement in your country?

A company should undertake appropriate internal investigations to ascertain the nature and extent of the issues, and to ensure the contents of any self-report are correct and not misleading (including misleading through any material omission). It should also seek legal advice on the applicable self-reporting obligations.

For licensed corporations and financial institutions that are under a regulatory duty to self-report, a balance needs to be struck between making timely self-reports and ensuring such reports are correct and not misleading.

Responding to the authorities

40 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

Hong Kong enforcement agencies such as the ICAC and the SFC have extensive powers to compel information to be provided to them by corporations involved in investigations, and there is very little that can be done to challenge requests for information when they are made.

However, it would be unusual for criminal charges to be brought against a corporation without it having any opportunity to discuss the circumstances of the allegations with the enforcement agency. In financial misconduct investigations, the twin regulatory and criminal nature of the supervisory jurisdiction of the SFC and the HKMA means that there would be an opportunity for representations to be made by the corporation, through its lawyers, as to the circumstances, and the proposed remediation, prior to criminal charges being brought.

41 Are ongoing authority investigations subject to challenge before the courts?

The circumstances under which an ongoing investigation could be challenged in the courts are difficult to envisage, short of provable *mala fides* on the part of the enforcement agency.

42 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

This scenario is most likely to arise in the context of financial regulatory investigation by regulators in different jurisdictions, or international anti-bribery enforcement under the FCPA or United Kingdom Bribery Act. In circumstances in which the notices or subpoenas have been validly issued, warrant substantive responses and relate to identical subject matters, it is advisable to adopt consistent disclosure with each agency. Given the increasing prevalence of international co-operation between regulators and criminal enforcement agencies, a failure to disclose certain matters in one jurisdiction may well be apparent, and seized on as an indication of inadequate compliance or co-operation.

43 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

Under notices issued by the various Hong Kong enforcement agencies, companies may be required to produce material in their possession, custody, control or power, whether this is located in other countries or solely in Hong Kong, subject to having a reasonable excuse not to do so.

This may give rise to issues in some foreign jurisdictions, where the transmission of certain types of information outside that country may be prohibited by local law. In Hong Kong, exposure to criminal liability under foreign law would not constitute a reasonable excuse for non-compliance with a notice or subpoena if a reasonable person in the circumstances would conclude that the Hong Kong public interest in the investigation of criminal activities outweighs any public or private interest in the compliance with the foreign law. However, if there are alternative means to obtain the documents without materially adverse consequences to the investigation, a real and appreciable risk of prosecution under foreign law would constitute a reasonable excuse for non-compliance.

44 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

Hong Kong regulators, including the HKMA and the SFC, have signed memoranda of understanding to establish co-operative arrangements that may include the sharing of information with foreign counterparts, including those of the People's Republic of China. One of the most important of these is the IOSCO Multilateral Memorandum of Understanding – this was the first global information-sharing arrangement among securities regulators.

Hong Kong authorities routinely co-operate with their foreign counterparts reciprocally in criminal matters under the framework established in the Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525).

45 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

Information provided to enforcement authorities in Hong Kong confidentially during an investigation will remain confidential, except to the extent that its use is necessary within an investigation, prosecution or regulatory enforcement. While it may be shared with other enforcement agencies or regulators under the information-sharing agreements referred to above, it would not be disclosed to other third parties, without an order from a court.

46 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

It may be possible to refuse production on the grounds that the foreign illegality constituted a 'reasonable excuse' not to produce the documents under the relevant legislation. However, this would be a difficult argument on which to succeed. These issues should be brought to the attention of the enforcement agency, and it should consider whether assistance could be sought under formal channels from the agency in the foreign jurisdiction, to allow the documents to be produced without violating foreign law.

47 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?

The Personal Data (Privacy) Ordinance (Cap 486) (PDPO) protects an individual from the abuse of personal data held about them and restricts the way in which those who control the collection, holding or use of data can process it. The PDPO contains six data protection principles that govern the purpose and manner of collection, the accuracy and duration of retention, the use and security of personal data, and rights of access and correction. While breach of a data protection principle is not a crime, it may give rise to a complaint to the Privacy Commissioner's office, which in turn may issue an enforcement notice. Breach of a notice is an offence. Breaches of provisions of the PDPO may give rise to civil liability.

48 Are there any data protection issues that cause particular concern in internal investigations in your country?

The provisions of the PDPO cover the monitoring and gathering of data in the context of internal investigations, whether this be by monitoring internet, telephone or email. An individual who suffers damage (including 'injured feelings') by reason of a breach may sue.

49 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

Care must be taken to ensure compliance with a company's confidentiality obligations in relation to information. If disclosure to an authority is voluntary, rather than compelled, then the disclosure may violate these obligations.

Law enforcement authorities in Hong Kong must maintain the confidentiality of confidential disclosures made to them (whether voluntary or compelled), except to the extent that they choose to share them with other enforcement authorities, or use the information in an investigation, prosecution or regulatory enforcement action.

Global settlements

50 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

The SFC has wide powers to enter into settlement agreements under the Securities and Finance Ordinance, and may do so if this is in the public interest. In considering settlement, aside from considering factors such as the strength of the prosecution and defence cases, the costs and reputational damage of a lengthy investigation and potential subsequent legal proceedings and possible penalties, the SFC may insist on a public reprimand of the financial institution via an announcement on the SFC's website. The SFC will take into account the degree of co-operation in considering the settlement package.

51 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

Companies or their directors, officers or employees may face disciplinary action – and in the case of directors, disqualification – and attract potential civil or criminal liability for misconduct in Hong Kong. For entities regulated by the SFC, such misconduct would include breaches of the Securities and Finance Ordinance, contravention of the terms of any SFC licence or any act prejudicial to the public interest. Sanctions may include a private or public reprimand; a fine of up to HK$10 million or three times the profit gained or loss avoided; revocation or suspension of licences or registrations; and a ban on regulated persons from applying to be licensed or approved as a responsible officer.

The SFC has powers under the Securities and Finance Ordinance to seek criminal prosecution and in practice, the SFC refers all market misconduct cases to the Hong Kong Department of Justice for advice. The maximum penalties for a person convicted of a market misconduct offence are 10 years' imprisonment and a fine of HK$10 million.

The SFC may also institute civil proceedings before the High Court or the Market Misconduct Tribunal (MMT).

52 What do the authorities in your country take into account when fixing penalties?

The authorities will consider all the circumstances of the case, including (1) the nature and seriousness of the conduct, (2) the amount of profits accrued or loss avoided, (3) other circumstances of the firm or individual, and (4) other relevant factors.

In considering the nature and seriousness of market misconduct, the SFC will have regard to the impact of the conduct on market integrity, the costs of the conduct caused to clients or the investing public, the duration and frequency of the conduct, whether there is a breach of fiduciary duty and whether any serious or systematic management or internal control failures are revealed. The SFC will also consider the degree of co-operation with the SFC and other authorities.

53 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

There are no formal mechanisms in Hong Kong for the negotiated settlement of criminal investigations or proceedings that are equivalent to deferred prosecution agreements in the

United Kingdom or the United States. However, in some limited circumstances, negotiations with, or representations made to, the SFC and Hong Kong Department of Justice may result in a decision being taken not to prosecute.

54 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

If any tenderer for a government service contract (excluding construction service contracts) has obtained a conviction on or after 1 May 2006 under the relevant ordinances, its tender offers would not be considered for five years from the date of conviction.

Contractors may apply to the Central Tender Board for a shortening of the debarment period of five years if the conviction was on or after 24 June 2010. The Central Tender Board will have regard to the circumstances of individual cases in reviewing the debarment period.

55 Are 'global' settlements common in your country? What are the practical considerations?

Generally, global settlements involving more than one Hong Kong agency would not occur because one agency will have primacy to resolve the case. With regard to global settlements involving more than one country, there are no published figures on their prevalence. The SFC has co-operative arrangements for investigatory assistance and exchange of information with many overseas regulators. In particular, the CSRC and the SFC have maintained a close strategic partnership to tackle cross-border trading misconduct.

56 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

The Securities and Finance Ordinance gives a person who has suffered pecuniary loss as a result of market misconduct the right to bring a civil action to seek compensation. Compensation will only be payable if it is fair, just and reasonable in the circumstances of the case. Findings of the MMT in relation to market misconduct will be admissible as *prima facie* evidence in the private action, though proceedings before the tribunal are not a prerequisite for bringing civil proceedings. The SFC will not intervene in private legal proceedings.

Publicity and reputational issues

57 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

In practice, the SFC does not normally publish the commencement of investigations of criminal cases. Publicity usually follows when a decision has been made to charge the individual or during criminal proceedings once instituted. Criminal trials in Hong Kong are conducted in open court. The SFC will publicise the outcome of regulatory enforcement proceedings on its website.

58 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

There are no particular factors specific to Hong Kong in managing corporate communications in Hong Kong. The steps are likely to be similar to those that would be taken to manage corporate communications in other jurisdictions, for example timely, accurate and effective messages using the right media channels, being sensitive and perceptive to the geopolitical environment. Public relations and media companies can be and have been used in Hong Kong to manage certain corporate crises.

59 How is publicity managed when there are ongoing, related proceedings?

Publicity is usually managed by a press officer or communications department that will monitor media reports and suggest the making of public statements as and when necessary. Any public statements made by the company should be carefully drafted and any prejudicial effects on ongoing proceedings should be taken into consideration.

Duty to the market

60 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

Under Part XIVA of the Securities and Finance Ordinance, a listed corporation must, as soon as reasonably practicable after any inside information has come to its knowledge, disclose the information to the public (subject to certain exceptions). Inside information is defined to include specific information about the corporation which is not generally known to the public but would, if generally known, be likely to materially affect the price of the listed securities.

For a listed corporation, a settlement of a regulatory investigation may constitute inside information (depending on the nature and severity of the underlying offence or misconduct) and thus require disclosure as soon as reasonably practicable. In practice, the corporation and the authorities will usually agree on a press release being issued as part of the settlement and will agree the timing for the release.

47

India

Srijoy Das and Disha Mohanty[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

Kingfisher Airlines Limited (KFA) was an airline group based in India, established in 2003 by the United Breweries Holdings Limited (UB Group). The Central Bureau of Investigation (CBI) and other authorities have charged KFA's chairman and managing director, Vijay Mallya, the airline, some of its employees and certain bank officials with fraud and criminal conspiracy in connection with the grounded airline's unpaid loans of over 9 billion rupees that it owed to the state-owned IDBI Bank. The loan was extended by IDBI to KFA without accepting shares or any tangible asset as collateral in contravention to what was decided by the bank earlier, even though the carrier had been struggling financially and had a credit rating that was allegedly below the bank's approval threshold.

The accused bankers and KFA executives were arrested under sections 13(1)(d) and 13(2) of Prevention of Corruption Act, 1988 and sections 120B (criminal conspiracy) and 420 (cheating) of the Indian Penal Code, 1860. According to the CBI, the bank officials entered into criminal conspiracy with KFA executives for misuse, misappropriation and diversion of funds. The total fraud amount is estimated to be around 13 billion rupees (including interest and penalty). Several other cases are also being pursued against the company, including proceedings under the Prevention of Money Laundering Act, 2002.

Further, the CBI set up a special investigation team to review the case in India and abroad. It has sent letters rogatory for legal support to authorities in the British Virgin Islands and Singapore to discover details of amounts lying in KFA bank accounts in those jurisdictions.

1 Srijoy Das is a partner and Disha Mohanty is a principal associate at Archer & Angel.

Subsequently, with the help of mutual legal assistance treaties with the United Kingdom, Indian authorities have sought the arrest of Mr Mallya, with respect to the ongoing investigation against him in India. The court cases are presently *sub judice*, and Mr Mallya has consistently denied any wrongdoing.

2 Outline the legal framework for corporate liability in your country.

The Supreme Court of India, in the case of *Iridium India Telecom Limited v. Motorola Incorporated & Others*, held that corporations cannot claim immunity from criminal prosecution on the ground that they are incapable of possessing the necessary *mens rea* required for commission of criminal offences. A corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences, including those requiring *mens rea*. Criminal liability would be attributable to a corporation when an offence is committed, in relation to the business of the corporation, by a person or body of persons in control of its affairs and management. Since a corporation cannot be imprisoned, courts will levy a fine on the corporation guilty of wrongdoing. The directors and officer of a company are also liable for imprisonment depending upon the gravity of the offences (such as misrepresentation of financial data or fraud).

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

The Ministry of Company Affairs through the Registrar of Companies (RoC) regulates private limited companies (i.e., closely held companies) and unlisted public companies. Listed public companies and public companies that propose to list their securities on the market are regulated by the Securities and Exchange Board of India (SEBI) as well.

SEBI monitors market activity and reports illegal activities to its Investigations Department, which investigates illegal activities, and refers them to the Enforcement Department, which enforces action against market participants that violate securities laws. It is important to note that SEBI has the powers of a civil court, such as ordering discovery and production of books of accounts, summoning and enforcing the attendance of persons and examining registers and documents, and issuing commissions for the examination of witnesses.

The RoC is tasked with ensuring that companies comply with India's company's law. It has the power to initiate prosecution against defaulting companies.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

India has a number of regulatory authorities that have been empowered by various statutory laws to investigate and prosecute offenders. The grounds for initiating investigation against a wrongdoer are many, and are usually specified in the statute empowering the authority.

Some of the important regulatory authorities are the Securities and Exchange Board of India (securities market regulator), the Reserve Bank of India (India's central bank, and financial regulator), the Central Bureau of Investigation (tasked with investigation of serious fraud, cheating and corruption cases), the Serious Fraud Investigation Office (prosecutes

white-collar crimes), the Central Vigilance Commission (supervises corruption cases in government departments), the Enforcement Directorate (enforces exchange control and money laundering regulations) and the Income Tax department.

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

Article 20 of the Constitution of India provides protection against double jeopardy. The doctrine of double jeopardy protects a person from being tried and punished twice for the same offence, but not from different offences arising out of violation of different laws by the same set of facts.

However, a corporation facing criminal exposure in India after it resolves charges on the same core set of facts in another country may not avail itself of protection against double jeopardy. For example, in the *Louis Berger* case, having been prosecuted in the United States, the company and its executives are still being investigated in India.

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

Indian criminal law has general extraterritorial effect. The Indian Penal Code (IPC) provides for the liability of the offenders committing offences beyond the territories of India. Under section 3 of the IPC, any person liable, by any Indian law, to be tried for an offence committed beyond India shall be dealt with according to the provisions of the IPC for any act committed beyond India in the same manner as if such act had been committed within India. Also, according to section 4, the IPC applies to any citizen of India in any place beyond India. The IPC also applies to people who are not citizens of India and, under section 4, it applies to any person on any ship or aircraft registered in India wherever it may be and any person in any place outside India committing an offence targeting a computer resource located in India.

Moreover, sections 4 and 188 of the Code of Criminal Procedure (CrPC) collectively deal with jurisdiction of Indian courts to try to punish persons or entities for offences committed by them 'outside India'. Under section 188, when an offence is committed outside India, by a citizen of India, whether on the high seas or elsewhere; or by a person who is not an Indian citizen, on any ship or aircraft registered in India, he or she may be dealt with in respect of such offence as if it had been committed at any place within India at which he or she may be found. However, the central government's sanction is required for a trial to commence.

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

Key challenges in conducting cross-border investigations include obtaining information relevant to the investigation from a foreign government; tracing the money trail and obtaining

bank records from abroad; and getting custody, or extraditing the accused from a foreign jurisdiction.

India has signed mutual legal assistance treaties (MLATs) with 39 countries for sharing information, and to obtain evidence from within the other country's jurisdiction. In the absence of an MLAT, a letter rogatory (i.e., formal request for information) is sent to a foreign court, or alternatively, an informal request for information is also made, but these requests for information lack predictability and oversight.

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

Decisions of foreign authorities on matters under investigation in India are of interest to Indian prosecuting agencies. This was best illustrated in the Augusta Westland investigation (see question 1) where the CBI sought a copy of the judgment passed by the Milan Court of Appeal that had found sufficient evidence to prove that the Augusta Westland deal was tainted by corruption. It had, among other things, observed that improper payments were wired to a former Indian Air Force Chief's cousins to influence the procurement process for the supply of helicopters.

These revelations had an immediate impact on the Indian investigation, and investigators scrambled to investigate and corroborate the facts noted by the Italian Court. However, it is yet to result in any conviction in India.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

The jurisprudence on corporate culture, as a tool to assess a company's liability for misconduct, is at a nascent stage of development in India. The Satyam Computer Services scandal brought to light the importance of ethics, and its relevance in corporate culture. The culture at Satyam symbolised an unethical culture that eventually resulted in fudging of accounts and misappropriation of money by the company's promoter.

An after-effect of the Satyam scandal has been the increasing emphasis placed by regulators on corporate governance standards. In this regard, India's new company's law has prescribed higher governance standards to set the right culture in corporations.

10 What are the top priorities for your country's law enforcement authorities?

In recent years, a raft of corruption cases and economic offences, most notably regarding 2G telecom/spectrum licences, the coal block allocation, the Commonwealth Games, Adarsh Housing Society, Agusta Westland, and recent cases of big-money economic offences involving Sahara group and Kingfisher Airlines have sharply drawn the focus of law enforcement agencies to corruption at higher levels of the government and towards companies involved in bank loan defaults, money laundering and fraud related to unauthorised collection of deposits. It appears this trend is likely to continue in the foreseeable future. The Indian government has also prioritised stamping out undisclosed income held by Indian citizens, overseas and in India.

11 How are internal investigations viewed by local enforcement bodies in your country?

Voluntary disclosure of wrongdoing by corporations is almost non-existent in India, perhaps attributable to the low rate of conviction in corruption cases. Therefore, there is little or no incentive for corporations to conduct and voluntarily disclose the findings of their internal investigations to the authorities.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

Allegations of misconduct most often come to light by way of whistleblower complaints, suspicious activity reports, internal audit or litigation processes initiated against the company's parents company in another jurisdiction. However, whistleblowers are usually hesitant in revealing their identities and co-operating in any court proceedings for fear of repercussions and lack of adequate protection.

13 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Search warrants or dawn raids on companies are provided for under specific laws, such as tax regulations and competition law. Authorities would normally look for two independent and respectable witnesses from the locality to observe that the raid is carried out according to the law. A list of items seized would be made and a copy of the list of items prepared will be given to the person where the search was carried out.

If search warrants or dawn raids are not carried out according to the law, the concerned person or company may approach the courts and challenge the action. Any prosecution based on the illegal raids can be challenged.

14 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

The company may object to the review or taking of copies of 'privileged documents', including confidential communication between the client and its external attorney during a dawn raid. However, attorney–client documents are not protected in the strictest sense from police or other law enforcement agencies, should they be found during a dawn raid or a search under a valid warrant. It would depend on the law enforcement agency's discretion whether to respect the company's request not to access such documents.

However, any such documentation may not be produced as evidence in the course of court proceedings.

15 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

Article 20(3) of the Constitution of India provides that no person accused of any offence shall be compelled to be a witness against himself or herself. Further, section 161 of the Code of Criminal Procedure, 1973 provides the following:

> *(1) Any police officer making an investigation, or any police officer not below such rank as the state government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.*
> *(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.*

A person is required to assist a public servant in the execution of his public duty, such as a police officer executing a search warrant. Failure to assist may result in the public servant filing a criminal complaint against the person.

16 What legal protections are in place for whistleblowers in your country?

The Whistle Blowers Protection Act, 2011 was passed by the Indian Parliament in May 2014. However, the Act is yet to be brought into effect. The Act provides for a mechanism of receiving and inquiring into complaints (also known as disclosures) relating to corruption, commission of an offence, and wilful misuse of power and discretion by a public servant. The Act, however, does not provide any protection to whistleblowers who make a complaint involving the actions within a private organisation. The Act provides protection to whistleblowers and provides safeguards against their victimisation. Rather, the Whistle Blower's Protection (Amendment) Bill, 2015 has been tabled before Parliament, which puts further restrictions on public interest disclosures. The Amendment Bill adds other grounds on which information is exempt from disclosure, such as:

- information relating to commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless such information has been disclosed to the complainant under the provisions of the Right to Information Act, 2005;
- information available to a person in a fiduciary capacity or relationship, unless such information has been disclosed to the complainant under the provisions of the Right to Information Act, 2005;
- information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;
- information that would impede the process of investigation or apprehension or prosecution of offenders; and

- personal information, the disclosure of which has no relationship to any public activity or interest, or that would cause unwarranted invasion of the privacy of the individual, unless such information has been disclosed to the complainant under the provisions of the Right to Information Act, 2005.

It is expected that the Act would be brought into effect after the Amendment Bill has been passed by both houses of Parliament.

Moreover, the revised Clause 49 of the Listing Agreement has made it compulsory for companies listed on the stock exchange to have a whistleblower mechanism for their employees and directors.

17 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

There are various labour-related statutes in India, which differ slightly from state to state. However, there is no at-will employment in India. Employers are expected to follow principles of natural justice and maintain proper documentation if action on the basis of internal investigation is to be initiated against an employee.

Officers (including key managerial personnel) as well as whole-time directors are also considered employees of the company and their terms of employment are governed as per their employment agreement. The only exceptions are the directors appointed by the board, who can only cease to hold the office of directorship under the circumstances provided for under the Indian Companies Act.

18 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

Depending on the type and gravity of the offence, various actions can be initiated against an employee, including suspension, warning, denial of pay rises, termination of employment, etc., keeping in mind the employment contract and policies of each company. If a company has adequate proof of misconduct against an employee who refuses to participate in an internal investigation, the company may dismiss the employee, after following the principles of natural justice.

Commencing an internal investigation

19 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

Detailing the precise purpose and scope of an internal investigation is a common practice before commencing an internal investigation.

Terms of reference would, among other things, include:

- the reason for undertaking the investigation and its objectives;
- what the investigation is required to examine;
- how investigation findings should be presented, for instance, an investigator will often be required to present his findings in some form of investigation report; and
- who the findings should be reported to, and who to contact for further direction if unexpected issues arise or advice is needed.

20 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

There is no statutory or legal prescription that requires a company to take any internal steps on becoming aware of any issue, except in the case of a complaint alleging sexual harassment at the workplace.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 requires every branch or office of a company employing 10 or more persons to constitute an internal complaints committee. Complaints of workplace sexual harassment must be investigated by the internal complaints committee.

In all other cases, companies usually follow their internal code of conduct for escalating or reporting any issue internally for investigation and resolution.

21 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

There is no statutory or legal prescription that requires a company to disclose the existence of an internal investigation, or contact from law enforcement agencies. In the case of a company whose securities are listed on a recognised stock exchange, care must be taken to comply with any disclosure obligation set out in the listing agreement signed between the company and the stock exchange.

22 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

There is no legal or statutory prescription that requires management to brief the board of directors about an internal investigation, or contact from law enforcement officials. The general principle should be to inform people on a need-to-know basis. Having said that, each company has a different policy on reporting matters to its board of directors.

23 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

A company that is the subject of an inquiry must extend full co-operation and furnish complete and correct information and documents within the given time to the law enforcement authority.

If the law enforcement authority has requested production or preservation of certain documents or data, the company should impose a document hold to ensure preservation of documents and information that may be necessary for completion of the inquiry, or in anticipation of any future litigation. In a similar vein, appointing a document custodian to maintain control over the relevant documents and information would be advisable.

24 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

The company can file a writ petition before the High Court challenging the notice or subpoena issued by a law enforcement authority and request the court to quash it. However, the High Court does not normally quash the notice or subpoena unless, in its opinion, grave prejudice will be or is being caused to the person to whom it has been issued.

Attorney–client privilege

25 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

Professional communications between attorneys (or advocates) and clients are protected as 'privileged communications' under the Indian Evidence Act, 1972 (the Evidence Act). Therefore, documents that are created during an internal investigation for the purpose of giving or obtaining legal advice (including advice as to what should prudently be done in the particular legal context) are privileged.

Privilege or confidentiality of an internal investigation may be protected by marking documents 'confidential and privileged'; sending a note to all relevant staff at the start of an investigation reminding them not to create additional documentation, for instance, notes or emails commenting on the matters under investigation and which the company may have to produce because it is not privileged; and segregating privileged material from non-privileged material and taking care to ensure that privilege is not waived by including privileged information in a document that is not privileged.

26 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

The Evidence Act, which has codified the law on attorney–client privilege, specifically refers to a 'client' and does not have different principles for a client that is a corporation or an individual. Therefore, the client enjoys a right to privilege with respect to information disclosed or documents provided to an external legal counsel for the purposes of an internal investigation.

27 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

Professional communications between an external counsel and client are privileged; however, attorney–client privilege may not extend to communications exchanged between an in-house counsel and the company. The law on the subject is far from being settled.

From a practical perspective though, companies usually insert a confidentiality clause in the employment contract of in-house counsel to afford protection to any information disclosed to the counsel during the course of his or her employment, which usually serves as an effective deterrent. Any disclosure made by in-house counsel in contravention of such a clause could amount to breach of contract, for which the company may claim damages in some circumstances.

28 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

Waiver of attorney–client privilege to obtain co-operation credit, as a concept, is non-existent in India. Also, there are no circumstances under which waiver of attorney–client privilege is mandatorily required by law.

29 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

Limited waiver of privilege, as a concept, does not exist in India. However, privilege may be waived, in its entirety, by a party to a judicial proceeding who calls his or her lawyer as a witness, and questions the lawyer on a matter that might otherwise be privileged.

30 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

Waiver of privilege, on a limited basis, in a foreign jurisdiction will not affect privilege with respect to the same matter in India.

31 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

The concept of common interest privilege does not exist in India.

32 Can privilege be claimed over the assistance given by third parties to lawyers?

Yes, privilege can be claimed with respect to assistance given by interpreters, clerks or assistants to lawyers.

Witness interviews

33 Does your country permit the interviewing of witnesses as part of an internal investigation?

There is no specific legislation governing how internal investigations are to be conducted in India, and as such there are no restrictions on interviewing witnesses as part of an internal investigation, which is fairly common.

34 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

Section 126 of the Evidence Act, 1872 prohibits barristers or attorneys from disclosing to a third party any communication made to them by clients, any documents they came upon for the purpose of their professional engagement, and any advice given to clients, unless clients expressly consent to the disclosure. Therefore, companies enjoy a right to privilege with respect to information disclosed or documents provided to external legal counsel for the purposes of an internal investigation.

However, whether section 126 confers privilege on in-house lawyers is a grey area, with courts of different jurisdictions coming to different conclusions on this topic. The matter is yet to be conclusively put to rest by the Supreme Court (i.e., the apex court in India).

35 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

At the outset, there are no set legal rules for conducting a witness interview of an employee in India and the purpose of the interview usually determines what kind of procedures must be followed.

Further, there is no concept of issuing *Miranda* or *Upjohn* warnings in India. However, in essence, the principles behind these warnings are usually recommended when conducting a witness interview. Personnel conducting the interview should clarify whom they represent at the outset, to prevent a scenario wherein an employee's co-operation is solicited, with the employee understanding that the company's in-house counsel represents them as well. Employees should also be informed if waiver of the privilege is likely. Recording of the interview should only be conducted after obtaining the consent of the employee.

The same principles apply when interviewing third parties.

36 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

No procedure for conducting interviews has been prescribed under law. However, as good practice, an interviewer should usually:

- interview the complainant or whistleblower;
- interview the alleged accused;
- interview other witnesses;
- document the investigation;

- reach a conclusion and prepare an investigation report;
- send the investigation report to decision makers in the company;
- take appropriate corrective action; and
- communicate the results to the complainant and the accused.

There is no statutory requirement to present documents to the witness and each company can decide on this having regard to the circumstances of each case. However, with respect to investigations pertaining to termination of an employee's services, it is usually recommended that a thorough investigation process be undertaken, which includes presentation of documents, if any, to the employee.

There is no legal requirement that mandates that an employee should have legal representation at the interview. From a practical perspective, employees usually do not express interest in having their own legal representation during an interview and such demands are not common. However, if such a demand is raised, the company's response may vary depending on the circumstances. For instance, if the investigation is being conducted by the company's HR personnel, then a request by the employee to have legal representation at the interview could be rejected. However, if the company's interviewing panel comprises in-house or external legal counsel, the company could consider allowing the employee's legal representative to accompany him or her.

At times, after an internal investigation is completed, a company may decide that an individual's employment should be terminated, or that other disciplinary action must be taken. Depending on the company's policies and the status of the individual, a show-cause notice may need to be issued to the individual, giving him or her an opportunity to raise a defence and show cause why disciplinary action should not be taken.

Reporting to the authorities

37 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

The obligation to report to government authorities is determined case by case, having regard to the specific nature of the offence committed, and the corresponding Indian statute that has been violated. However, listed companies must check their disclosure obligations in accordance with the listing agreement signed with the stock exchange.

38 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

In India, the self-reporting mechanism is not very evolved. Few regulations provide leeway or an advantage for self-reporting in India, and it is very rare to find cases where voluntary self-reporting is beneficial.

However, it is advisable to report cases where misconduct or fraud might lead to criminal acts. More particularly, in cases relating to sexual harassment within the workplace, it is important to follow the mandate prescribed in the statute.

Cases of bribery and corruption may need to be reported to governments of countries where there are strict anti-corruption laws and legislations, such as the United States and the United Kingdom. However, it is advisable to seek counsel from attorneys in these jurisdictions before self-reporting.

39 What are the practical steps you need to take to self-report to law enforcement in your country?

In practice, it is important to conduct a proper investigation involving interviews and preparation of an internal report, to get clarity on the alleged offence prior to reporting to any law enforcement agency.

Responding to the authorities

40 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

This depends on a number of factors, including the identity of the authority issuing the notice or subpoena. For instance, if a notice is issued by authorities from the legal metrology division, the company may discuss aspects of the violation and address the authorities' concern before charges are brought (through compounding of the offence). Similarly, if notice is issued to the company in the course of a police investigation, it might be possible to discuss the issues with the police official to aid the investigation. However, this option may not be available in every situation.

If a notice is received by a company from the court, the company can present its defence only after entering proceedings before the court of law, and no dialogue may be possible after the charges are brought.

41 Are ongoing authority investigations subject to challenge before the courts?

There is no restriction on internal investigations being challenged before the courts. For instance, if disciplinary action is initiated against an employee on the basis of an internal investigation, that action may be challenged by the employee before the court.

42 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

In India, there is no specific concept of consistent disclosure packages. In cases where separate notices or subpoenas have been issued to a company, it would have to deal with each of them separately.

However, there may be some scope to request the courts to admit information (e.g., a decision in a court of another country) which would maybe have been provided in a different country, but even this would be at the discretion of the courts.

43 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

Technically, courts in India do not have extraterritorial jurisdiction. Therefore, if an Indian court seeks production of material relating to the Indian company's foreign parent company, the Indian company is not obligated to procure such materials from other countries.

A recent example of this is the *Louis Berger* case, in which the company was prosecuted in the United States under the Foreign Corrupt Practices Act and the Indian government has requested the US government for information from the findings.

44 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

The Indian authorities do share information with law enforcement in other countries case by case. The extent of co-operation with other countries is determined by the nature of the relationship between the countries.

45 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

There is no specific legislation or statute that completely prohibits disclosure of information received during an investigation and use of the same by the third parties. However, courts in India have criticised law enforcement bodies in the past for disclosing sensitive information received during an investigation related to an individual or an entity. If an extremely sensitive document gets seized by investigating authorities, companies usually seek an order from the court specifically restraining disclosure of its contents by investigating authorities.

However, disclosure of any such information may be allowed if it is necessary in the general public interest.

46 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

There is technically no legal power or legislation in place for an Indian law enforcement agency to request a company in India to provide documents from another country. We would normally advise them to refrain and to reject the request. However, the advice may change if other aspects are at play, such as the gravity of the offence and the charges.

47 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?

There are no blocking statutes in India. India has legislation on the protection of sensitive personal data. However, the data protection statutes are aimed more at ensuring sensitive data is not shared without permission of the data provider.

Protection granted under these data protection laws does not apply when a government authority seeks the information. Companies must comply with court or government requests for information as long as it is available within the country.

48 Are there any data protection issues that cause particular concern in internal investigations in your country?

The Information Technology Act, 2000 and rules thereunder govern issues relating to data protection in India. Section 69 of the Act provides an exception to the general rule of maintenance of privacy and secrecy of information. It provides that where the government is satisfied that it is necessary in the interests of the investigation of an offence, it may direct any agency of the appropriate government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored on any computer resource.

49 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

Any document submitted on demand by law enforcement agencies or courts in India are technically confidential documents and may not be discoverable by third parties. The exception to this may be a scenario wherein an international agency (such as Interpol) seeks the help of Indian police agencies in respect of the records of an individual under investigation.

The material so reproduced before law enforcement agencies would be discoverable if it is reproduced in the final judgment by the court. Basically, it is at the discretion of the courts if the information or material produced should form part of the judgment.

Confidentiality for voluntarily produced documents cannot be ensured.

Global settlements

50 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

The following points should ideally be kept in consideration while settling with an enforcement agency in India:

- The settlement must be clear on whether the matter is being settled and whether charges, if any, are being dropped.
- It should be made clear that future inquiries about the same matter should not take place.
- The settlement should clarify that the case would not be reopened.
- In case there is an inquiry, it should be for a fresh matter and not for the same.
- It should be clear that the settlement cannot be used against the party as evidence for another matter.

51 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

Under the provisions of the Indian Companies Act, directors are described as officers in default unless a specific officer or director is designated by the company for overseeing compliance. Further, it defines the duties and responsibilities that directors should keep in mind while undertaking the operations of a company. For contraventions, the Act provides penalties on the part of company as well as directors that range between 100,000 and 2.5 million rupees. Some of the contraventions also result in an automatic vacation of office. In most cases, the penalties are monetary. However, a few provisions also provide for imprisonment, depending upon the gravity of the offences (such as misrepresentation of financial data or fraud).

52 What do the authorities in your country take into account when fixing penalties?

In India, authorities usually take into account the penalty prescribed by law and the gravity of the offence when fixing penalties.

53 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

The concepts of non-prosecution agreements or deferred prosecution agreements are not available in India for corporations. These terms are not recognised under any statutes in the country.

54 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

Each government contract comes with its own terms, and there is no master document prescribing a regime for suspension and debarment from government contracts. Typically, a company can be suspended or debarred from future government contracts for non-fulfilment of contractual obligations in its dealings with any governmental body, or if the company has been found guilty of any major corporate misconduct in the past.

Usually a settlement in another country may not result in automatic suspension of a company or debarment in India, depending on the nature and magnitude of the offence and whether that offence is listed in the suspension criteria in the particular government contract.

55 Are 'global' settlements common in your country? What are the practical considerations?

In the recent past, India has not been involved in any global resolutions. There is currently no specific legislation for this in India.

56 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

Parallel private actions may be permitted only under certain limited circumstances. For instance, parallel private antitrust action is allowed, subject to India's antitrust law.

The Right to Information Act, 2005 empowers a private person (whether plaintiff or not) to request public information. This Act allows an Indian citizen to request from the government any government record, document, etc., not considered confidential.

Publicity and reputational issues

57 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

In India, no specific law or policy guides publicity of criminal cases at the investigatory stage. In practice, the media may print any information at any time, be it at the investigatory stage or during the pendency of the case.

In our experience, we have seen the media reporting investigations into the functioning of a company almost as soon as the investigation starts.

58 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

Larger companies usually have their own in-house communications and publicity managers to deal with corporate crises. However, it is very common for companies in India to outsource this service to a third party who is better experienced at handling publicity tasks.

59 How is publicity managed when there are ongoing, related proceedings?

Since not all investigations by government agencies are made public, companies would normally attempt to ensure that no public disclosure is made at all. If the investigations or proceedings become public, it is customary to engage PR agencies to work behind the scenes to manage the media. At times, consultants who specialise in government relations are also engaged for damage limitation.

Duty to the market

60 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

No, there is no such requirement. In the case of a company whose securities are listed on a recognised stock exchange, care must be taken to comply with any disclosure obligations set out in the listing agreement signed between the company and the stock exchange.

48

Ireland

Carina Lawlor[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

The ongoing investigation into Irish Bank Resolution Corporation (IBRC) by a Commission of Investigation remains the highest-profile corporate investigation under way in Ireland.

It is a very significant investigation as it is connected to the collapse and subsequent wind-down of Anglo Irish Bank plc, a prominent Irish bank that collapsed in connection with the financial crash. The related trial of certain high-ranking banking executives concerning their conduct before the bank collapsed was the longest criminal trial in the history of the state and resulted in penal sentences, which are rarely imposed in Irish business crime cases.

It is important both for the subject matter under investigation and also for the procedural conduct of such investigation in the future. In that regard, it has published a number of interim reports that have highlighted difficulties in conducting such investigations in Ireland, such as duties of confidentiality, privilege and the constitutional rights of persons implicated in the investigation.

Recently, a draft order and terms of reference for a Commission of Investigation into the National Asset Management Agency (NAMA) were published by the Irish government. The terms of reference provide for an investigation into Project Eagle, which is the name given to NAMA's Northern Ireland property-loans portfiolio, which it sold in April 2014 for about €1.6 billion. This was previously the subject of an inquiry in Northern Ireland.

1 Carina Lawlor is a partner at Matheson.

2 Outline the legal framework for corporate liability in your country.

Corporations are separate legal entities and a company can be found liable for the criminal acts of its officers. Section 18(c) of the Interpretation Act 2005 provides that the term 'person' when used in legislation includes a corporate, unless otherwise specified. Companies can also be vicariously liable for the conduct of employees. Where the doctrine of vicarious liability does not apply, the state of mind of an employee can be attributed to the company in circumstances where the human agent is the 'directing mind and will' of the company, or when an individual's conduct can be attributed to the company under the particular rule under construction. A company can also be guilty of a strict liability offence, which is an offence that does not require any natural person to have acted with a guilty mind, such as health and safety legislation infringements.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

An Garda Síochana (the Irish police) is the primary body for the investigation and prosecution of crime in Ireland, with a specialised wing for complex fraud-type offences (the Garda Bureau of Fraud Investigation). There are also a number of regulatory bodies with a separate specific remit to investigate and enforce corporate crime. Such investigations are often carried out with the assistance of the police. These authorities include:

- the Office of the Director of Corporate Enforcement (ODCE), which monitors and prosecutes violations of company law;
- the Office of the Revenue Commissioners (the Revenue Commissioners), responsible for the collection, monitoring and enforcement of tax laws;
- the Competition and Consumer Protection Commission (CCPC), responsible for competition law and consumer protection;
- the Central Bank of Ireland, which regulates financial institutions;
- the Health and Safety Authority, which enforces occupational health and safety law; and
- the Office of the Data Protection Commission (ODPC), which is responsible for data protection law.

In terms of prosecution, offences are divided between summary (minor) offences and indictable (serious) offences. In general, regulatory bodies such as those listed above are authorised to prosecute summary offences directly. The Office of the Director of Public Prosecutions (DPP) is the relevant body for the prosecution of criminal offences on indictment, or for prosecution of summary offences outside the remit of regulatory bodies. The DPP has no investigative functions; the relevant investigating body prepares a file and submits it to the DPP for consideration. It is then solely at the discretion of the DPP as to whether a case will be taken.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

This will depend on the statutory basis for that investigation. For the large part, investigations are initiated on the basis of a complaint alleging that an offence has been committed. Some bodies (such as the Standards in Public Office Commission) can only initiate investigations on foot of a complaint alleging that an offence has been committed, whereas others, such as the ODPC, can also initiate investigations on their own initiative. Different bodies use different factors to consider whether to initiate an investigation into a specific matter. For example, the GBFI has stated that they will assess whether or not to investigate a complaint on the basis of different factors, such as the monetary loss involved, the international dimension to the complaint and the complexity of the issues of law or procedure that arise.

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

The long-established principle of double jeopardy applies in Ireland. A corporation cannot be prosecuted twice for the same or similar offences on the same facts following a legitimate acquittal or conviction by an Irish court or by a court of competent authority in a foreign jurisdiction. There must be identity between the foreign and domestic offences. It is possible for the same course of conduct in an international setting to give rise to multiple separate offences in different jurisdictions.

The fact that a corporation entered into a DPA in a different country is unlikely to prevent prosecution in Ireland, which does not provide for the use of DPAs, unless the DPA was viewed as being equivalent to an acquittal or conviction.

Typically, the principle does not apply until proceedings are concluded. However, under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, no proceedings may be initiated in circumstances where an individual has been charged under that Act in the absence of consent from the DPP.

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

Ireland does not, in general, assert extraterritorial jurisdiction in respect of acts conducted outside the jurisdiction. However, extraterritorial jurisdiction is conferred by statute in respect of specific offences to varying degrees. For instance, section 4 of the Competition Act 2002 provides that it is an offence to be party to an anti-competitive agreement that has the effect of preventing, restricting or distorting competition in trade in goods or services within the state. Importantly, the section is not restricted to agreements made within Ireland.

Examples of specific offences for which Ireland exercises extraterritorial jurisdiction are as follows.

Corruption

The Prevention of Corruption Acts 1889–2010 (the corruption legislation) prohibit bribery offences occurring outside Ireland in two circumstances: (1) if an Irish person or company does something outside Ireland that, if done within Ireland, would constitute an offence under the corruption legislation, that person is liable as if the offence had been committed in Ireland. There is no requirement that the offending act also be an offence in the foreign jurisdiction; and (2) if an offence under the corruption legislation takes place partly in Ireland and partly in a foreign jurisdiction, a person may be tried in Ireland for that offence. To date there have been no prosecutions in Ireland under these extraterritorial provisions.

Money laundering

The Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (the CJ(MLTF) Act) sets out specific circumstances in which an action can be taken for money laundering occurring outside Ireland. If an individual or a company engages in conduct in a foreign jurisdiction that would constitute a money laundering offence both under the CJ(MLTF) Act and in that foreign jurisdiction, they can be prosecuted in Ireland. This extraterritorial jurisdiction may only be exercised where the individual is an Irish citizen, ordinarily resident in the state, or the body corporate is established by the state or registered under the Companies Act 2014.

The Proceeds of Crime Acts

Under the Proceeds of Crime Act 1996–2005 (the PCA Acts), the Irish High Court can make orders depriving a defendant of assets that are merely suspected of being the proceeds of crime, regardless of whether the defendant has been convicted of a criminal offence. The standard of proof required to determine any question arising under the PCA Acts is that applicable to civil proceedings. 'Property' in relation to the proceeds of crime is broadly defined and includes money and all other property, real or personal. 'Proceeds of crime' for the purposes of the PCA Acts means any property obtained or received at any time by, or as a result of, or in connection with criminal conduct. The definition of 'criminal conduct' is such that foreign criminality is covered by the scope of the act where the proceeds are within the state. The legislation has extraterritorial effect therefore where (1) the criminal conduct occurred outside the state, but the respondent and the property are situated within the state, provided that the conduct constituting the offence is also an offence in the foreign state; (2) the respondent is situated within the state and the criminal conduct occurred outside the state and the property is located outside the state; or (3) the property is located within the state, the respondent is situated outside the state and the criminal conduct occurred outside the state, provided that the conduct constituting the offence is also an offence in the foreign jurisdiction.

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

Cross-border investigations, whether by law enforcement, regulators or internal investigations by companies, pose challenges in every jurisdiction for practical, political and legal reasons. For investigations by Irish regulators and law enforcement agencies, the foremost consideration will be whether there is an existing framework for co-operation between Ireland and the other jurisdiction or jurisdictions. The Criminal Justice (Mutual Assistance) Act 2008, as amended, is the primary piece of legislation governing mutual legal assistance between Ireland and other countries. The extent of available co-operation under mutual legal assistance procedures is dependent on the identity of the corresponding state and the greatest level of co-operation is among other EU Member States. Co-operation with third countries (those outside the European Economic Area) is dependent on their ratification of relevant international agreements or the existence of a mutual assistance treaty agreed between them. Regulators and law enforcement can co-operate with their counterparts outside these formal procedures, and this will depend on the relationships between such bodies.

Investigations by regulators or law enforcement and by corporations can also encounter difficulties owing to different legal standards. For example, data protection laws in some countries can restrict the flow of information out of the country, and different levels of protection for private data may restrict the possibility of transfer between the jurisdictions. Further, different rules can apply to matters such as the application of privilege and the constitutional protections owed to persons under investigation.

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

Investigations into similar matters in other jurisdictions are often the catalyst for investigations in Ireland. Irish authorities will usually try to co-operate with foreign investigation authorities, and the exchange of information through appropriate channels can aid an investigation greatly. Irish investigatory authorities will take notice of decisions of foreign investigatory authorities, but the weight given to such a decision will vary depending on factors such as the similarity of the facts under investigation and the jurisdiction concerned. Ultimately, it will be a matter for the Irish authorities to determine whether and how to conduct their own investigations, and prosecutions and enforcement actions in other jurisdictions will at most be one of a number of factors considered.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

Corporate culture can be relevant to considerations of proportionality. Authorities may not pursue a corporate prosecution if the conduct was of a 'lone wolf' individual and otherwise went against the corporate culture. It can also be a mitigating factor at sentencing. However, there are no strict rules and ultimately an ethical corporate culture will not block a prosecution for corporate misconduct.

10 What are the top priorities for your country's law enforcement authorities?

Each of the regulatory authorities listed above is concerned with the monitoring and supervision of activities within its competence. For example, the ODPC will be concerned with data protection while the Revenue Commissioners deal primarily with tax offences. Regulatory bodies typically publish their enforcement priorities annually. For example, the Central Bank of Ireland has stated a current focus on, among other things, anti-money laundering and counter-terrorism financing compliance. The ODPC and the Central Bank of Ireland have both stated a current focus on cybersecurity.

11 How are internal investigations viewed by local enforcement bodies in your country?

Internal investigations are considered part of good corporate governance. However, companies are subject to reporting obligations in respect of certain offences and will therefore be required to escalate matters to law enforcement in certain circumstances (see question 37).

The Irish High Court ruled in *Mooney v. An Post* (1998) 4 IR 288 that the acquittal of an employee of criminal charges does not preclude employers from considering whether an employee should be dismissed on the basis of the impugned conduct. However, if criminal prosecution precedes an internal investigation, in general, internal disciplinary procedures are suspended to respect the individual's right to silence.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

Specific points to note are as follows:

- Whistleblowers are protected by the Protected Disclosures Act 2014. Accordingly, great care must be taken not to violate these protections when allegations come to light in this way.
- Thematic reviews are typically carried out by regulators. By the time an allegation of misconduct has arisen on a thematic review or on foot of any other regulatory oversight, the company may not be able to remedy the matter or otherwise prevent an investigation or enforcement action. For example, the Central Bank of Ireland often bases its investigations under the Administrative Sanction Procedure under the Central Bank Act 1942, as amended, on matters that arose during thematic reviews.
- Where allegations arise through media reports, publicised litigation or other publicised external sources, there are more immediate public relations risks than where a matter arises internally. Companies should consider engaging a PR agency if there are significant reputational risks attached to any allegation of misconduct.
- As detailed below in response to question 37, a company will commit an offence if it fails to report certain suspected offences. Therefore the company itself may be obliged to report the conduct once it has a reasonable suspicion. If the company is a regulated entity, it may be required to make certain disclosures to its regulator or indeed consider a voluntary self-report. Further, auditors have additional disclosure obligations, and misconduct coming to light during their engagement may trigger a reporting obligation.

13 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Search warrants and dawn raids are often used in investigations against companies, particularly by the CCPC and ODCE. Both company premises and private homes of relevant persons can be searched on foot of an appropriate warrant.

There are constitutional protections for persons subject to searches, particularly of private homes. Depending on the specific statute, a regulator or investigatory body would obtain a search warrant to enter a dwelling to conduct a search and to seize documents. There is a general requirement that there is some nexus between the investigation by the regulatory body of the offence in question and the dwelling in question. The body is only permitted to search the premises specified in the warrant and to seize items coming within the terms of the warrant.

Evidence seized outside the scope of a search warrant may, depending on the circumstances, be inadmissible at trial.

14 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

Privileged material is *prima facie* protected from examination by law enforcement or regulatory bodies. Specific statutes, such as the Companies Act 2014 and the Central Bank (Supervision and Enforcement) Act 2013, also provide for the protection of privileged information during investigations.

In practical terms, it can be difficult to determine during a seizure operation whether material is privileged and sometimes the material will be isolated so that a claim of privilege can be assessed later.

The mechanism to assess whether privilege has been properly asserted will be dependent on the legislation under which the search warrant was granted. For example, the Competition and Consumer Protection Act 2014 provides a mechanism whereby material that is seized and which is claimed to be legally privileged is vetted impartially to determine whether privilege has been properly asserted.

15 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

The Irish Constitution recognises a right to silence and the privilege against self-incrimination. Arrested suspects are brought into police custody for questioning 'under caution'. The suspect should be cautioned that they have the right to maintain silence, and anything they say may be used in evidence. However, the Criminal Justice Act 1984 (as amended) provides that in the case of arrestable offences, inferences can be drawn at trial from an accused's silence.

The right to silence can be abridged by statute, most often in the context of regulatory investigations, meaning that answers can be compelled. However, Irish courts have frequently held that statements given under statutory compulsion (such as in connection with

a regulatory investigation attracting a civil penalty) cannot be used against that person in subsequent criminal proceedings, whereas voluntary statements can be.

16 What legal protections are in place for whistleblowers in your country?

The Protected Disclosures Act 2014 protects whistleblowers. Where a worker makes a protected disclosure, the employer in question is prevented from dismissing or penalising the worker, taking an action for damages or an action arising under criminal law, or disclosing any information that might identify the person who made the disclosure. Further, the Act creates a cause of action in tort for the worker for detriment suffered as a result of making a protected disclosure. The definitions of 'protected disclosure', 'relevant wrongdoing' and 'worker' are quite broad and care should be taken to consider whether the Act applies in every case of reported misconduct.

17 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

As a general matter, employees have a constitutional right to 'fair procedures' in any investigative or disciplinary process. This means that, among other things, the employee must be kept appraised of the investigation and must be permitted to participate in the investigation and make points in their defence.

The following specific protections may arise in the context of conduct related investigations and dismissals:

- Unfair dismissal: In general, an employee with one year's continuous service may bring a claim for unfair dismissal. An employer cannot lawfully dismiss an employee unless substantial grounds exist to justify termination, such as the employee's conduct. Regard will also be had to the reasonableness of the employer's conduct and the extent of any failure to adhere to agreed procedures. A preliminary investigation is an essential precursor to a fair disciplinary process.
- Discrimination: Irrespective of length of service, an employee may bring a claim for discriminatory dismissal or discrimination based on any one of the nine discriminatory grounds contrary to equality legislation (i.e., gender, civil status, family status, sexual orientation, religion, age, disability, race (including colour, nationality and ethnic or national origin) and membership of the traveller community).
- Whistleblowing: see question 16.
- Wrongful dismissal or High Court injunction: An employee can seek a High Court injunction to restrain an employer from implementing a dismissal if the decision is not implemented correctly. An injunction maintains the *status quo* pending the determination of an overarching breach of contract claim. A similar order may also be brought to restrain an investigation or disciplinary hearing before matters even reach the dismissal stage. A challenge may be based on corporate governance grounds, the fairness of the procedures adopted or failure to terminate the contract in accordance with its terms.

To fairly dismiss for out-of-work misconduct, there must be a genuine connection between the employee's offence and his or her employment. The connection must be such that it leads to a breach of trust or causes reputational or other damage to the employer. The rights do not differ for officers and directors who are employees.

18 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

The disciplinary process should, at a minimum, follow the WRC's Code of Practice on Disciplinary and Grievance Procedures, the employer's own procedures and involve the basic principles set out below.

- Advance written notice of any allegations, together with any supporting documentation and witness statements should be provided to the employee.
- The employee should be invited, in writing, to an investigation meeting to discuss the allegations and to put forward his or her response.
- The investigation should go no further than to determine whether there is a sufficient factual basis to warrant a matter being put to disciplinary hearing.
- Suspension should only be imposed after full consideration of the necessity for it pending a full investigation of matters. It may be justified if it is to prevent repetition of the conduct complained of or interference with evidence; to protect individuals at risk from such conduct; to comply with any regulatory rule applicable to the individual or their role; or to protect the employer's business and reputation. Suspension must be for no longer than is reasonably necessary and on full pay and benefits.
- Depending on the investigation's outcome, the employee should be invited in writing to a disciplinary meeting to discuss the allegations and to put forward a response. Documents obtained during the investigation should be provided.
- The employee should be allowed to bring a colleague or trade union representative to any meetings.
- Any sanction must be proportionate and reasonable in the circumstances and should be confirmed in writing to the employee.
- A right of appeal to someone not previously involved should be provided.
- Unless the allegations are sufficient to constitute gross misconduct, the sanctions should progress from verbal warning to written warning to final written warning to dismissal. Summary dismissal will only be permitted where the circumstances genuinely constitute gross misconduct.

The extent to which an employer may take disciplinary action against an employee, up to and including dismissal, for failure to participate in an investigation will depend on the circumstances.

Commencing an internal investigation

19 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

There is no statutory requirement for such a document, but it would be considered general good practice. Depending on the circumstances, it may be useful to detail the purpose and scope of the investigation and to clarify the remit of the investigators' role. Matters to cover might include:

- the structure and methodology of the investigation;
- definition of the issues to be covered; and
- details of any engagement with legal counsel and related matters concerning privileged material.

If the investigation concerns employees of the company, it should go no further than gathering the relevant information or evidence to determine whether or not there is a sufficient factual basis to put particular allegations at a formal disciplinary hearing; be carried out in accordance with any relevant internal procedures; and not reach factual conclusions on the evidence or decide whether the allegations are proved.

20 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

Depending on the severity of the issue, it would usually be prudent for a business to commence an internal investigation. The company is only under an obligation to share the results of such an investigation with the relevant authorities where it is required under a court order, statute, or as part of a self-report. A number of legislative provisions impose a positive obligation on persons (including businesses) to report wrongdoing in certain circumstances (see question 37).

It is also, of course, essential that any wrongdoing is ceased as soon as the company becomes aware of it, and that remedial measures are taken where appropriate. Care should be taken to preserve evidence of the wrongdoing, as a failure to do so could result in accusations of destruction of evidence, which can itself be an offence under certain legislation, such as pursuant to section 793 of the Companies Act 2014.

21 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

Privately owned companies are not required to publicly disclose the existence of internal investigations or contact from law enforcement.

Under the Irish Listing Rules, publicly listed companies on the Irish Stock Exchange (ISE) must, without delay, provide to the ISE any information that it considers appropriate to protect investors. The ISE may, at any time, require an issuer to publish such information within the time limits it considers appropriate to protect investors or to ensure the smooth operation of the market.

22 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

Depending on the severity of the issue, it would usually be advisable to inform the board of significant suspicions, an internal investigation or contact from law enforcement officials as soon as practicable so that appropriate action can be taken. However, care should be taken if there is a possibility that any board members are implicated in the relevant conduct, in which case a subcommittee may be constituted to deal with the matter.

23 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

It is advisable to immediately implement a document hold by suspending deletion policies and circulating document retention notices.

The company should review the request and consider the power under which it is exercised, and in particular if the request is voluntary or mandatory. This is because there are risks associated with releasing documentation without being lawfully compelled to do so. External legal advice may be required in this regard.

An inventory should also be prepared listing the materials falling within the notice. The material should then be assessed for privilege. Lastly, copies should be retained of anything provided to the investigation authority.

24 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

The lawfulness or scope of a notice or subpoena from a law enforcement authority may be challenged in the Irish courts through judicial review proceedings, unless it is possible to reach a compromise with the law enforcement agency on the scope of the notice. It may also be possible to obtain an interim injunction in certain circumstances preventing the exercise of the notice, subpoena or warrant, or preventing the authority using information already obtained, until the court rules on the validity of the instrument.

Attorney–client privilege

25 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

Any requirement to disclose documents obtained through an internal investigation to the Irish authorities is qualified by legal professional privilege. In Ireland, documentation may attract legal professional privilege either in the form of legal advice privilege or litigation privilege. Legal advice privilege arises over confidential communications between lawyer and client that are created for the sole or dominant purpose of giving or seeking legal advice, even if there is no actual or potential litigation. Litigation privilege applies to communications between a lawyer and a client made in the context of contemplated or existing litigation or regulatory action. As it is the broader form of legal professional privilege and also covers

communications with third parties, such as experts, litigation privilege is the preferable form of privilege to assert in the context of internal investigation, provided there is actual or contemplated litigation or regulatory action.

The main way to protect privilege is to involve lawyers in internal investigations at an early stage, although it should be noted that privilege cannot be created over existing documents after their creation merely by involving lawyers. To ensure that existing privilege is not lost, it is important to limit the disclosure or sharing of materials to essential persons only. Legal advice should not be summarised or copied and shared by non-legal persons. If privileged materials need to be shared with third parties, it is important to use appropriate confidentiality agreements.

26 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

Legal professional privilege applies equally to individuals and companies and belongs to the client. See question 25.

27 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

Both in-house and external counsel attract legal professional privilege where the criteria for legal professional privilege are met. However, in the context of the investigation of competition breaches by the European Commission internal communications with in-house counsel are not considered legally privileged.

28 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

Asserting legal professional privilege is a legal right and the fact of its assertion should not be held against a party. However, if the materials over which legal professional privilege are being asserted are central to any enforcement investigation (such as a party defending certain conduct on the basis that it was taken on foot of legal advice), it may appear unco-operative to refuse to disclose such material. In such case, disclosure could, in fact, be in a party's strategic interest. Any decision to waive privilege should be carefully considered, as once waived, legal professional privilege is lost. It is generally recommended that waiver should be limited to those materials strictly necessary and should be made on a limited and specified basis, namely a general waiver of all legal professional privilege in respect of a particular matter is not advisable.

29 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

It is possible to waive privilege on a limited basis. However, care should be taken as privilege can inadvertently be lost in such circumstances. The scope of the waiver should be clear, limited and in writing, and of utmost importance is that confidentiality in the material should be maintained.

30 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

If the waiver of privilege was appropriate, limited and restricted, it should not defeat the overall assertion of legal professional privilege. However, this will depend on the extent and nature of the waiver in each case.

31 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

Common interest privilege does exist in Ireland. It is important that common interest privilege is expressly asserted and that the third party is aware of the necessity of preserving privilege in the materials received, such as by not disclosing it to any other persons outside the common interest circle.

32 Can privilege be claimed over the assistance given by third parties to lawyers?

Third-party communications are only protected against disclosure in the context of litigation privilege. Litigation privilege can be asserted over third-party communications where the dominant purpose of the communication is in anticipation of existing or contemplated litigation.

Witness interviews

33 Does your country permit the interviewing of witnesses as part of an internal investigation?

Witnesses can be interviewed in internal investigations and are often seen as an integral part of the fact-finding exercise of an investigation. However, the internal investigation would not be able to compel witnesses to attend, except to the extent that employees can be requested to co-operate in the context of their employment.

34 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

Reports that contain legal analysis, advice or conclusions, or which are prepared in contemplation of or in connection with litigation, can be protected by legal professional privilege.

35 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

It is important that witnesses are warned of the nature of the interview, whether they are implicated in any wrongdoing and, crucially, of any possible consequences for them of the investigation process. For example, if it is possible that an employee will be sanctioned or dismissed if wrongdoing is upheld, the employee must be appraised of this risk. It would also be important to note that any lawyers present are acting for the company and not for the employee, who may, in some cases, have their own legal representation.

Existing employees have a greater right to fair procedures as they are more likely to face the possibility of an adverse outcome, such as dismissal. However, it is best practice to accord equal fair procedures to all interviewees.

36 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

It is good practice to ensure that any documents of relevance to the witness are put to them. 'Interview by ambush' is contrary to fair procedures and open to challenge, particularly by employees.

Employees have no statutory right to legal representation at witness interviews. However, if the employee or witness is, or may become, the subject of the investigation, the employer should consider advising the employee or witness to have legal representation to minimise the risk of a later legal challenge to the investigation process. Further, if the person requests permission to have legal representation, the company should only refuse this request if considered strictly necessary. This should be assessed case by case.

Reporting to the authorities

37 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

A number of legislative provisions impose a positive obligation on persons (including businesses) to report wrongdoing in certain circumstances. Most significantly, section 19 of the Criminal Justice Act 2011 provides that a person is guilty of an offence where he or she fails to report information which he or she knows or believes might be of 'material assistance' in preventing the commission of, or securing the prosecution of another person in respect of, certain listed offences, including many corporate crimes. The disclosure must be made 'as soon as practicable', and a person who fails to disclose such information may be liable to a fine or imprisonment of up to five years, or both.

Other mandatory reporting obligations include duties on:

- persons with a 'pre-approved control function' to report breaches of financial services legislation;
- designated persons (auditors, financial institutions, solicitors) to report money laundering offences;
- auditors to report a belief that an indictable offence has been committed;
- auditors or persons preparing accounts to report theft and fraud offences; and
- all persons to report any offence committed against a child.

38 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

A company might be advised to self-report, in Ireland or overseas, to mitigate the risk of prosecution or any potential sentence that may be imposed by a court. There are no express provisions for immunity or leniency in prosecution under Irish law, but self-reporting can be

considered a mitigating factor. The DPP does have discretion to grant immunity in certain circumstances. Some regulatory regimes, such as the Central Bank's Administrative Sanction Procedure, also consider self-reporting as a mitigating factor affecting the level of sanctions.

The exception is the Cartel Immunity Programme operated by the CCPC, which allows a member of a cartel to apply for immunity in return for co-operating with the CCPC. Only the first member of a cartel to come forward can avail of the programme and must meet strict eligibility criteria.

In terms of extraterritorial self-reporting, an Irish company may self-report to authorities in other jurisdictions that have immunity or leniency programmes if the conduct in question could also be investigated or prosecuted by such authorities. For example, the European Commission also runs a cartel immunity programme and an Irish company may self-report to the Commission to avail of this.

39 What are the practical steps you need to take to self-report to law enforcement in your country?

It is important that a company has considered its risks and, as far as possible, investigated the matter before making a report. A report can be made in writing, such as by letter to the appropriate authority. The report should include all evidence in the company's or individual's possession which would assist the Irish police or regulator. The report should also include the contact details of the relevant person, the date and time of the suspected offence and the address at which the suspected offence occurred. It would also be prudent to ensure that any data deletion policies are suspended during this time so that materials are retained should the police have further queries following the report.

Responding to the authorities

40 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

Dialogue may start with the authority once a notice has been received and analysed. For example, the company may wish to address concerns such as the scope of the request, the legal basis or the deadline for compliance. It is important that care is taken with such communications, as they can set the tone for engagement with the authority and may be relevant for any subsequent court challenge or dispute that may arise.

41 Are ongoing authority investigations subject to challenge before the courts?

Ongoing investigations may be subject to challenge in the courts, usually through an application for judicial review. It is also possible to seek injunctions, typically on an interim basis, to protect legal rights while the underlying challenge is resolved.

42 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

Each request should be treated separately as the legal basis for the request will likely be different. A request which may appear to compel disclosure of documents may not in fact have legal effect if it is from outside the jurisdiction and the procedures for compelling such information cross-border (such as the procedures under the Criminal Justice (Mutual Assistance) Act 2008, as amended, see question 44) are not engaged. It is generally not advisable to release information, particularly personal data within the meaning of the Data Protection Acts 1988 and 2003, in the absence of lawful compulsion. 'Package disclosures' are therefore usually unadvisable as documents one agency has a legal right to obtain may not be within the compulsory power of another agency. That said, where requests are made from different authorities, it is important to have a consistent approach with regard to how requests are treated and what arguments are made to authorities.

43 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

The appropriate response will depend on the nature of the request and the relationship between the company subject to the request and the entities holding the documents across borders. If the company in receipt of the request has the power to compel production, such as from a branch or subsidiary, it may be required to do so. However, generally speaking the entity to which the request is addressed will be the only body with an obligation to respond.

44 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

Irish law enforcement and regulatory bodies are known to share information on an informal basis with equivalent bodies in different jurisdictions.

In terms of formal procedures, the Criminal Justice (Mutual Assistance) Act 2008, as amended, is the primary piece of legislation governing formal mutual legal assistance between Ireland and other countries. The extent of available co-operation under mutual legal assistance procedures is dependent on the identity of the corresponding state. The greatest level of co-operation exists between Ireland and other EU Member States. Co-operation with third countries (those outside the European Economic Area) is dependent on their ratification of relevant international agreements or the existence of a mutual assistance treaty agreed between them.

45 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

There is no distinct statutory obligation that creates an obligation on the police to keep information received during an investigation confidential.

However, Irish law recognises a broad 'right to privacy', which is protected by the Irish Constitution, the EU Charter of Fundamental Rights and the European Convention on Human Rights. Further, data protection is regulated in Ireland primarily by the Data Protection Acts 1988 and 2003 (the Data Protection Acts). Irish data protection laws reflect EU data protection laws and protect the personal data of individuals from disclosure in certain circumstances. The police are subject to the same obligation under the Data Protection Acts as all 'data controllers', within the meaning of the Data Protection Acts, when processing personal data. There are exceptions to the rules set out in the Data Protection Acts, including where the processing is required to investigate or prevent an offence.

The police may disclose information to law officers and other law enforcement agencies during an investigation or on the basis of the prevention and detection of offences, under mutual assistance agreements with Interpol Europe and other agencies with a statutory investigative and enforcement role.

Whistleblowers are protected from identification by the Protected Disclosures Act 2014. Accordingly, great care must be taken not to violate these protections when an investigation involving whistleblower information is under way. However, under the act, the identity of whistleblowers can be disclosed to prevent a crime or to aid in the prosecution of a criminal offence.

46 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

In such circumstances, it would usually be prudent to advise the company not to provide the documents. The company should, however, ensure that it is not violating any laws in its own jurisdiction by doing so. The company should inform the requesting authority of the basis for the decision to refuse the request for documents.

47 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?

Data protection is regulated in Ireland primarily by the Data Protection Acts 1988 and 2003. Irish data protection laws reflect EU data protection laws and protect the personal data of individuals from disclosure in certain circumstances. The transfer of data outside Ireland is restricted, but there is no outright 'block' preventing all transfers. The main implication of Irish data protection law is that companies may be reluctant to release materials in the absence of a legal obligation.

As discussed below under question 48, Irish law also recognises a broad right to privacy, which can restrict the disclosure of data even where the disclosure would comply with the Data Protection Acts.

Further, care should be taken when releasing documents that relate to any type of contractual relationship, as there may be confidentiality terms in the contract or engagement terms that could be violated by the disclosure. A party should always be mindful that if it releases information without being compelled to do so, it is not protected from claims that it has breached Irish data protection legislation or breach of confidence claims.

48 Are there any data protection issues that cause particular concern in internal investigations in your country?

The Data Protection Acts restrict the use and disclosure of an individual's data in Ireland. There are exceptions to the protection given under the Data Protection Acts, but there is no specific exemption where an internal investigation is being carried out. Therefore all the rules and protections regarding personal data, as set out in the Data Protection Acts, must be followed during an internal investigation. The Data Protection Acts allow for data to be processed where it is necessary for the purposes of legitimate interests pursued by the data controller, which can be the case for an internal investigation, but that needs to be balanced against the fundamental rights and freedoms and legitimate interests of the data subject in question.

Organisations do have a legitimate interest in protecting their businesses, reputations, resources and equipment. However, as outlined above, Irish law recognises a broad 'right to privacy', which includes a right to privacy at work and you do not lose your privacy and data protection rights just because you are an employee. Any limitation of the employee's right to privacy should be proportionate to the likely damage to the employer's legitimate interests. Companies should draft an internal investigation policy reflecting this balance, and employees should be notified of the nature, extent and purposes of any investigation.

49 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

As outlined above, there are risks attached to voluntary production of documents, and it is generally not advised unless there are compelling reasons to do so. In particular, as noted above, a company may be in breach of the Data Protection Acts 1988 and 2003 if it releases materials that contain personal data in the absence of lawful compulsion, and may also be in breach of confidence if it releases confidential material without being compelled to do so. There may also be other contractual consequences for a company releasing certain materials voluntarily. There is no automatic confidentially attached to materials disclosed to law enforcement, unless restrictions have been agreed to that effect. Accordingly, material provided to authorities voluntarily may be shared with other authorities or used for purposes other than the initial basis of the request. Materials obtained on foot of a compulsory power are subject to greater protections. However, once material is in the possession of an authority there is nothing to prevent a third party from seeking the material, such as through a non-party discovery order.

Global settlements

50 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

Although deferred prosecution agreements do not exist in Ireland, settlements are possible with certain regulatory bodies. For example, the Central Bank of Ireland commonly uses settlements to resolve investigations brought under the Administrative Sanctions Procedure under the Central Bank Act 1942, as amended. The company should balance the seriousness of the charge, the effect of a conviction and the strength of the case against it, against the terms of the settlement, such as the quantum of any fine and whether there is publicity associated with the settlement. Care should be taken with regard to a settlement under the Cartel Immunity Programme, to ensure that the stringent eligibility criteria are met before engaging with the CCPC.

51 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

Irish criminal legislation typically provides for monetary fines or terms of imprisonment for offences. Given the nature of corporate entities, which cannot be imprisoned, the most common form of sanction against a corporate entity is a fine. However, while less common, Irish legislation also provides for specific remedies such as compensation orders and adverse publicity orders under health and safety legislation.

Common sanctions in the context of business crime are restriction and disqualification orders. Under section 839 of the Companies Act 2014, where a person has been convicted of an indictable offence in relation to a company, or convicted of an offence involving fraud or dishonesty, that person may not be appointed to, or act as, an auditor, director or other officer, receiver, liquidator or examiner or be in any way, whether directly or indirectly, concerned or take part in the promotion, formation or management of any company.

As discussed further under question 54, companies convicted of certain offences may be excluded from participation in public tenders for a specific time.

52 What do the authorities in your country take into account when fixing penalties?

Sentencing of corporate crimes is largely a function for the courts. There is no express provision under Irish law for immunity or leniency in prosecution. If a business is found guilty of an offence, a wide range of factors may be taken into account at the discretion of the court. Mitigating factors include whether the company ceased committing the criminal offence on detection or whether there were further infringements or complaints; whether remedial efforts to repair the damage caused were utilised by the company; the existence of a compliance programme; and whether the company itself reported the infringement before it was detected by the prosecuting authority. Additionally, in imposing any sentence, the court must comply with the principle of proportionality as set out in *People (DPP) v. McCormack* [2000] 4 IR 356.

Certain sanctions, such as those available to the Central Bank under the Administrative Sanction Procedure or the CCPC in connection with cartels, can be expressed as a percentage of turnover. This allows the size of the entity to be considered when penalties are imposed.

53 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

Non-prosecution agreements and deferred prosecutions are not available in Ireland.

54 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

The 2014 EU Public Sector Procurement Directive was transposed into Irish law by the European Union (Award of Public Authority Contracts) Regulations 2016. Under these Regulations, companies must be excluded from public procurement for a specific period where they have been convicted of certain offences. The Regulations also provide for offences that carry discretionary debarment. These include offences under EU law, meaning that a company should take care when settling charges in another country, as doing so could, depending on the offence, trigger these exclusion rules.

The Regulations enable companies to recover eligibility to bid for public contracts by demonstrating evidence of 'self-cleaning', such as the payment of compensation to the victim, clarification of the facts and circumstances of the offence, co-operation with the investigating authority, and the implementation of appropriate measures to prevent further criminal offences or misconduct.

55 Are 'global' settlements common in your country? What are the practical considerations?

It is possible for a domestic authority to reach a resolution as part of a coordinated approach with an overseas authority. If a party wishes to reach a settlement with authorities in another country or countries, it should, however, be aware that such an agreement may not prevent Irish authorities from continuing to pursue a prosecution.

56 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

A defendant may be subject to simultaneous civil and criminal proceedings arising out of the same set of circumstances. There is no obligation on the courts to adjourn the civil proceedings pending the completion of the criminal proceedings. Civil proceedings are, however, commonly adjourned pending the outcome of the criminal case. As there are different burdens of proof in civil and criminal matters, the outcome of civil and criminal proceedings will not necessarily be the same. It is also possible, although rare, for individuals to initiate private criminal prosecutions by issuing a summons pursuant to the Petty Sessions (Ireland) Act 1851 in certain limited circumstances.

Authorities are not obliged to disclose their files to such persons unless the particular file is generally open to the public or a court order has been obtained.

Publicity and reputational issues

57 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

The Irish judiciary is extremely protective of the accused's right to a fair trial and will prohibit or stay a trial if necessary. This sometimes occurs in respect of high-profile cases where the extent of publicity affects the ability of the defendant to have a fair jury trial. A recent example is the trial of a high-profile former executive of Anglo Irish Bank, which was adjourned and rescheduled due to concerns of adverse publicity surrounding the trial.

Reports that undermine legal proceedings can amount to contempt of court. Further, any reporting that goes beyond a faithful account of the court proceedings could give rise to defamation claims.

58 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

In larger companies, corporate communications are generally managed by a team of marketing professionals, and it is common for companies to employ public relations companies where there is a risk of negative publicity.

59 How is publicity managed when there are ongoing, related proceedings?

It is important that any public statements issued by the company do not potentially prejudice ongoing criminal proceedings or investigations. Statements issued by a company in such circumstances should be brief, factual and approved by a company's legal advisors. Care should also be taken that no comments are made that potentially identify any persons, as there could be a risk of defamation proceedings if the statement incorrectly implies that the person has committed any wrongdoing.

Duty to the market

60 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

As discussed above, the ISE may require an issuer to publish information within such time limits as it considers appropriate to protect investors or to ensure the smooth operations of the market.

49

New Zealand

Polly Pope, Kylie Dunn and Emmeline Rushbrook[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

In April 2017, Fujifilm Holdings Limited (FHL), a Japanese company, reportedly commenced an internal investigation into the alleged overstatement of revenues by a subsidiary company within its group: Fuji Xerox New Zealand Limited (FXNZ). A summary of the investigation report, dated June 2017, has been released publicly.

New Zealand's Serious Fraud Office has indicated that it is not investigating the matter but will review the report and any other material it receives. The issues raised have attracted some attention from international media, as well as New Zealand politicians, as FXNZ holds a number of services contracts with the government.

2 Outline the legal framework for corporate liability in your country.

While there are some offences that on their proper interpretation cannot be committed by corporations (as opposed to natural persons), the general position in New Zealand is that corporations are legal persons and may be held criminally liable for offences. A corporation may be criminally liable for the conduct of employees or agents through the application of the doctrine of vicarious liability, or it may be liable directly or personally. There is no corporate manslaughter offence under New Zealand law. Although it was considered for inclusion in the Health and Safety at Work Act 2015, it was ultimately excluded.

1 Polly Pope and Kylie Dunn are partners and Emmeline Rushbrook is a senior associate at Russell McVeagh.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

Key law enforcement authorities regulating corporations include:

- New Zealand's Serious Fraud Office, which investigates and prosecutes serious or complex financial crime, including bribery and corruption;
- the Inland Revenue Department (IRD), which is responsible for enforcing New Zealand tax law (including investigating tax-related offending);
- the Financial Markets Authority (FMA), which is responsible for enforcing securities, financial reporting and company law related to capital markets and financial services in New Zealand;
- the Commerce Commission, which enforces legislation promoting competition in New Zealand markets and consumer protection legislation, including legislation prohibiting misleading and deceptive conduct in trade; and
- Worksafe, the workplace health and safety regulator, which conducts investigations and criminal prosecutions in relation to workplace health and safety breaches.

Unlike many similar jurisdictions, New Zealand has no centralised agency to take prosecution decisions. Regulatory agencies frequently publish their own enforcement policies. To assist in maintaining a core set of standards for the conduct of public prosecutions, the Solicitor-General publishes Prosecution Guidelines. These guidelines contain no specific policies relating to the prosecution of corporations.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

The statutory requirements differ across enforcement authorities, but in all cases there are limits on when an investigation can be commenced and information-gathering powers used. For example, the Director of New Zealand's Serious Fraud Office requires a reason to suspect that an investigation into the affairs of any person may disclose serious or complex fraud before issuing a notice to produce a document; the Director then needs to satisfy the higher threshold requirement of having reasonable grounds to believe that an offence involving serious or complex fraud may have been committed before issuing a notice requiring a person to attend an interview.

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

The principle of double jeopardy may apply to prevent a corporation from facing criminal exposure in New Zealand after it resolves charges on the same set of facts in another country. Section 26(2) of the New Zealand Bill of Rights Act 1990 provides that no one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again. This provision applies to all legal persons, including corporations, by virtue of section 29. Difficult issues could arise, however, and the principle of double jeopardy could be tested

if it is thought that an alleged offender has been unreasonably or improperly acquitted in, or unreasonably leniently punished by, the courts of another country.

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

Criminal law does not have general extraterritorial effect. There are, however, a range of offences where conduct occurring outside New Zealand can amount to an offence in New Zealand. An example is the bribery of foreign public officials by an employee of a company incorporated in New Zealand.

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

The principal issues that have arisen in cross-border investigations we have been involved in include:

- ensuring that there is no difference in approach between jurisdiction as to the scope and application of legal advice and litigation privilege;
- ensuring that there is no difference in approach to data protection or privacy laws and that all data transfer arrangements put in place take into account the need to respect these laws and protect legal professional privilege;
- understanding the different legal offences in play across multiple jurisdictions, including determining whether different regimes may have applicable extraterritorial offences; ensuring that there is no difference in approach between jurisdictions as to the potential culpability of officers or employees that may result in additional care in respect of providing independent advice to officers or employees; and ensuring that there are no differences in approach to positive obligations to notify regulators and enforcement agencies of potential offences;
- whether evidence-sharing or mutual assistance treaties exist between the relevant jurisdictions; and
- practical issues around the analysis, review and translation of datasets that include a mix of languages.

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

New Zealand law enforcement authorities generally keep abreast of international developments and try to co-operate with their counterparts in foreign jurisdictions. In this respect, New Zealand's Serious Fraud Office, FMA, IRD and Commerce Commission all have standing co-operation agreements in place with equivalent authorities in other jurisdictions.

In the event of a decision by a foreign authority on an identical matter being investigated in New Zealand, we would expect that New Zealand authorities would take into account that decision but continue to conduct their own investigation.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

Corporate culture has been receiving increased prominence in recent years in New Zealand, particularly in respect of workplace health and safety and the financial services sector. Enforcement authorities have indicated that cultural factors may influence enforcement outcomes in the event of misconduct and other legislative breaches.

10 What are the top priorities for your country's law enforcement authorities?

A major focus for New Zealand's Serious Fraud Office has been bribery and corruption, particularly as New Zealand increasingly has links to high-risk jurisdictions, including doing more business abroad in countries in the red zone of the Transparency International index.

The IRD is focusing on implementing proposals to address base erosion and profit shifting (BEPS) and on implementing systems to allow for the greater exchange of information between tax authorities.

Both the FMA and Commerce Commission continue to focus on conduct that has the potential to harm customers, particularly vulnerable customers, or harm New Zealand's reputation. One recent focus of the FMA has been to remove a number of firms from the Financial Services Providers Register (FSPR) because there have been concerns that the public (including overseas customers) may interpret 'registration' on the FSPR to mean that an entity is actively regulated in New Zealand. However, the FMA does not regulate companies simply because they are registered on the FSPR.

11 How are internal investigations viewed by local enforcement bodies in your country?

New Zealand regulators and enforcement agencies are typically not opposed to internal investigations that would not impede a criminal investigation. However, if a matter becomes known to an authority before the internal investigation has begun or been concluded, some caution is necessary. At present, New Zealand regulators and enforcement agencies provide less formal guidance on the appropriateness and expectations around internal investigations than in some other jurisdictions.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

Allegations of misconduct come to light in all manner of ways in New Zealand, including:

- after specific accidents or events that highlight issues;
- through whistleblowers;
- through internal and external audits and compliance reviews;
- through thematic reviews undertaken by regulators; and
- through media reports, including in respect of emerging issues in other jurisdictions.

13 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Authorities that investigate corporate crime in New Zealand, such as the Serious Fraud Office or FMA, may conduct dawn raids of businesses or residential premises under the authority of a search warrant issued by the court or an issuing officer. The Commerce Commission also has similar powers.

The authorities will also consider using their powers to compel companies to provide information via the authorities' respective statutory powers by issuing statutory notices.

When a raid is carried out under a warrant in New Zealand, the authority may use reasonable force to gain entry to the premises. However, it may only search the premises specified in the warrant and seize items within the scope of the warrant. Some authorities have additional powers that can be exercised during the search, including compelling persons to assist with the search or to answer questions relevant to the search, such as how to access electronic documents or where documents are located.

If there are significant errors in the process of obtaining the warrant or authorising the raid, or in its execution, the raid can be challenged by judicial review (in the High Court) and rendered unlawful, and the material seized during the raid could be rendered inadmissible.

14 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

In most instances, legally privileged material cannot be seized during a dawn raid.

The authorities who investigate corporate crime are frequently accompanied during raids by an independent lawyer specifically tasked with reviewing on-site any material that the company asserts as privileged. It is important to be aware of where privileged material is likely to be stored (electronically and physically) so that claims for privilege can be made before items are seized. The company should assert its rights in writing in this regard.

Where there is a dispute as to privilege, in practice, the authority will often seal the material or the server (depending on what is permitted to be seized under the warrant) for review by an independent lawyer (typically a barrister) for privilege before it is examined by the investigating team.

Technology such as servers, mobile phones and tablets may contain both privileged and non-privileged material that cannot be separated. These can be seized or cloned during the raid, subject to the terms of the warrant. In practice, the privileged material will then be quarantined by digital forensic experts within the authority and privileged material will be identified by applying search criteria provided by the company.

15 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

A person providing required information in the course of a proceeding or to a person carrying out a statutory power has a right against self-incrimination when providing testimony. This

right does not apply when it is removed by statute, and a number of New Zealand statutes that provide regulatory investigation powers expressly remove this right. Whether information obtained compulsorily is admissible in court will depend on the statute under which that information is acquired.

16 What legal protections are in place for whistleblowers in your country?

The Protected Disclosures Act 2000 offers protection to individuals who make qualifying protected disclosures of serious wrongdoing in or by an organisation. A disclosure is protected if:

- the information is about 'serious wrongdoing' as defined in the Protected Disclosures Act;
- the individual has a reasonable belief that the information is true (or likely to be true);
- the individual wishes to disclose the information for it to be investigated; and
- the individual wishes the disclosure to be protected.

A protected disclosure must be made in accordance with the internal procedures of the organisation, unless circumstances permit otherwise.

An individual who makes a protected disclosure is granted three core protections under the Protected Disclosures Act:

- Protection from retaliatory action – the individual cannot be dismissed or disadvantaged in his or her employment as a result of making the disclosure.
- Confidentiality – anyone to whom the disclosure was made must use his or her best endeavours not to disclose information that might identify the individual (unless the individual's consent is obtained or there is a reasonable belief that disclosure of identity is essential to the investigation or the principles of natural justice).
- Immunity from civil or criminal liability – the individual cannot be sued for making a protected disclosure.

Upon receipt of a protected disclosure, an organisation has 20 working days to take action, and failure to do so entitles an individual to make further disclosure to an appropriate authority.

17 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

Justification test

Under the Employment Relations Act 2000, an employee may only be dismissed or disadvantaged (when in ongoing employment) lawfully if the employer can justify its action. The test for justification is whether the employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This is an objective test, which requires an employer's actions to be both substantively justified and procedurally fair.

Characteristics of a fair process in relation to an allegation of misconduct include (but are not limited to):

- conducting a sufficient investigation having regard to resources available;
- advising the employee of the nature of allegations against him or her;

- providing all relevant information and an opportunity to provide feedback;
- providing an opportunity for the employee to be supported by a support person or other representative; and
- genuine consideration of feedback provided by the employee prior to making a decision.

Where an employer is unable to justify an action (according to the test above), the employee has a personal grievance. Potential remedies for a successful personal grievance include reinstatement, reimbursement of lost remuneration and compensation for hurt and humiliation.

Good faith obligation to employees

Both employers and employees owe each other a duty of good faith. The duty of good faith includes not doing anything that directly (or indirectly) misleads or deceives (or is likely to mislead or deceive) the other. This also requires parties to be active and constructive in establishing and maintaining a productive employment relationship as well as being responsive and communicative.

Specifically, where an employer proposes to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, the employer has a good faith duty to provide the affected employee with all relevant information. The employer must also provide the employee with the opportunity to comment on the information.

Directors and officers

If a director is also an employee, the above obligations apply with regard to the employment relationship. All directors will also be subject to obligations under the Companies Act 1993, including duties to act in good faith, act in the best interests of the company and exercise the care, diligence and skill of a reasonable director in the same circumstances. Failure to comply with such duties may result in additional consequences.

18 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

There is no requirement for an employer to suspend an employee who is implicated or suspected of misconduct. However, suspension may be lawful, provided the employee's employment agreement contains a power to suspend, a dismissable action has been alleged and a fair process is followed.

An employee can only be dismissed for refusing to participate in an internal investigation if such a refusal constitutes a failure to follow a lawful and reasonable instruction from the employer. Whether this is the case will depend on whether participation in the investigation is within the scope of the employee's role.

Generally in respect of this question, we note again that the justification test and good faith obligations apply to all disciplinary processes or other actions taken by an employer against an employee.

Commencing an internal investigation

19 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

There are a range of practices in New Zealand depending on the legal representatives engaged. It is, however, good practice to draw up written terms of reference. This is particularly the case when an external party is being instructed and there is a desire to ensure a tight rein is kept on the scope of the investigation. Key purposes of a term of reference document include:

- setting out very clearly the aims of the investigation;
- defining the scope of the investigation, in terms of both issues to be covered and any proposed limitations in terms of access to people or documents;
- recording who is conducting the investigation and to whom in the company (and in what form – written or oral) they are to report;
- setting time frames.

Privilege should be a key consideration when drafting the terms of reference. Where litigation privilege may be claimed over a report, the terms of reference should record that the company anticipates proceedings and that the dominant purpose of the investigation is preparing for those proceedings. Given privilege is a matter of substance and not form, this alone will not guarantee a claim of privilege is successful. Further, the terms of reference will also need to be implemented as intended for privilege to attach.

20 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

A company should obtain prompt legal advice on the issue, and should consider matters including:

- notifying insurers;
- preserving claims against or minimising liabilities to other parties;
- identifying any other jurisdictions and regulators potentially relevant to the issue;
- continuous disclosure obligations;
- any legal obligations to report or regulator policies encouraging self-reporting;
- protecting whistleblowers;
- commencing employment investigations; and
- document preservation.

21 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

Companies publicly listed on the New Zealand Exchange must disclose material information immediately. 'Material information' means information that:

- a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of the issuer's quoted securities; and
- relates to particular securities, a particular issuer, or particular issuers, rather than to securities generally, or issuers generally.

Some exceptions to the continuous disclosure obligation apply, notably where information is generated for internal management purposes, or comprises matters of supposition or is insufficiently definite to warrant disclosure. Legal advice is recommended on the application of continuous disclosure rules to a particular internal investigation or contact from law enforcement.

Privately owned companies are not required to publicly disclose the existence of internal investigations or contact from law enforcement.

22 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

If the allegations are serious and could expose the company to legal or reputational risk, the board of the company would usually be briefed at the outset and kept updated on progress. It would, however, be usual for a subcommittee or some other person or committee to hold responsibility for the internal investigation.

23 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

Upon receipt, the notice or subpoena should be sent to the appropriate person or persons, which will usually include the general counsel. We recommend acknowledging receipt of the notice immediately, and indicating that the notice will be considered and that the recipient will revert with any questions or concerns as to the scope or timelines set out in the notice. An initial assessment of the legal basis for the notice (for instance, to check whether it is a voluntary or compulsory request, whether it is validly issued and whether there are any confidentiality obligations) is recommended.

Consideration should then be given to which documents and other materials may respond to the notice or subpoena, and steps should be taken to preserve and hold those documents and materials. Consideration should also be given to how best to address the request, for example, keyword searching across date ranges, etc. Issues of privilege, data privacy and (where applicable) bank secrecy and contractual confidentiality obligations should be considered (noting there may be particular issues where a voluntary notice is issued).

Once a plan is developed as to how to respond in terms of process, we typically recommend checking the approach to be adopted with the requestor and explaining any difficulties foreseen in terms of completing what is required within the time frame set in the notice.

The company may be required to take steps to preserve documents and data prior to the receipt of a notice or a subpoena if earlier correspondence with the law enforcement authority suggests a proceeding may be commenced. An obligation to preserve documents exists from the time a court proceeding is reasonably contemplated. Particular consideration should be given to automated document deletion practices as electronic documents must be preserved in a retrievable format even where they would otherwise be deleted in the ordinary course of business.

24 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

Before making any formal challenge, it may be possible to vary the scope and terms of a notice or subpoena through informal agreement with the issuing authority. A notice or subpoena issued by a public authority may otherwise be formally challenged through an application to the High Court for judicial review.

In a notable example of a challenge through judicial review, notices issued by the FMA requiring the recipients to supply information or produce documents were declared to be unlawful due to a failure to comply with the statutory requirement to specify a time for compliance.

Attorney–client privilege

25 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

In some circumstances, where an investigation is conducted by lawyers and comprises confidential legal advice, or an investigation is conducted for the dominant purpose of preparing for contemplated court proceedings, privilege may be claimed over aspects of the investigation. A company should take legal advice on the applicability of privilege before commencing an internal investigation. Where privilege attaches, the relevant communications or work-product must be kept confidential to preserve privilege.

26 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

Under the Evidence Act 2006, legal advice privilege attaches to communications between a person and their legal adviser if:

- the communication was intended to be confidential; and
- it was made in the course of, and for the purpose of the person obtaining professional legal services from the legal adviser, or the legal adviser giving such services to the person.

Corporations can be persons for the purposes of the Evidence Act. The same privilege applies to individuals.

27 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

Yes, so long as the inside or outside counsel holds a current practising certificate. Privilege may attach to communications to or from an in-house lawyer, provided that the in-house lawyer holds a current practising certificate, and provided that the communications were intended to be confidential and were made in the course of, and for the purpose of, the person obtaining professional legal services. Privilege may also apply to lawyers of certain named overseas jurisdictions.

28 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

The concept of limited waiver of attorney–client privilege is recognised as a potential step, but there are no specific policies or contexts where it is expected by regulators as a matter of course.

29 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

The concept of limited waiver is recognised in New Zealand. The Evidence Act provides that a person who has legal advice or litigation privilege (for instance) may waive that privilege either expressly or impliedly. The Act sets out those situations where privilege will be deemed to be waived generally:

- if the privilege holder (or anyone with the authority of that person) voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion or document in circumstances that are inconsistent with a claim of confidentiality;
- if the privilege holder acts so as to put the privileged communication, information, opinion or document in issue in the proceeding; or
- if the privilege holder institutes a civil proceeding against a person who is in possession of the privileged communication, information, opinion or document the effect of which is to put the privileged matter in issue in the proceeding.

In cases of limited waiver, therefore, care needs to be taken, particularly regarding the first bullet point above, by ensuring that confidentiality is maintained over the material.

30 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

The key consideration will be whether the limited waiver in another country is deemed to amount to a general waiver of privilege (applying the statutory test, see question 29).

31 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

This concept exists in New Zealand and is frequently invoked. The provisions of the Evidence Act dealing with waiver of privilege (see question 29) will govern whether disclosure of privileged information to a person with a common interest is deemed to be a waiver of privilege. Further, it is key to a successful claim to common interest privilege that disclosure take place in circumstances of confidentiality.

32 Can privilege be claimed over the assistance given by third parties to lawyers?

Communications by clients or lawyers with third parties (such as accountants or other experts) may only attract privilege in exceptional circumstances. Either the communication must be for the dominant purpose of preparing for apprehended litigation, or in certain

narrow circumstances the third party may be considered to be the agent of the client for the purpose of communications with the lawyer.

Witness interviews

33 Does your country permit the interviewing of witnesses as part of an internal investigation?

Yes. However, it is important to remain sensitive both to expectations of any other investigating authority and to employee rights.

34 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

Yes, to the extent that any documents fall within the categories of legal advice privilege or litigation privilege, as discussed above. This may depend on the context of the investigation, who is conducting the investigation, and any terms of reference under which these persons are engaged.

35 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

Where a witness in an investigation is also an employee, an employer's actions must be fair and reasonable in all the circumstances and the employer will owe a duty of good faith to the employee as outlined above (see question 17). Unless the interview arises in the context of a disciplinary process against the employee, no additional obligations (including in relation to notification or warning) arise.

The duty of good faith only applies to employees and not third parties (including former employees).

36 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

The conduct of an internal interview is entirely fact-specific. The employee cannot be misled in relation to information provided or questions asked. As a consequence, it is common to put documents to the individual being interviewed. Employees are not required to, but they may, have legal representation or a support person present.

Reporting to the authorities

37 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

In certain circumstances it is mandatory to report misconduct to law enforcement authorities in New Zealand. For instance, under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, financial institutions must report certain suspicious transactions.

Under the Companies Act 1993, a liquidator must report to the Registrar of Companies certain offences committed by the company or its directors that are 'material to the liquidation'. As another example, under the Financial Markets Conduct Act 2013, a number of parties, including an auditor, issuer, supervisor and manager of schemes established under that Act, must report to the FMA the contravention or possible contravention of an issuer's obligations under that Act, or the likely insolvency of an issuer or a registered scheme.

38 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

Relevant considerations for a company in deciding whether to self-report an issue to law enforcement may include the expectations of the relevant agency, whether issues of public health and safety are at risk, and whether agencies in other jurisdictions have been notified.

Like many jurisdictions globally, New Zealand has also introduced a leniency policy that provides a cartel participant with immunity from prosecution by the Commerce Commission for its participation in that cartel, as long as that participant is the first party involved in that cartel to come forward to the Commerce Commission, and meets a number of further criteria (such as ongoing co-operation with the Commerce Commission during an investigation). For cartels that have had global effect or implementation, the decision whether to self-report cartel conduct in New Zealand to the Commerce Commission is often made in coordination with legal counsel in other jurisdictions, as it is often important to sequence in which jurisdictions leniency applications are made first, and to adopt a consistent approach across jurisdictions.

39 What are the practical steps you need to take to self-report to law enforcement in your country?

The company or the individual should seek legal advice to ascertain its legal risk, and should satisfy itself as to the appropriate strategy. There are some particular considerations in relation to self-reporting under the Commerce Commission's leniency policy. Because full immunity is only available for the first applicant to approach the Commerce Commission, and also because the Commerce Commission may decline to offer immunity if it has already begun an investigation of its own accord, time is of the essence.

Responding to the authorities

40 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

New Zealand's transparent approach to government means that agencies are typically open to communication at a range of stages. In practice, companies often enter into dialogue with agencies to clarify the scope of notices and deadlines within which information is requested.

41 Are ongoing authority investigations subject to challenge before the courts?

The exercise of a public power (including, for instance, in an ongoing investigation) may in principle be challenged through an application to the High Court for judicial review.

42 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

In such an event, counsel should liaise closely with the client's counsel based in other jurisdictions, to ensure that any concessions or understandings are aligned. It will, however, be important to ensure that any disclosure to a New Zealand agency meets the requirements of the notice in New Zealand and that obligations under New Zealand law (including in relation to data privacy and any confidentiality obligations) are properly considered.

Also the agency in question may have information-sharing arrangements in place with its counterparts in other jurisdictions. For example, the Commerce Commission has entered into a number of international agreements with foreign competition and consumer law protection agencies, which provide for co-operation on matters of common interest. Some co-operation agreements allow the Commerce Commission to share compulsorily obtained information with overseas regulators even without the party's consent.

43 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

There is often an expectation that a New Zealand company will search for information within its control, even if it is located in another country. However, data protection laws and blocking statutes in other jurisdictions may present legal obstacles to adopting such an approach.

44 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

There are formal mechanisms for New Zealand law enforcement to provide mutual legal assistance to other governments in criminal investigations and prosecutions. Formal mutual legal assistance by the New Zealand government is governed, largely, by the Mutual Assistance in Criminal Matters Act 1992. The New Zealand Police provide informal, police-to-police, co-operation to the police forces of other countries. In addition, agencies such as New Zealand's Serious Fraud Office and the Commerce Commission have entered into memoranda of understanding enabling the sharing of information with their counterparts in other countries.

45 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

New Zealand agencies such as the FMA, Commerce Commission and Serious Fraud Office (SFO) are bound by their empowering statutes to maintain a limited standard of confidentiality with respect to information obtained during their investigations. This prohibits publication or disclosure of the information or documents unless the disclosure falls within one of the listed exceptions. Where the party who provided the information consents, or the publication can be justified in light of the purposes of the empowering statute, publication may be permitted.

46 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

Generally a company may wish to consider entering into a dialogue with the relevant New Zealand agency as early as possible to explain that it is prohibited from making the disclosure under the laws of another country.

47 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?

New Zealand's data protection laws are primarily set out in the Privacy Act 1993. This sets out 12 data protection principles that apply to both public and private sector entities. These principles are generally similar to those underlying the data protection laws of other developed countries – the Privacy Act was heavily influenced by 1980 OECD Guidelines.

A company conducting an investigation will have various obligations in relation to the collection, use, storage, accuracy and disclosure of personal information. Under the Privacy Act, an individual can make a data access request requiring the recipient to provide all personal information held about that individual (subject to limited exceptions).

For the purposes of Article 25(2) of Directive 95/46/EC, the European Commission has recognised New Zealand as ensuring an adequate level of protection for personal data transferred from the European Union. The effect is that personal data can flow from the 28 EU countries and three EEA member countries to New Zealand without any further safeguard being necessary.

48 Are there any data protection issues that cause particular concern in internal investigations in your country?

In our experience the data protection issues that arise in New Zealand are similar to those encountered in internal investigations in other developed countries.

The Privacy Act allows disclosure of otherwise private personal information should it be required to avoid prejudice to the maintenance of the law, including the prevention, detection, investigation, prosecution and punishment of offences. This can allow the disclosure of personal information to a regulatory agency in the context of an investigation.

49 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

A company should consider whether providing information voluntarily means (under the particular statute involved) there is a broader range of circumstances in which the information can be used against it in court proceedings. However, in some contexts providing information voluntarily will mean that it cannot be shared with overseas regulators without a waiver. There may be circumstances in which compelled production is preferable in light of the risks to the company of breaching confidentiality, bank secrecy or data privacy obligations.

As noted above, New Zealand agencies such as the FMA, Commerce Commission and SFO are bound by their empowering statutes to maintain a limited standard of confidentiality with respect to information obtained during their investigations.

Third parties may make information requests to certain public agencies under the Official Information Act 1982. However, if an investigation is ongoing or the information was provided confidentially the agency, in certain circumstances, may have grounds to withhold the information.

Global settlements

50 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

Relevant considerations will include the risks of enforcement action if a settlement is not entered into, the nature of the potential enforcement action that may be taken, the strength of the company's potential defence, any reputational risks, whether all relevant agencies are involved in the settlement, whether confidentiality is available, and whether there are issues raised in other jurisdictions as a result of either the settlement or the possible enforcement action.

51 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

The penalties for criminal offences in New Zealand include fines and imprisonment. Multiple corporate regulatory statutes allow agencies to take a range of enforcement action. Notably, a number of agencies may bring civil proceedings seeking pecuniary penalties against companies and individuals. In some circumstances individuals can be debarred from (for instance) being a director or involved in the management of a company.

52 What do the authorities in your country take into account when fixing penalties?

Authorities must have regard to binding or relevant sentencing principles when fixing penalties for conviction of a criminal offence. Factors the courts have had regard to include:

- level of culpability;
- harm to victims (investors or the 'nation');
- previous character;

- co-operation or assistance with the investigation; and
- whether a guilty plea was entered and at what stage.

Similar factors have been taken into account in fixing civil pecuniary penalties. In deciding what enforcement action to take an agency will also be guided by the principles set out in its own enforcement policies.

53 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

Some New Zealand agencies (such as the FMA) may obtain 'enforceable undertakings'. An advantage for the company concerned is that they can form part of a settlement and thereby avoid immediate court action. A potential disadvantage is the risk of future breach of the undertaking, as the agency may bring court proceedings for breach of the undertaking itself.

54 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

There is no legislative regime for suspension and debarment from government contracts in New Zealand. However, under the Government Rules of Sourcing, a government agency may exclude a supplier from participating in a contract if there is a good reason for exclusion, which includes conviction for a serious crime or offence.

55 Are 'global' settlements common in your country? What are the practical considerations?

Such settlements are not common in New Zealand, but there have been examples of information exchange and co-operation between New Zealand authorities and their counterparts in other countries.

56 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

Civil claims by private parties running parallel to agency investigations and action are generally possible. The courts may allow a plaintiff in parallel proceedings access to authorities' files. However, particularly where the information sought is of a confidential or commercially sensitive nature, there will often be obstacles to obtaining this information.

Publicity and reputational issues

57 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

Where materials are published in the period leading up to or during a proceeding, the publication of those materials could amount to contempt of court where there is a real risk that it interferes with the administration of justice.

58 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

Both communications specialists within the company itself and external public relations consultants are routinely used to manage a corporate crisis in New Zealand.

Generally the CEO is the company spokesperson and manages messaging in conjunction with the board or with internal communications or PR teams. In-house and external counsel may also be called on to advise in some circumstances. Some organisations may consult external public relations specialists, particularly if they do not have the expertise in-house, in the face of a crisis.

59 How is publicity managed when there are ongoing, related proceedings?

Companies often decline to comment on matters where there are proceedings before the courts. A key consideration tends to be the continuous disclosure obligations of listed issuers of securities.

If information can be disclosed to the public, companies may opt to distinguish between the facts found and the legal consequences. Careful consideration is required, particularly regarding any confidential obligations (such as bank secrecy obligations) when dealing with a voluntary disclosure and whether customer information can be redacted. It may be better for PR reasons to wait until disclosure is required by law.

Duty to the market

60 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

There are exceptions to the New Zealand Exchange requirements to disclose material information to the market where information is confidential or concerns an incomplete negotiation or proposal.

50

Nigeria

Babajide Ogundipe, Keji Osilaja and Benita David-Akoro[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

Possibly the most high-profile corporate investigation involving Nigeria in the past year relates to the allegation that Shell and ENI engaged in the bribery of Nigerian officials in connection with their acquisition from the Nigerian National Petroleum Corporation of the interest in an oil prospecting licence (OPL), previously held by a company called Malabu Oil and Gas Limited. A criminal investigation in Italy resulted in indictments in Milan against Shell and ENI, and it is uncertain what sort of investigation, if what has occurred in Nigeria can properly be so described, has been conducted in Nigeria. An interim forfeiture order of the OPL, obtained *ex parte* by the Nigerian authorities in January 2017, was subsequently discharged upon applications by Shell and ENI. It is unclear whether criminal charges have been filed against either company's Nigerian affiliates. The decision of the Nigerian government to proceed against Shell and ENI appears to have been influenced by the publicity that followed allegations that both Shell and ENI had been aware that the payments made for the OPL included improper payments to government officials (an allegation strongly denied by both companies), and the fact that indictments were issued against them in Italy. While the instruction of Nigerian legal practitioners to conduct internal corporate investigations has always been something of a rarity, it is uncertain whether any Nigerian firms were instructed to conduct internal investigations for Shell and ENI.

1 Babajide Ogundipe is a partner, Keji Osilaja is a senior associate and Benita David-Akoro is a trainee associate at Sofunde, Osakwe, Ogundipe & Belgore.

2 Outline the legal framework for corporate liability in your country.

Many statutes create criminal offences for which corporations may be held liable. Each state of the Nigerian federation has its own criminal laws. In Lagos, the largest state, in terms of population and size of its economy, the Criminal Law at section 20 makes specific provision for corporate criminal liability. Any act or omission done or omitted to be done by its officer under Lagos's Criminal Law is attributable to the corporation. In determining which officer of a corporation whose act or omission can be ascribed to the company, a court must 'have regard to all the circumstances, including the fact that the person has apparent or real authority to bind the company'. Where the prohibited conduct is performed by a person who is not an officer of a corporation, it will nevertheless be criminally liable if the act or omission was carried out in the performance of the person's duty as an employee of the corporation and if the corporation failed to take steps to prevent it.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

Other than the body charged with the regulation of corporations, the Corporate Affairs Commission (CAC), no specific law enforcement authority regulates corporations. The CAC regulates and supervises companies from incorporation to dissolution. Its functions are listed in the Companies and Allied Matters Act. The CAC can impose penalties and sanctions for corporate misconduct, and security market-related offences such as insider trading and market manipulation, most of which are pecuniary in nature.

In addition to the CAC, Nigeria's Securities and Exchange Commission is charged with the regulation of investments and securities in Nigeria, and its functions are listed in section 8 of the Investments and Securities Act.

The Federal Inland Revenue Service is responsible for the taxation of corporations in Nigeria, and may take tax enforcement action against corporations.

The various authorities are created by statute and, generally, there is rarely any overlap.

There are a number of other regulatory agencies, such as the Central Bank of Nigeria which regulates the banking industry, the Department of Petroleum Resources, which regulates the oil and gas industry and the National Insurance Commission, which regulates the insurance industry.

Other than these agencies, the law enforcement agencies that prosecute cases against corporations are the Nigeria Police Force and the Economic and Financial Crimes Commission.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

There are no grounds laid down on which law enforcement authorities may initiate investigations. Consequently, it would appear that simple suspicion may be all that is required to trigger an investigation. Usually, however, investigations will only be initiated on the basis of a complaint, or allegation, that an offence has been committed.

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

Under Nigerian laws persons may not be tried for an offence where they can show they have previously been 'convicted or acquitted of the same offence by a competent court' or 'convicted or acquitted by a competent court on a charge on which he might have been convicted of the offence charged'. It is, however, questionable whether this provision would be of assistance to corporations carrying on business in Nigeria, given that foreign corporations wishing to carry on business in Nigeria must incorporate in Nigeria and be separate and distinct from the non-Nigerian corporation. The Nigerian corporation would have to have been involved in the foreign proceedings to be able to take advantage of these provisions. Further, since a DPA does not amount to an acquittal or conviction, this might pose additional challenges to the ability of a corporation to rely on the double jeopardy provisions to avoid being subjected to further action in Nigeria.

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

The criminal law in Nigeria does not purport to have extraterritorial effect. The state and federal criminal laws apply only to persons (natural and legal) within Nigeria.

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

The principal challenge, and one that has arisen in relation to investigations conducted and concluded outside Nigeria, relates to corporations being pursued, and punished, in Nigeria for conduct that has been penalised outside Nigeria. This occurred, to some extent, to corporations involved in the Bonny Island bribery cases. Those corporations were subjected to sanctions imposed by the US Department of Justice and the Securities and Exchange Commission. While from a strictly legal perspective this is not a real problem as the corporation that would most likely be subjected to sanctions in Nigeria is likely to be Nigerian (foreign corporations are, generally, not permitted to carry on business in Nigeria unless they are locally incorporated), the corporations that were involved did consider action taken against their Nigerian subsidiaries and affiliates as amounting to being penalised for conduct that had already been sanctioned elsewhere.

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

Much depends on the foreign authority and the corporations involved, and on whatever policy considerations are at play. There appear to be no rules or other objective criteria available to enable an all-embracing answer to this question.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

Corporate culture does not appear to have been a feature in the approach of law enforcement authorities in Nigeria to taking action against corporations.

10 What are the top priorities for your country's law enforcement authorities?

Corruption has been stated by the present Nigerian government to be one of its top priorities. In addition, given the recent decline of the price of crude oil – the country's largest source of income – more efficient collection of tax and customs duties have also become more important. The approach, however, has been to focus more on recovering money than on pursuing transgressors.

11 How are internal investigations viewed by local enforcement bodies in your country?

As stated above, internal investigations involving external legal practitioners are rare in Nigeria. When they are conducted, they tend to be in the form of internal and external audits rather than investigations conducted by outside counsel. Given their rarity, the authorities do not appear to have any position on them.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

Allegations of misconduct usually surface through whistleblowers, internal audits and media reports. A matter of concern when allegations arise from whistleblowing is the victimisation and dismissal of whistleblowers by corporations.

13 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Search warrants and dawn raids are a rarity in Nigeria. Where search warrants are issued, this is done by magistrates.To obtain one, the law enforcement authority must show there is reasonable ground to believe the search will provide evidence that a crime occurred or is likely to occur, and that evidence relating to this is believed to be in the premises to be searched. Unfortunately, search warrants and the process for obtaining them have rarely been subjected to any significant judicial scrutiny, and anecdotal evidence indicates that warrants are issued on request and magistrates do not scrutinise the grounds for them.

In theory, where law enforcement authorities fail to comply with the terms of the warrant, a court may preclude them from using any improperly or illegally obtained evidence in a court proceeding.

14 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

According to section 144 of the Administration of Criminal Justice Act, searches are conducted where law enforcement authorities show there is reasonable ground to believe that the search will provide evidence that a crime occurred or is likely to occur. All material deemed to be connected to the commission of a crime can be seized, privileged or otherwise. The issue as to the admissibility of the material and the weight to be attached to it can only be resolved in the courts when, and if, it is sought to rely on such material.

15 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

The Evidence Act provides for competence and compulsion of witnesses. Privileges that prevent individuals from providing testimony include attorney–client privilege, spousal privilege, and with regard to self-incrimination.

16 What legal protections are in place for whistleblowers in your country?

There is, presently, no law for whistleblowing protection in Nigeria. A Whistle Blower Protection Bill was recently presented to the National Assembly for consideration and is yet to be passed. Nevertheless, the Federal Ministry of Finance unveiled its whistleblowing programme in December 2016. Under this, persons with information relating to the violation of financial regulations, the mismanagement or misappropriation of public funds and assets, theft, solicitation and collection of bribes, procurement frauds and other infractions are protected. The Investments and Securities Act provides a framework for the disclosure of information in respect of capital market operators and public companies. In 2011 Nigeria's Securities and Exchange Commission released a Code of Corporate Governance for Public Companies, which includes a provision that all public companies establish a whistleblowing mechanism for the reporting of illegal and unethical behaviour. In addition, the Financial Reporting Council of Nigeria released the National Code of Corporate Governance, which also provides a comprehensive guideline for the protection of whistleblowers in the private sector.

17 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

Generally, employees have no specific rights under employment laws that determine how they should be treated where their conduct brings them within the scope of an internal or external investigation. The rights and obligations of an employee are, by and large, regulated by the terms of the employment contract. Where employees are accused of misconduct, employment law does not afford them any specific rights.

18 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

The steps an employer may take when an employee is suspected of misconduct depend on the terms of the employment contract. Generally speaking, and without specific provisions in the employment contract, corporations may take any number of disciplinary actions against employees suspected of misconduct, including suspension or termination. Where an employee is deemed to have engaged in misconduct, upon conclusion of investigations, the company may dismiss the employee summarily and report the conduct to the appropriate law enforcement authority.

Commencing an internal investigation

19 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

As stated above, the involvement in Nigeria of external counsel in corporate investigations is uncommon and, as a result it is difficult to discern any general practices. However, to conduct an internal investigation properly, there must be some terms of reference, and it would be expected that such document would include a summary of ascertained facts, the objectives and scope of the investigation, the procedures for the conduct of the investigation and any limitations that there may be in carrying out the investigation.

20 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

When a company becomes aware of issues before Nigerian authorities do, the first step should be to seek local legal advice. There is no positive obligation to ensure that records are secured and retained. However, the destruction or suppression of such records could result in obstruction of justice charges. Similarly, there is no requirement to self-report to regulatory or law enforcement agencies. Any decision as to whether to self-report should be made case by case. Currently, it is extremely rare that companies self-report to the authorities. In one instance where a publicly quoted company self-reported issues relating to its accounts, arising from the fraudulent conduct of an individual executive that resulted in the incorrect reporting of stock, all the members of the board were sanctioned and barred from holding office as company directors. While the sanctions were eventually overturned following successful litigation against the regulators, that occurrence reinforces the view that, presently in Nigeria, the best course of action may not involve any self-reporting, given the absence of any reporting framework. It might well be that the best thing to do, once an investigation has been concluded, is to keep the information private and secure and wait to see what, if any, action the relevant regulatory or law enforcement agencies might take.

21 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

Privately owned companies are not required to publicly disclose the existence of internal investigations or contact from law enforcement. However, Rule 187 of Nigeria's Securities and Exchange Commission's rules, which apply to companies listed on public exchanges, provides that 'all information likely to affect the financial condition of a company shall be made available to the Commission by the company and the Commission shall disclose it on the trading floor immediately the information is made available'.

22 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

There are no legal requirements as to when management should brief the board about an internal investigation or contact from law enforcement. To a great extent this would depend on each company. Clearly, it would normally be best that the board be kept informed of such developments.

23 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

The power to issue subpoenas in Nigeria stems from provisions in civil and criminal procedure legislation. Accordingly, they may only be issued by a court in the context of ongoing proceedings. Consequently, law enforcement agencies and regulatory authorities do not, as a general rule, issue subpoenas. Upon the receipt of a properly issued subpoena, the recipient must, in the case of a witness summons, attend the court at the designated time and, in the case of a documents subpoena, to attend to produce the documents listed in the subpoena.

24 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

A subpoena may be challenged by application to court seeking to set aside the subpoena. The grounds on which a court will set aside a subpoena include:

- the scope of the documents or information requested unfairly burdens or prejudices the recipient of the subpoena; and
- legal privileges such as attorney–client privilege, spousal privileges and the right against self-incrimination.

Attorney–client privilege

25 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

Attorney–client privilege may only be claimed under Nigerian statutory law where a legal practitioner has been engaged and has received information from his or her client 'in the course of and for the purpose of his employment as such legal practitioner by or on behalf of

his client'. Legal practitioners may also not disclose the contents of documents with which they have become acquainted, or the contents of any advice given, in the course and for the purpose of their employment as legal practitioners. In addition, the Rules of Professional Conduct for Legal Practitioners impose a duty to keep confidential all communications with clients. There is some doubt as to whether in-house counsel have the same duty, and the issue has yet to be determined in Nigeria. To ensure that privilege attaches to an internal investigation, it would be advisable to engage external counsel.

26 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

Under the Evidence Act, legal practitioners may not, except with the consent of the client, disclose 'communications made to him in the course and for the purpose of his employment as such legal practitioner by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment or to disclose any advice given by him to his client in the course and for the purpose of such employment'. This privilege is the client's, and does not extend to communications made in furtherance of illegal purposes.

The Rules of Professional Conduct for Legal Practitioners state the obligations differently, providing that all communications made by a client to a 'lawyer in the normal course of professional employment' are 'privileged'. It goes on to prohibit a lawyer from revealing a 'confidence or secret of his client'. Again, it is clear that the privilege is that of the client. There is no distinction between a client that is an individual and one that is a corporation.

27 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

This is unclear, as there have been no judicial statements on the matter. The answer turns on how in-house counsel are viewed – as employees in general, or as lawyers whose client is their employee. As Nigeria is a common law jurisdiction, the views in other common law jurisdictions are relevant. Generally, in-house counsel are lawyers for privilege purposes. Ultimately, the burden of demonstrating that an in-house counsel's communication is privileged falls on the corporation. To establish the privilege, the corporation must show that the in-house counsel's communication: (1) was made for the purpose of obtaining or providing legal advice to the corporation; (2) involved subject matters within the scope of the employee's responsibilities for the corporation; (3) was known by the parties to the communication to be for the purpose of legal advice; and (4) was confidential when made and has remained confidential.

28 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

We are not aware of any instance where this issue has arisen. There are no situations where the waiver of privilege is mandatory. Generally, the privilege may only be waived by the client – the corporation – but the obligation to maintain client confidentiality is not mandatory:

- where the communication was made in furtherance of any illegal purpose and the acts of the client constitutes a crime or fraud or other illegal acts; and
- where permitted by law or to comply with a court order.

29 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

In theory, given the nature and extent of legal privilege, the client may stipulate the extent to which it waives that privilege, and should be able to require parties to which disclosure is made to maintain the confidentiality with regard to further disclosures. This issue has, however, not been considered by the courts in Nigeria.

30 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

Yes. Privilege generally can only be waived with the consent of one's client. In relation to attorney–client privilege, no attorney is permitted, unless with the client's express consent, to disclose any communication made to him or her in the course and for the purpose of his or her employment. Accordingly, information that is not treated as privileged in another country may still attract privilege in Nigeria, if it comes under what the law determines to be privileged communication.

31 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

As a common law jurisdiction, Nigeria would recognise, in appropriate circumstances, common interest privileges. Such privilege would attach to communications between a legal practitioner and other parties with a common interest with the client, provided such communications are made with a view to developing legal advice in anticipation of, or collecting evidence for, litigation. This privilege also applies to all documents obtained or prepared with a view to litigation.

32 Can privilege be claimed over the assistance given by third parties to lawyers?

Yes. Where the third party acts under the direction of a legal practitioner, the third party is bound by the same obligations as the legal practitioner.

Witness interviews

33 Does your country permit the interviewing of witnesses as part of an internal investigation?

Yes, as there is no law precluding this.

34 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

Communications made with a view to developing legal advice in anticipation of litigation or collecting evidence for litigation is privileged. Therefore, privilege may be claimed where internal witness interviews take place with litigation in contemplation.

35 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

There are no legal or ethical requirements or guidance currently stipulated in Nigeria when conducting witness interviews of employees. However, the wise course is to adhere to international best practices.

36 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

There is no prescribed way to conduct internal interviews. This would be mainly down to the nature of the investigation and any internal company policy and guidelines. Investigations are usually document-heavy so, most probably, documents will be put to the witness if they are relevant to the investigation. Ordinarily, employees do not require their own legal representation; however, there is no law prohibiting it. The only concern for most employees is that the use of legal representation may appear to suggest some measure of guilt on their part.

Reporting to the authorities

37 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

Under certain legislation, such as the Independent Corrupt Practices Commission Act (reporting the solicitation of bribes) and the Money Laundering (Prohibition) Act, the reporting of certain conduct is mandatory.

38 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

Generally, we would not advise a company to self-report to any law enforcement agency or regulatory authority. If, as a result of a good relationship with an agency or authority, it were possible to anonymously provide information as to the nature of some infringement and to obtain assurances that the resulting official investigation would not be conducted oppressively, we might advise that a report be made. Otherwise, our routine advice would be not to self-report.

39 What are the practical steps you need to take to self-report to law enforcement in your country?

As indicated above, we would generally not advise self-reporting. However, where self-reporting is contemplated, no information should be passed on to the authorities until attempts have been made to understand how the authority would respond and after assessing that any action that would be taken would not be oppressive or inordinate. Only where there is a high level of confidence would self-reporting be advised.

Responding to the authorities

40 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

Law enforcement authorities do not issue subpoenas, which may only be issued by courts in the context of ongoing proceedings.

41 Are ongoing authority investigations subject to challenge before the courts?

The exercise of investigative powers by law enforcement authorities can be challenged by an application to the court if it is considered unlawful. If declared unlawful, the court can order various remedies such as terminating the exercise of that power or awarding damages. Generally, however, the courts tend not to interfere with the conduct of investigations by law enforcement authorities.

42 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

As indicated above, subpoenas may only be issued by courts in the context of ongoing proceedings. Unless the authority in the foreign countries can exercise authority over a Nigerian company, disclosure cannot be enforced against the Nigerian company. Of course, there may be other factors that would influence how a company might react to foreign demands for material. There are, however, no data protection laws or blocking statutes in force in Nigeria that would be relevant.

43 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

Subpoenas are only issued by courts, and Nigerian courts have no extraterritorial reach, nor do they profess to have. Consequently, if material sought by a properly issued subpoena is not under the control of the company to which the subpoena is addressed, the company is under no obligation to seek to obtain such material and will not be sanctioned for its inability to produce the material.

44 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

Yes. Information is shared both formally, with countries with which Nigeria has treaties, conventions or other agreements, as well as informally with other friendly countries where such sharing of information is not unlawful.

45 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

Any such obligations would depend on how the information is shared. If there is an agreement under which the information is shared and that agreement stipulates some confidentiality obligations, the Nigerian authorities would most likely abide by them.

46 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

Unless the law enforcement authority in Nigeria may request the production of the documents, we would advise against their production.

47 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?

Nigeria has no data protection or blocking statutes and, other than the general constitutional right to the privacy of homes, correspondence, telephone conversations and telegraphic communications, Nigeria has no general privacy laws.

48 Are there any data protection issues that cause particular concern in internal investigations in your country?

No.

49 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

The primary risk of voluntary production of material is that there are no guarantees as to how such material will be used by the Nigerian authority or agency. The material may also be subject to disclosure under freedom of information legislation. Although there are no confidentiality rules attached to productions to law enforcement in Nigeria, and Nigerian law enforcement agencies are generally unwilling to share information with non-official bodies, there can be little confidence that such material will not be leaked.

Global settlements

50 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

The primary considerations would be with regard to whether the settlement needs to be kept confidential, and whether it would have any adverse consequences outside Nigeria.

51 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

The penalties applicable to companies are fines and forfeiture of assets. Directors and officers of companies, on the other hand, are subject to imprisonment as well as to fines and forfeitures.

52 What do the authorities in your country take into account when fixing penalties?

The authorities will consider the gravity of the offence, the punishment prescribed by the law, whether the offender is a first-time offender, any mitigating circumstances and the interest of the public, among other things.

53 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

Nigeria has no formal framework of non-prosecution or deferred prosecution agreements.

54 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

Nigeria has no formal framework for suspension or debarment from government contracts, and settlements in other jurisdictions are not usually relevant to the award of contracts in Nigeria.

55 Are 'global' settlements common in your country? What are the practical considerations?

Simultaneous resolutions are uncommon. However, companies that have had issues in other jurisdictions have, on occasion, also had to resolve issues related to the same misconduct separately in Nigeria.

56 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

Private civil actions can be undertaken at the same time as prosecutions. Private individuals have limited rights to undertake the prosecutions of criminal offences. However, Nigeria does not have the concept of complainants being parties to prosecutions undertaken by the state, and complainants have no rights to access the authorities' files.

Publicity and reputational issues

57 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

There is no law regulating publicity of criminal cases at either the investigatory stage or once the case is before a court. Although persons accused of criminal offences are presumed to be innocent until proven guilty, the absence of jury trials in Nigeria makes it extremely difficult for defendants to contend that pre-trial publicity has created a real risk of their not being afforded a fair trial.

58 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

Large companies will frequently use public relations firms to manage crises, but this is rarely made public.

59 How is publicity managed when there are ongoing, related proceedings?

If there is public (or media) interest in ongoing proceedings, they will be covered by Nigeria's print and electronic media. Proceedings in court are generally open to the public although they cannot be televised or otherwise broadcast. Documents filed in court are, theoretically, accessible to the public, though many courts will place obstacles to access in the path of persons seeking to obtain them. For example, judges may direct court registrars to restrict access to court documents to the parties to a legal action. Though there is no legal backing for restricting access, there is a lack of understanding among some of the judiciary of the rights of persons to access information under the Freedom of Information Act.

Duty to the market

60 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

Publicly quoted companies must, under the rules of Nigeria's Securities and Exchange Commission, disclose to it 'all information likely to affect the financial condition of' the company. Under the rules, it is required to disclose that information 'on the trading floor immediately the information is made available'. Therefore, if a settlement has been agreed with a publicly quoted company and it is 'likely to affect the financial condition' of the company, that must be disclosed to Nigeria's Securities and Exchange Commission, which would then disclose it on the floor of the exchange.

51

Russia

Alexei Dudko[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

One of the most recent high-profile corporate investigations has been carried out by the Russian state corporation Deposit Insurance Agency (DIA), which acts as the mandatory state liquidator of insolvent banks, and was with regard to the US$2 billion collapse of Mezhprombank. It led to the subsequent anti-fraud, insolvency and asset tracing litigation in Russia and overseas against the bank's beneficial owners and directors, including Mr Sergei Viktorovich Pugachev. (The author's firm acted as lead counsel for the DIA and Mezhprombank.)

In April 2015, the Russian court issued a judgment holding Mr Pugachev and three other top managers liable for the insolvency of Mezhprombank, ordering them to pay 75 billion roubles, a record amount ordered by the court in the context of Russian insolvencies. The judgment was upheld by the superior Russian courts. Following the grant of the default judgment in the English courts in February 2016, the DIA is also seeking to enforce the Russian judgment in other jurisdictions where Mr Pugachev has assets.

The English High Court of Justice granted a worldwide freezing injunction for in excess US$2 billion over Mr Pugachev's assets in connection with the Russian insolvency proceedings. Mr Pugachev left Russia in early 2011, following the collapse of the bank and the opening of criminal investigations. In 2015, pending the hearing in the United Kingdom of the Russian extradition request, Mr Pugachev left London in breach of the English court passport order. Mr Pugachev was held to be in contempt of court in the English courts on 12 separate

1 Alexei Dudko is a partner at Hogan Lovells CIS.

counts, including giving false evidence under oath, selling assets in breach of the freezing injunction and concealment of close to US$150 million. He now lives primarily in France.

The ongoing corporate investigation in Russia over the collapse of Mezhprombank revealed evidence crucial to the successful pursuit of the court proceedings against Mr Pugachev in Russia and internationally. This was done despite the efforts of Mr Pugachev to conceal and destroy the evidence relating, in particular, to such crucial spheres as Mr Pugachev's *de facto* control of the bank (he had no formal official position with the bank but implemented a shadow decision-making control system with his personal special stamps authorising key decisions) and his role in the bank's insolvency, including his actions in siphoning funds out of the bank, placing them beyond the reach of the bank's creditors, in multiple jurisdictions using a complex web of offshore companies and trusts.

The status of the DIA (acting on behalf of Mezhprombank) as an injured party in the Russian criminal investigation allowed it to use the witness statements and other evidence obtained in the course of the Russian criminal proceedings (with the permission of the investigators) in support of the DIA's civil law claims in Russia and overseas. It has proved to be extremely useful and allowed it to create a strong *prima facie* case of fraud necessary to obtain crucial injunctive relief and prevent dissipation of assets.

It was possible to set up a robust system of inter-jurisdictional evidence and information flows. It enabled it to pursue both Russian and international proceedings simultaneously while complying both with the complex requirements of Russian criminal law limiting the scope of the use of the information obtained in the ongoing criminal investigation as well as the English court's 'confidentiality club' restrictions for the use of the information obtained in the English proceedings.

2 Outline the legal framework for corporate liability in your country.

Although Russia has ratified the 2003 UN Convention Against Corruption and 1999 Criminal Law Convention on Corruption, legal entities under Russian law cannot be held criminally liable for any contravention of Russian criminal law; only individuals can be criminally liable.

Russian law provides for administrative liability of legal entities, including fines in the amount up to 100 times of a bribe's value but not less than 100 million roubles, under the Russian Code of Administrative Offences.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

In addition to the law enforcement authorities with investigative powers applying to all persons, including corporations, depending on the type of crime (such as the Investigation Committee, General Prosecutor's Office, Ministry of Internal Affairs, Federal Security Service), a number of state bodies are competent to regulate corporations. These include, among others, the Central Bank, the Federal Antimonopoly Service, the Federal Tax Service and other multiple federal services and departments in specific economic sectors (e.g., transport, security, healthcare, education). We are not aware of publicly available policies specifically relating to the prosecution of corporations.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

Russian criminal and administrative law does not specify the exact threshold of suspicion to initiate an investigation. Broadly, it lies within the relevant authority's discretion and should be based on a reasonable belief of certain facts or grounds supported by evidence. This should give grounds to suspect that there has been a contravention of the law or infringements of a person's rights (e.g., based on someone's application, audit and tax reports, or information in the media).

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

Russian law establishes a general principle of justice, according to which no one can be held liable twice for the same offence (*ne bis in idem*). This provision is enshrined in the Russian Constitution as well as the Criminal Code and Code of Administrative Offences. A legal entity that commits an offence outside Russia may be prosecuted in Russia if such an offence is contrary to the interests of the Russian Federation, and in cases stipulated in the respective international legal treaty, provided that the legal entity was not found criminally or administratively liable for offence in a foreign state.

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

The Russian Criminal Code is generally applicable in the territory of the Russian Federation but has also extraterritorial effect in specific cases identified therein. The Code includes a special provision dealing with the application of criminal law in relation to persons committing a crime outside the Russian Federation (Article 12). As regards Russian citizens and stateless persons permanently residing in Russia who committed a crime outside Russia falling within the ambit of the Russian Criminal Code, they shall be held criminally liable if no foreign court judgment was made concerning such crime in respect of such persons. In relation to foreign nationals and stateless persons who do not reside permanently in Russia who committed a crime outside Russia falling within the ambit of the Russian Criminal Code for which they are prosecuted in Russia, they are subject to criminal liability in Russia if (1) the committed crime is directed against the interests of the Russian Federation, a Russian citizen or a stateless person permanently residing in Russia (which is quite a vague definition and has not been sufficiently clarified in law and practice), and (2) unless such persons were held criminally liable for this crime in a foreign state. Criminal liability in Russia for crimes committed overseas is also possible in cases provided by international agreements of the Russian Federation or international legal documents that have obligations accepted by Russian Federation.

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

One of the major challenges in relation to Russian cross-border investigations has to do with the transfer of information outside Russia. There is a plethora of issues in this respect mostly connected with the strict regulations protecting various categories of classified information of Russian persons (personal data, personal privacy information, personal correspondence, commercial and state secrets, etc.). The processing of classified information often requires the prior express written consent of a data subject. For example, any processing of personal data requires the express written consent of an employee before it is processed, and includes special requirements for the export of personal data to jurisdictions not considered to provide adequate protection for personal data subjects (such as the United States). A failure to observe personal privacy, business and state secrets' rules could trigger criminal liability, whereas a breach of personal data requirements would invoke administrative liability.

The routine practice of the DOJ and SEC is to request production of information directly from Russian entities in the course of their global anti-corruption investigations, circumventing the Russian authorities through which such requests should normally be made under the 1999 Russia–US Treaty on Mutual Legal Assistance in Criminal Matters. This practice has caused significant concerns on the Russian side, especially at the time of the heightened geopolitical tension. Various legislative projects of blocking statutes have been circulated for consideration to put an end to this practice.

The other problem has to do with the existing tensions between Russian antimonopoly regulation and US and other extraterritorial anti-corruption statutes. In some Russian court and regulatory cases it has been held that Russian subsidiaries of foreign companies should comply in the first place with local regulation on antimonopoly and anti-corruption, and not with foreign laws on anti-corruption, which have a wider effect than Russian regulations. For example, if a seller enjoys a dominant market position, there is a risk that such use of anti-corruption measures could be regarded as an abuse of dominant position if they are not properly structured (e.g., request for an anti-corruption audit of a distributor; refusal to contract with an unqualified party; termination of contract or suspension of deliveries post-audit; incorporation of such terms into contracts and policies).

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

Russia is a party to various international conventions on co-operation and mutual assistance in the area of crime prevention, anti-corruption, anti-fraud, etc. If the decisions of foreign authorities fall within the ambit of the respective convention, the Russian authorities will accept and work with the materials and evidence received from abroad as well as execute requests for legal co-operation, including providing documents, records and other items; executing requests for searches and seizures; locating and immobilising assets for purposes of forfeiture, restitution, or collection of fines; extradition; and recognition and enforcement of civil judgments in criminal matters relating to compensation for damages.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

Corporate culture issues have become more important and must be considered in the assessment of anti-corruption compliance measures by companies in Russia. Yet, this practice is just emerging as the authorities are only making their first steps in this direction.

10 What are the top priorities for your country's law enforcement authorities?

The top priorities of the Russian law enforcement authorities in the economic sector include prevention of financing terrorist activities and money laundering, fighting corruption and bribery, combating tax evasion and prevention of fraud.

11 How are internal investigations viewed by local enforcement bodies in your country?

Internal investigations aimed at uncovering infringements or misconduct and crimes in corporate entities and at ensuring compliance are welcomed by the Russian authorities and regarded as an important part in accomplishing state goals of fighting bribery and anti-corruption, and improving the business environment. The sharing of their results with law enforcement bodies could be regarded as a desirable, although not mandatory, step in the company trying to earn credit for co-operation with the authorities.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

The most effective and common sources of information on misconduct allegations tend to be whistleblowers, standard screening processes, tax reporting and compliance. Russian law encourages companies to introduce whistleblowing programmes, such as helpdesks and reporting lines where employees can submit information about any alleged non-compliance. However, there is no formal protection of whistleblowers similar to that found in other foreign jurisdictions. Although various measures to stimulate whistleblower rewards similar to US measures have been constantly discussed in Russia, they have not yet been implemented for fear of a flood of applications.

Audit reviews have been less relevant, as auditors, both external and internal, on the one hand, are mostly dependent on the information provided by the company's management; on the other, there is a sizeable supply of 'puppet' auditors. The auditors' activism has not been helped by the underdeveloped court practice of holding auditors liable for professional negligence.

Major Russian companies have developed sophisticated screening processes and compliance functions, but for the significant number of other companies, who can only allocate small or a zero budget to these processes, it remains a box-ticking exercise. Against this background the internal audit plays a relatively more important role, as its function, if it operates effectively in the corporate structure, is well established, as opposed to the compliance function, which often has to prove its purpose and its usefulness in many Russian companies.

13 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Search warrants and dawn raids are one of the most frequently used investigation tools in Russia. Very often they are associated not only with collection of evidence, but, in the case of 'black raids', they are used for illegitimate purposes, for example, in the case of a corporate conflict to deter or even eliminate competitors. Searches must be executed on the investigator's order or the court's authorisation if the action is taken on premises where people live. The Criminal Procedure Code sets out the limitations on executing a search warrant or dawn raid:

- it should not cause damage to property;
- private and family life circumstances must not be disclosed;
- the owner of the premises and at least two attesting witnesses must participate during the execution of the search;
- an advocate of the person in whose premises the search is carried out may be present; and
- it should not be carried at night unless there is an urgent need.

In case of violation of rights during searches and dawn raids, such actions may be challenged in court and damages awarded if it is established that they infringed the law.

14 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

In December 2015, the significant Ruling No. 33-P of the Russian Constitutional Court specifically dealt with the protection to be granted and respected by law enforcement agencies during searches in relation to privileged materials. Search and access to privileged information is only possible under a court order specifying exactly the search objects. No sweep search is allowed. It is forbidden to take information from advocates' files, which have to be marked accordingly, unless the information directly relates to criminal violations by either advocates or their clients or other third parties' crimes; or constitutes instruments of crime or objects whose circulation is limited under the law. No video, photo or other recording related to privileged information is allowed during the search. Subsequently, in April 2017 the respective amendments were introduced to the Criminal Procedure Code reflecting this approach, which were welcomed by the Russian Bar as a significant step forward.

15 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

It is a basic constitutional right that persons may refuse to provide information that would incriminate themselves, their spouse or close relatives. There are also certain categories of persons who enjoy immunity from giving testimony. They include judges and jurors in relation to the circumstances of their activities on a case; priests in relation to the circumstances that come to their knowledge in confession; parliamentarians (unless they give consent) in relation to their activities; and tax officers, in relation to the information from voluntary declarations

of taxpayers. Apart from this, a witness as well as a victim of crime shall not refuse to testify under the penalty of criminal liability in the course of the criminal investigation or if ordered by the court in all other circumstances. The law does not specifically differentiate between whether the testimony is voluntary or compelled but leaves it to the judge's discretion to attach such evidentiary weight to it as it thinks proper depending on the circumstances.

16 What legal protections are in place for whistleblowers in your country?

Unless a whistleblower acts in the context of a criminal case and is threatened, he or she does not have specific protection under the law. The Criminal Procedure Code provides a general rule under which, if a witness is threatened with any illegal actions (including murder, violence, property damage), the court, the prosecutor and investigating officers shall take all security measures to protect such person: anonymisation of the person, monitoring of telephone, providing bodyguards and property security, etc.

17 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

The rights of an officer or director affected by an investigation do not differ. In the course of the investigation, the employee continues to enjoy the rights of confidentiality and data privacy (e.g., it is illegal to review his or her emails without express written consent; private emails should not be reviewed or stored separately). The affected employee charged with misconduct may be informed about the subject matter of an investigation as well as the right to be provided explanations and evidence in support of its case, and to challenge its results, etc.

18 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

An employee must co-operate and provide written explanations in connection with investigated matters if he or she is implicated or suspected of misconduct. An employer should request explanations from an employee on the fact of misconduct. The employee's refusal to participate in an internal investigation shall not by itself be a reason for dismissal or other disciplinary action. There are no disciplinary or other official steps provided in the Labour Code when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation. In practice, however, employers normally suspend the suspected employee using other legal provisions, such as providing additional paid leave, and if the employee consents, changing the employee's place of work to home or another location.

Commencing an internal investigation

19 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

Normally, Russian companies issue internal orders signed by their general directors setting out the scope of an investigation, the investigated conduct and the committee and its members who will be investigating and reporting back to the director general within a prescribed time frame.

20 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

The best practice is for the company to investigate the issue and assess whether it should be reported to the authorities. A company itself or its investigators are not legally obliged to report the uncovered issue to anyone, including the state authorities, except in certain situations. The duty to report may arise when the issue relates to a very serious crime punishable with 10 or more years in prison. In this case, under specific conditions, a failure to report could trigger criminal liability for concealing a crime (Article 316 of the Criminal Code). Also, in cases where the issue could affect the price of the publicly traded securities of a company, it has to be disclosed in the company's official financial reporting as provided for under the Federal Law on the Securities Market dated 22 April 1996 No. 39-FZ. Failure to do so may result in civil, administrative and in some cases criminal liability. There is no culture of proactive reporting in Russia. In practice, companies take individual decisions about whether to report based on the circumstances.

21 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

There is no legal obligation of a company to disclose the existence of an internal investigation or contact from law enforcement officials, apart from in the situations mentioned above (see question 20).

22 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

Under Russian corporate law, directors must act in good faith and reasonably in the interests of their company. Any serious issue that could expose the company and affects its share value, provided that no further standards and limits are established in the company's board regulations and internal corporate documents, must be brought without unreasonable delay to the attention of the board for further consideration.

23 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

Notices to preserve documents or data from the Russian law enforcement authorities are not usual. Such notices could actually prompt the destroying of documents, therefore Russian authorities tend to be proactive in seizing important documents and information without notice. In cases where a company receives a document production request from authorities that is lawful, it must comply with it or seek its extension or variation if necessary. Typically, such requests are handled by the company's in-house counsel, who assesses their legality, and finds and preserves the respective data. The appointment of a document custodian is not standard practice.

24 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

Russian law provides a right to challenge, in the courts or in an administrative forum, actions and decisions of state authorities, including law enforcement bodies, if those authorities or bodies violate the company's rights or interests or create obstacles to the conduct of activities and the exercise of rights or unjustly imposes any obligations.

Attorney–client privilege

25 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

The attorney–client privilege is known in Russia as 'advocate secrecy'. Advocate secrecy applies to any information related to the legal advice provided by a lawyer admitted to the Russian Bar who has the status of an 'advocate'. If an internal investigation is conducted by a duly retained advocate, it is likely that the information regarding the investigation and obtained in an investigation will be protected by advocate secrecy. It is highly recommended to mark all the documents produced or obtained in the course of an internal investigation as 'confidential' and 'subject to advocate secrecy' as well as to keep the most important documents and information in the offices or on the servers of the advocates to reduce the risk of their seizure by the authorities.

26 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

The status of an advocate in Russia is required mostly for court representation, especially on criminal cases. The majority of corporate lawyers in Russia are not advocates and the advocate secrecy privilege does not cover information and documents related to legal advice provided by lawyers who are not advocates.

Any information obtained from any client that is related to the relationship of the client with an advocate is covered by advocate secrecy. The advocate shall not be compelled

to disclose information covered by advocate secrecy to any state body or be examined as a witness regarding such information. Search and seizure in the offices of an advocate must be authorised by a court. Documents seized from an advocate's offices may not be used as evidence unless an exception applies (see question 28). There is no difference regarding the advocate secrecy privilege as to whether the client is an individual or a company.

27 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

The privilege only applies to advocates, not lawyers who are not advocates, whether they are inside or outside counsel. Advocates may only practise law as self-employed practitioners through specific Bar institutions; they are not allowed to be employed.

28 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

The waiver of advocate secrecy may be regarded as amounting to active assistance in the disclosure and investigation of crimes and, as such, considered as a co-operative step leading to a less severe criminal penalty. It is not typical in practice though. Advocate secrecy is not applicable if:

- the information in question relates to money laundering;
- the information in question directly relates to criminal violations by an advocate, an advocate's client or third parties;
- the information in question relates to instruments of crime;
- the information in question relates to goods restricted from circulation in Russia (e.g., drugs, weapons); or
- it is expressly waived by the client.

We are not aware of any other context where a waiver of privilege is mandatory or required (e.g., to obtain credit for co-operation).

29 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

Such a concept does not exist in Russia.

30 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

Russian law has no provisions or relevant precedents in this regard. We think that there are, nevertheless, arguments to claim that privilege in this case could be maintained in Russia to the extent it has not been waived in another country.

31 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

No, such privileges do not exist in Russia.

32 Can privilege be claimed over the assistance given by third parties to lawyers?

There is no express guidance on this in Russian law. It may be possible, if such assistance is directly linked to the advice provided by the advocate to the client, which is itself covered by advocate secrecy privilege.

Witness interviews

33 Does your country permit the interviewing of witnesses as part of an internal investigation?

Yes, it is permitted. Employee interviews are widely used during internal investigations in Russia.

34 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

Yes, if the interview is performed and the reports are produced by an advocate in the course of providing services to the client.

35 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

There is no formal legal requirement similar to the *Upjohn* warning that has to be made to the interviewed employee in the course of an internal investigation. But it is expected that the general principles of law should be followed, such as protection of the individual, avoiding conflicts of interest and breaches of law, and maintaining confidentiality. If an interview is to be relied on in court as evidence, it must be in writing and personally signed by the employee. To enhance its evidentiary force it should be conducted by an advocate who must warn the employee before it starts (and it shall be reflected in the interview protocol) that it has the right not to testify against itself and its relatives. The employee must be aware that he or she could face criminal liability for giving false evidence. The requirements are the same when interviewing third parties.

36 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

Normally the investigator begins the interview with a brief introduction that includes the reason for the interview, appropriate disclosures and planned use of the information obtained during the interview. To assure the impartiality and objectivity of an interview as well as its privileged status, it is good practice to engage, for an interview, an advocate as an external counsel as well as HR and compliance representatives.

When asking the questions, an investigator should always remain neutral and never appear to take sides. The investigator should remain focused, keep the interview on track and move forward to obtain as much information as possible. Relevant issues can be explored with the aid of, where appropriate, open-ended or leading questions. After witnesses answer

the questions, it is recommended to put the evidence and documents to them and to ask them to provide explanations, especially in cases of discrepancies between their answers and evidence. The investigator should encourage witnesses to contact them or the company's management after the interview if they think of anything else that might be relevant to the case. They should also remind the witness of the importance of confidentiality. If necessary, the investigator should prepare the protocol of the interview and ask the witness to sign it. Employees may have their own legal representation at the internal interview but in practice such requests are relatively rare, and normally employees insist on legal representation only in exceptional cases.

Reporting to the authorities

37 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

See the answer to question 20.

38 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

Even if there is no legal duty to self-report in Russia, it might be advisable to do so when there is a duty of self-reporting in relation to the issue in a foreign jurisdiction, for example, because of the global nature of the company's business. It might be advisable to consider self-reporting when it is the company's policy to do so or it is in the company's interests to inform public investigative authorities, for example, if there is a need to co-operate with the competent authorities to complete the investigation and make it more effective or prevent crimes from taking place. It may also be advisable to self-report when the risk of leaks about the issue is significant and such self-reporting is a part of the risk mitigation strategy. It may also be advisable in cases where public interests and third-party rights and legal interests are significantly affected and non-disclosure generates significant risks.

39 What are the practical steps you need to take to self-report to law enforcement in your country?

It is possible to file a written application to the competent authority identifying the issue with contact details. It is important to make sure that such filing is duly recorded.

Responding to the authorities

40 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

It is very important to enter into dialogue with the authorities to address their concerns before charges are brought. This could allow controlling the communication and testing it

in real time as well as checking the intentions, which might not be evident, and reaction of the law enforcement authority. If this is done the chances of avoiding prosecution are much higher than in the situation where the charges have already been brought. Very often such dialogue is started by telephone and carried out through personal meetings.

41 Are ongoing authority investigations subject to challenge before the courts?

Yes, a party to an investigation usually has the right to challenge the decision of an authority on commencement, or at various procedural steps during the investigation, before a court.

42 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

There are no general blocking statutes in Russia, except for separate regulations that require 'strategic' companies (state-owned companies that are especially important for the development of Russian economy) to get permission to provide information to foreign authorities. There is also the law on protection of personal data and other related laws (see question 47). The company would have to deal with each notice separately complying with the laws of the Russian Federation in the first place.

43 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

Although the scope of the information production request is normally limited to the territory of Russia, the company must still produce Russian authorities with the information within its ownership, possession or control abroad, for example, in its foreign branch or representative office. Russian law enforcement may require translation of the documents or impose comparatively short terms for production of information.

44 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

Russian authorities usually share information with the law enforcement agencies of foreign countries if there is a relevant framework in place and reciprocity in handling Russian requests for legal co-operation. Russia has a significant number of international and regional agreements and treaties dealing with various aspects of law enforcement with the competent authorities from other countries relating to crime prevention, tax, antitrust, criminal and civil enforcement, extradition, etc.

45 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

Law enforcement authorities in Russia have certain confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties. For example, according to Article 5 of the Federal Law on the Public Prosecution Office of the Russian Federation, dated 17 January 1992, No. 2202-1, material obtained from inspections carried out by the prosecutor's office is not disclosable without the specific permission of the prosecutor. In the case of institution of a criminal investigation, Russian law also prohibits any disclosure of preliminary investigation data without the permission of an investigator, as the information about the preliminary investigation is not disclosable (Article 161 of the Criminal Procedure Code). The disclosure of information about the investigation shall not contradict the interests of the preliminary investigation and shall not violate the rights and interests of parties to criminal proceedings. In this regard, obtaining the permission of the investigator is mandatory for disclosure of the preliminary investigation information in any form. In practice it is often recommended to state that the information provided to the investigators or other law enforcement authorities by parties is confidential. It is important to identify legal specific grounds for its confidentiality and legal protection and mark or stamp it accordingly (e.g., that it is information comprising 'commercial secrets'). This would expressly signal to law enforcement authorities how the information should be handled. This is likely to reduce the risk of such information passing to third parties without any unauthorised transfer or allowing access to it by law enforcement authorities.

46 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

We would point out to the Russian authorities the risks of production of documents in a foreign country and rely on the respective legal opinion of foreign lawyers to prove our case and identify the risks in the dialogue with the Russian authorities. At the same time, we would explore whether a respective waiver of the information transfer to the Russian authorities could be possible to obtain in the foreign jurisdiction in question.

47 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?

Russia has data protection laws (laws on personal data protection, privilege, commercial secrets, etc.) and certain blocking regulations that affect major state-owned companies. Normally a legal notice or subpoena requiring the production of information trumps any specific requirements for disclosure of classified information with limited access.

48 Are there any data protection issues that cause particular concern in internal investigations in your country?

Russian data protection regulations do not directly address internal investigations, but that does not mean they do not apply. In fact, they can play a major role in drawing the line between lawful and unlawful investigative measures. A necessary element of internal investigations is the analysis of documents and correspondence of employees working in the organisation under investigation. Typically such documents could cover data stored on servers and individual users' computers as well as data from corporate mobile devices. Such information always contains a wide range of personal data. Any processing of personal data requires the prior express written consent of an employee before it is processed. It also includes special requirements for export of personal data to jurisdictions not considered to provide adequate protection for personal data subjects as well as for further personal data maintenance. A failure to observe personal privacy could trigger criminal liability, whereas a breach of personal data requirements would invoke administrative liability, which is being tightened due to the significance attached to the protection of personal data in Russia and its multiple breaches in day-to-day business and other processing.

49 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

The refusal to provide information voluntarily could incur penalties imposed by Russian authorities (e.g., fines) as well as the use of enforcement measures to actually obtain the requested information, including searches, or other negative consequences (e.g., the authority may take into account the unwillingness of the company to co-operate when rendering the final decision on the matter). The provided material is discoverable by third parties (usually by other parties to the proceedings) unless it is specifically identified that such materials are confidential, in which case access to the file could be restricted. In criminal matters all files have restricted access.

Global settlements

50 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

Companies need to ensure their settlement is final and enforceable and as such confirmed by the court. Under Article 190 of the Commercial Procedure Code, it is possible to settle a dispute arising from public and administrative relations. However, a company willing to make a settlement with a law enforcement authority in Russia should keep in mind that such settlements shall be made in full compliance with the law and not violate rights and interests of third parties, otherwise the Russian court will not recognise them.

51 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

Companies may incur official warnings, fines, debarment from public procurement, or disqualification or suspension of operations. In relation to individuals (directors, officers or employees), in addition to the above-mentioned penalties under the Code of Administrative Offences, which apply where appropriate, the Criminal Code provides for removal of the right to hold specific employment positions, compulsory community service, corrective or compulsory labour, confiscation, restriction of liberty, arrest and jail. Also, from 1 January 2018, information in relation to state officials removed from their positions for 'loss of trust' as a result of their involvement in corruption shall be officially published on the internet as part of a 'name and shame' state anti-corruption policy.

52 What do the authorities in your country take into account when fixing penalties?

Application of an administrative penalty in relation to the company depends on the nature of a violation, the property and the financial circumstances, as well as the respective mitigating and aggravating circumstances.

As for the application of penalties in relation to individuals, the following circumstances are considered: the nature of the crime and the character of the guilty person, mitigating and aggravating circumstances, and the effect of a penalty on the person's family (the latter is taken into account in criminal proceedings).

53 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

Such agreements are not available for corporations in Russia.

54 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

If a company has been held liable for administrative misconduct and its operations have been suspended, it cannot participate in any public procurement. The debarment from government contracts applies in cases where the company's director, member of the executive board or the chief accountant were disqualified for an administrative offence or held liable for economic crimes (disqualified officers). On expiry of the sanction, such restrictions are not applicable to the company. If there is a risk of suspension or debarment or other restrictions on continuing business in Russia, it could be possible to conduct business from another corporate entity from abroad, provided that the disqualified officers are not associated with it (bearing in mind that companies in offshore jurisdictions are generally not allowed to participate in bidding for Russian state procurement). Also, Russian law does not allow redomiciliation of an existing company.

55 Are 'global' settlements common in your country? What are the practical considerations?

Global settlements have not yet become a common practice in Russia, but there are no restrictions to having such settlements, provided they comply with Russian law.

56 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

It is a basic constitutional principle that everybody has a right to find, obtain, transfer and share information. Persons willing to investigate any matters do so using their own resources, including any open public resources. Injured parties may enter criminal proceedings, and familiarise themselves with all case materials upon completion of a preliminary investigation. Parties may bring a civil claim as private civil claimants against an accused person to compensate for the damage caused by the crime.

Publicity and reputational issues

57 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

Information about a preliminary investigation is confidential and not subject to disclosure according to the Criminal Procedure Code, unless it is provided with the investigator's consent. Upon release of a judgment, the court shall post it to ensure that all personal data and information on state, commercial and other secrets is excluded. In addition, there is a list of cases on which the publication of judgments is prohibited (public safety, sexual crimes, etc.).

58 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

Public relations firms are often used by major Russian companies to manage a corporate crisis in Russia. Medium and smaller firms usually handle such matters in-house.

59 How is publicity managed when there are ongoing, related proceedings?

Publicity should be tightly managed having regard to any orders of the court, interests of parties without infringing the procedural rights of all participants, the nature of the proceedings (open or closed) and with careful consideration of the effect of publicity on each proceeding.

Duty to the market

60 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

In cases where the settlement could affect the price of the publicly traded securities of a company, one has to consider the need to disclose it in the company's official financial reporting under the Federal Law on the Securities Market dated 22 April 1996 No. 39-FZ.

52

Singapore

Mahesh Rai[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

The highest-profile investigation under way in Singapore involves 1MDB, a strategic development company wholly owned by the government of Malaysia. Its stated purpose is to drive economic development and encourage foreign direct investment in Malaysia. Allegations have been made that 1MDB was used to siphon state funds into the accounts of several key government officials of Malaysia.

In 2016, various law enforcement authorities in Singapore announced that an investigation had commenced over 1MDB-related fund flows through Singapore. In the course of the investigation, several bank accounts were seized and dealings were 'curtailed'. At the same time, law enforcement authorities have made requests for information to other countries, that, in turn, have also sought Singapore's assistance.

As a result of the investigation, the Monetary Authority of Singapore (MAS) found that BSI Bank Singapore committed serious breaches of anti-money laundering requirements with poor management oversight, and consequently withdrew its status as a merchant bank.

On 11 October 2016, the MAS announced that it had ordered the Singapore branch of Falcon Private Bank to cease operations, and imposed fines on the Development Bank of Singapore and UBS AG following investigations into 1MDB-related fund flows that took place through these banks. The reason cited by the MAS for these actions was lapses in anti-money laundering controls.

1 Mahesh Rai is a director at Drew & Napier LLC.

On 30 May 2017, the MAS announced that it had completed its two-year review of banks involved in 1MDB-related fund flows, calling it the most extensive supervisory review it has ever conducted. Following its review:

- the MAS found that Credit Suisse and United Overseas Bank (UOB) had breached various anti-money laundering requirements and imposed fines of S$0.7 million and S$0.9 million on them respectively; and
- employees of Falcon Private Bank and BSI Bank Singapore have been issued with prohibition orders barring them from providing financial advisory services or serving as a director or participating in the management of a capital markets services or financial advisory firm in Singapore.

To date, four ex-employees of BSI Bank have been charged and convicted for varying offences ranging from failing to report suspicious transactions to forgery and cheating.

2 Outline the legal framework for corporate liability in your country.

Companies can be held criminally liable under the Penal Code (PC) as a company falls within the definition of 'persons' liable for punishment under the PC. A company may be held directly liable for its employee's conduct if the latter is considered the directing mind and will of the company.

Companies can also be held liable for offences under specific legislation, such as the Securities and Futures Act (SFA), the Income Tax Act and the Corruption, Drug Trafficking and Other Serious Crimes Act (CDSA). Companies can be held directly responsible for committing offences (applying the 'directing mind and will' principle), or in certain circumstances, for offences committed by employees or officers of a corporation (for instance, see Section 236B of the SFA).

Historically, the approach has been to charge companies for regulatory offences instead of a PC offence. In recent years, charges have often been brought under the SFA, CDSA, ACRA and Companies Act.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

There are several law enforcement authorities that regulate companies, as set out below:

- The Commercial Affairs Department (CAD) is a division of the police that investigates white-collar commercial and financial crimes.
- The Corrupt Practices Investigation Bureau (CPIB) is independent of the police and reports to the Prime Minister's Office. The CPIB investigates and aims to prevent corruption in both the private and the public sectors. It is the only agency authorised to investigate corruption offences under the Prevention of Corruption Act (PCA).
- MAS is the central bank. It administers and enforces the SFA and the Singapore Code on Take-overs and Mergers. It is also responsible for the enforcement of civil penalties for market misconduct, and for regulating and supervising financial services. Its officers have the power to compel disclosure of those acquiring or disposing securities, to inspect and order production of company books, and examine witnesses.

- Singapore Exchange Ltd (SGX) is a market regulator of listed companies. It investigates infractions and complaints in relation to listing requirements, and takes appropriate remedial measures against the same. It also reviews listing applications and provides support on regulatory issues to listed companies.
- The Accounting and Corporate Regulatory Authority (ACRA) regulates business entities, public accountants and corporate service providers. It investigates breaches of statutes such as the Companies Act (CA) and the Accountants Act. It monitors corporate compliance with disclosure requirements and regulates accountants performing statutory audits.
- The Competition Commission of Singapore (CCS) is Singapore's competition authority and it enforces the Competition Act. Its role is to promote competition in the markets.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

Investigations commence when the suspicion of a police officer has been aroused to such an extent as to cause him or her to proceed to any action. No specific threshold of suspicion is needed to trigger an investigation.

The relevant acts and regulations provide regulators such as the SGX, ACRA and MAS with independent investigative powers. The main sources of these are:

- SGX: Chapter 14 of the Mainboard Rules, and Chapter 3 of the Catalist Rules;
- MAS: Part IX, Division 3 of the SFA; and
- ACRA: Section 31 of the ACRA Act.

There appear to be few restrictions on the initiation of investigations by such regulators. The language of the relevant statutes is as follows:

- SGX: Rule 307 of the Catalist Rules and Rule 1407 of the Mainboard Rules: 'reason to believe' or 'is of the opinion that the circumstances warrant it';
- MAS: Section 152 SFA – 'as it considers necessary or expedient' for the purposes of policing the SFA; and
- ACRA: Section 31 of the ACRA Act – 'reasonably believes' or 'thinks necessary'.

In practice, the authorities do not disclose what triggered the investigation into a particular company.

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

Singapore laws protect against double jeopardy such that a person is not to be tried again for a criminal offence for which he or she has been convicted or acquitted.

The question of whether international double jeopardy will prevent a corporation from facing criminal exposure in Singapore after it resolves charges on the same core set of facts in another country has not been resolved in Singapore yet.

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

Criminal law does not typically have extraterritorial effect unless expressly provided for by a statute. There is a general presumption against the extraterritorial application of criminal laws and other statutes in the absence of express words to the contrary as a matter of comity and in observance of the sovereignty of other nations (*PP v. Taw Cheng Kong* [1998] 2 SLR(R) 489).

For example, Section 37 of the Prevention of Corruption Act (PCA) extends the application of the PCA to Singapore citizens who commit offences under the PCA outside Singapore.

Further, Sections 108A and 108B of the Penal Code extended the abetment provisions in the Penal Code criminalising:

- abetment by a person in Singapore of an offence committed outside Singapore if the offence would constitute an offence in Singapore; and
- abetment by a person outside Singapore of an offence committed in Singapore notwithstanding that all the acts constituting the abetment took place outside Singapore.

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

Authorities often face difficulties in obtaining evidence, getting parties to give evidence or to assist in criminal investigations, recovering, forfeiting or confiscating property, restraining dealings in properties or freezing of assets, executing requests for search and seizure, locating and identifying witnesses and suspects, and service of documents.

Singapore tackles these challenges by entering into reciprocal treaties, some of which have been adopted and incorporated into law. Examples of these include:

- the Mutual Assistance in Criminal Matters Act (Cap. 190A) (MACMA);
- the CDSA;
- the Extradition Act (Cap. 103) and the Extradition (Commonwealth Countries) Declaration;
- the Terrorism (Suppression of Financing) Act (Cap. 325); and
- the SFA.

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

Investigations by foreign authorities or requests for assistance can and often do lead to commencement of investigations by Singapore authorities.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

Corporate culture cannot be used as a justification for misconduct by a company.

There is an ever-increasing focus on encouraging good corporate culture and ethics in Singapore's legislative and regulatory corporate governance framework. Singapore has shifted

from a merits-based approach to a disclosure-based regime, through the encouragement of self-reporting. In line with this, many companies have set up compliance departments to ensure adherence with their obligations under the applicable legislation. This focus on good corporate governance has also been the driver of legislation in recent years.

10 What are the top priorities for your country's law enforcement authorities?

The current top priorities in Singapore are money laundering and corruption.

11 How are internal investigations viewed by local enforcement bodies in your country?

Internal investigations are welcomed by law enforcement authorities. In some cases, the authorities may request the company to disclose the findings of their internal investigations to assist with investigations carried out by the authorities. While such findings may be provided by the company in the spirit of co-operation or as part of a bid for leniency (to avoid being charged, or as a factor to be considered at sentencing), the company may be required by law to disclose the results of its investigations in some situations (see questions 21, 26, 38 and 39). The question of whether companies can avoid disclosure on grounds of privilege has not been tested in any reported case.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

Allegations of misconduct often come to light through complaints made by third parties (whistleblowers) either to companies themselves or to law enforcement authorities. In most cases, the identity of the complainant is not revealed by the law enforcement authorities.

Reports from auditors or independent directors could also lead to internal investigations into misconduct. Often, the company's audit committees work with external auditors and lawyers to uncover misconduct, which is then reported to the board of directors.

Misconduct may also be revealed through reporting conduct encouraged by statutes – for instance, disclosure obligations under the CDSA.

13 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Yes, search warrants and raids on companies are features of law enforcement in Singapore.

Law enforcement authorities executing the search warrant cannot seize more items than permitted by the terms of the warrant and Section 25 of the Criminal Procedure Code (CPC). Otherwise the search warrant is liable to be quashed.

The court issuing the search warrant may suspend or cancel the warrant if there are good reasons to do so (Section 27 of the CPC).

If an illegal search was conducted, the aggrieved party may make a criminal complaint for trespass or criminal force, or commence a civil claim for damages in the tort of trespass.

However, evidence obtained through an illegal search is not necessarily inadmissible; there is a judicial discretion to admit illegally obtained evidence if its admission would not operate unfairly against the accused.

14 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

It will be difficult to protect privileged material obtained during a dawn raid or a search. There is no process to quarantine allegedly privileged material for independent review. Instead, it is more practicable to assert privilege when law enforcement authorities attempt to rely on the privileged material during legal proceedings, or when the company or individual in question is charged. When the privilege is asserted before the trial, the claim is made in affidavits that set out the relevant facts about the relationship and the communications, though not the detailed contents of the communications. When the privilege is asserted in court, evidence must be led of the circumstances in which the communications came into existence.

While Sections 28 and 29 of the CPC require that searches be conducted in accordance with the warrant, which must specify the documents or things that may be seized, the police have wide-ranging powers to search and seize without a search warrant in certain circumstances.

15 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

There is a qualified right against self-incrimination in Singapore. Section 22(2) of the CPC gives suspects the right against self-incrimination. The right is qualified as follows:

- This right does not extend to the right of an accused to be informed of this right.
- Suspects are unlikely to know of this right (rendering the right otiose) as they do not have an immediate right to counsel under Article 9(3) of the Singapore Constitution and may be questioned before receiving legal advice.
- Lastly and most importantly, the Singapore courts are permitted to draw an adverse inference against the accused under Section 261(1) of the CPC from a failure to disclose to the police facts that he or she subsequently relies on in his or her defence at the trial.

Under Section 258 of the CPC, if the accused is compelled to give evidence by any threat, inducement, or promise having reference to the charge against him, such evidence will not be admissible.

In criminal cases, under Section 283(2) of the CPC, the court may issue a summons to compel the appearance of a witness where the person's evidence is essential to making a just decision at the close of the case for the defence, or at the end of any proceeding under the CPC.

16 What legal protections are in place for whistleblowers in your country?

There is currently no overarching legislation in Singapore that addresses whistleblowing.

However, certain statutes and schemes have provided for the protection of whistleblowers:

- Magistrates, police officers and revenue officers cannot be compelled to reveal their source as to the commission of any offence under Section 127 of the Evidence Act. However, this is no guarantee of the informer's anonymity because the relevant officer has the discretion to provide or withhold the information.
- The CCS has a scheme that permits individuals and companies to seek leniency in disclosing information on cartel activities.
- No complaints regarding an offence under the PCA may be admitted in evidence in any civil or criminal proceedings, and no witness is obliged or permitted to disclose the identity of any informer. Further, courts must redact passages in any material in evidence or liable to inspection in any proceedings that contain an entry in which an informer is identified, or that might lead to the discovery of his or her identity. The CSDA also has similar provisions that protect the identity of whistleblowers as well as the information they provide.

17 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

While there is no statutory protection of employees if their conduct is being investigated, employees are protected against wrongful or constructive dismissal by their companies at common law. If, in the course of an investigation, employees are wrongfully or constructively dismissed, they may sue their employers for damages.

The following guidelines also protect employees who participate in internal investigations:

- Guideline 12.7 of the Code of Corporate Governance (issued by the MAS) provides that the audit committee 'should review the policy and arrangements by which staff of the company and any other persons may, in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters'.
- The Guidebook for Audit Committees (also issued by the MAS) lays out guidelines on the implementation, conduct and review of whistleblowing policies within companies. The whistleblowing policy should at least provide protection for whistleblowers, including confidentiality of identity and non-discrimination.

Directors are treated no differently from employees in terms of protection, but are subject to potentially greater criminal and civil exposure for breaches of directors' duties under the Companies Act.

18 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

There are no mandatory disciplinary steps a company must take and much depends on a company's internal procedures. It is common for the employee who is the subject of an internal investigation to be suspended while the investigation is under way.

Singapore is an at-will employment jurisdiction and generally companies may terminate the employment as long as the termination complies with the employment contract and, where applicable, the Employment Act. There is no legal obligation on the employer to provide the employee with reasons for the termination. Hence, subject to the terms of the employment contract, an employee can be dismissed for refusing to participate in internal investigations.

Commencing an internal investigation

19 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

It is common practice for companies to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation. The terms of reference should address the following:

- the aims of the internal investigation;
- the scope of the investigation – in particular, the duration of the investigation, areas to be covered, who the investigator is and to whom he or she will be reporting, how internal communications should be restricted, whether the public should know of the investigation, restriction of access to documents and restriction of access to persons;
- how interviews of employees will be conducted (what should happen if employees refuse to be interviewed or demand to be represented by counsel); and
- whether the internal investigation conducted in conjunction with counsel is in anticipation of proceedings and whether the dominant purpose of the investigation is to prepare for proceedings (if this is indeed the case).

20 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

Companies should immediately engage external counsel to obtain legal advice, commence an internal investigation, minimise criminal exposure and determine what leniency programmes may be applicable.

The company may have an obligation to report to the authorities under the self-reporting regime of certain statutes. For instance, the company's obligations under the CPC and CDSA to actively self-report may be triggered. Under the CPC and the CDSA, the company may be required to disclose arrestable offences. In most cases, self-reporting is viewed favourably by the authorities, but there is no general duty to be open with the regulator.

21 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

A listed company must make timely disclosure of any information it has concerning itself or any of its subsidiaries or associated companies that is either 'necessary to avoid the establishment of a false market in [its] securities', or 'that would be likely to materially affect the price or value of its securities' under the Listing Manual, Rule 703 (Rule 703).

An intentional or reckless failure to disclose under Rule 703 is a criminal offence under the SFA for which the directors of the listed company may also be liable.

There is no obligation on private companies to disclose the existence of an internal investigation or contact from law enforcement to the general public.

22 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

Depending on internal policies, it is not uncommon for companies' management only to report and brief the board of a company upon the conclusion of an internal investigation, or at least only when significant findings have been made. However, given Singapore's shift towards a disclosure-based regime and favourable view of self-reporting, it is desirable to brief the board as soon as an investigation is commenced.

23 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

It is advisable for the company to comply with any notice or subpoena and immediately disseminate and implement a document preservation policy specifying the categories of documents to be preserved, a cache where the documents are to be stored, and the list of authorised custodians.

24 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

A notice or subpoena from a law enforcement authority can be challenged by asking the court to quash it or prohibit further action by the relevant law enforcement authority.

Search warrants issued by the Singapore courts under the CPC may be suspended or cancelled if there are good reasons for doing so.

Attorney–client privilege

25 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

Yes, companies can claim litigation privilege over investigation reports, statements and drafts that are created during internal investigations if there is a reasonable prospect of litigation, and if advice is sought for the main purpose of litigation or contemplated litigation. Legal advice privilege can be claimed over investigations provided that such reports have legal

advice embedded in them or forming an integral part of the reports, even if the reports were drafted by third parties who are not legal professionals.

Companies should adopt the following practices to ensure that privilege or confidentiality is preserved at certain steps of the internal investigation:

- Counsel (whether internal or external) should be substantially involved in conducting witnesses interviews. Interview notes taken without counsel present should be kept factual, and without any comments or opinions. Privilege is more likely to attach to interview notes where the interview is conducted by counsel (internal or external) for the purpose of advising the client.
- Copying a lawyer in correspondence is not enough to attract privilege. The correspondence needs to be addressed to or from the lawyer for the purpose of obtaining legal advice or receiving instructions.
- Internal communications between non-legal employees may be privileged if they are entered into for the dominant purpose of gathering information to enable the company to seek legal advice from counsel. This can be demonstrated if the information was collected pursuant to a request from counsel to collect the information, and the communication is marked as 'privileged'.

26 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

There are two main types of legal professional privilege in Singapore law.

Legal advice privilege applies to communications between a lawyer and a client for the purpose of giving or obtaining legal advice. It protects communication between a client and a lawyer to ensure that the client may confidently provide all necessary information to, and receive appropriate advice from, the lawyer. Notably, legal advice privilege only extends to communications made primarily for the purpose of giving or receiving legal advice, and does not attach to documents that existed prior to the lawyer–client relationship.

Legal advice privilege persists even after the lawyer stops acting for the client and the client's successors in title continue to enjoy the privilege unless waived.

Litigation privilege is available over information when there is a reasonable prospect of a dispute and the information is provided for the dominant purpose of the dispute. It permits litigants to prepare their case in confidence, in the context of an adversarial justice system.

Legal professional privilege belongs to the client and there is no difference as to whether the client is an individual or an entity.

27 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

Yes, legal professional privilege applies to both internal and external counsel under Section 131 of the Evidence Act.

28 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

Waiver of privilege can be viewed as a co-operative step by the authorities. There are no set contexts in which privilege waiver is mandatory or required. In practice, it is rare for authorities to request that parties waive privilege.

29 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

The question of whether limited waiver of privilege exists in Singapore has not yet been determined.

30 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

The question of whether limited waiver of privilege exists in Singapore has not yet been determined.

31 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

Yes, common interest privilege exists. Common interest privilege allows one person to share privileged materials with others who have a common interest in the subject matter to which the privileged materials relate, without any loss of legal privilege. Such sharing does not amount to a waiver of privilege except as between the provider of the materials and the recipients. In addition, each recipient can assert privilege over the shared materials against a third party.

32 Can privilege be claimed over the assistance given by third parties to lawyers?

Companies can maintain legal professional privilege over investigation reports, statements and drafts that are created during internal investigations if there is a reasonable prospect of litigation, and if the advice is sought for the main purpose of litigation or contemplated litigation: *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367.

Witness interviews

33 Does your country permit the interviewing of witnesses as part of an internal investigation?

Yes, this is common. Typical internal investigations involve conducting interviews with the employees and directors, collection and forensic review of documents, emails, telephone records and electronic device transmissions, and tracing of the proceeds of fraud. Witness interviews may be recorded in statutory declarations under the Oaths and Declarations Act, which can then be used as evidence in court proceedings.

34 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

Yes (see question 32).

35 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

Interviewers should state whom they represent and, where appropriate, make it clear that they are not acting for the employee. This is to avoid any potential claims of conflict of interest.

Employees being investigated may retain their own lawyers, especially if the investigations are likely to lead to prosecutions. Early engagement of lawyers will ensure that employee statements during an internal investigation are given with the benefit of legal advice and such statements can later be submitted to law enforcement authorities.

For the company, it is important to consider whether counsel (external or internal) should be involved during witness interviews to ensure that any statements taken during internal investigations are properly protected by privilege.

There are no special requirements when interviewing third parties such as former employees.

36 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

The interviewer typically explains to the witness the reasons for the interview and the aims of the investigation. The interviewer usually has someone else present to take notes and to corroborate what was said during the interview. Often, the interviewer does not share with the witness what other witnesses have said. Confidentiality and anonymity are thus maintained.

The interview is usually conducted with references to documents, emails, telephone records and electronic device transmissions. Questions are asked based on such documents.

Where allegations are being made against the employee, it is advisable, but not compulsory, for the employee to be represented. This will ensure that statements given during the internal investigations that may be subsequently turned over to the police or other investigative bodies are given with the benefit of legal advice or will be protected by privilege, or both.

Reporting to the authorities

37 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

Yes, there are several circumstances under which reporting misconduct to law enforcement authorities is mandatory under certain statutes and regulations.

Listed companies have an obligation to disclose any information they have concerning themselves or any of their subsidiaries or associated companies that is either 'necessary to avoid the establishment of a false market in [their] securities', or that 'that would be likely to materially affect the price or value of [their] securities' under Rule 703. Non-compliance is a criminal offence under the SFA if the company intentionally or recklessly withholds disclosure.

Companies also have disclosure obligations under the CPC. Under Section 424, every person aware of the commission of or the intention of any other person to commit certain offences must give information to the police.

Further, Section 39 of the CDSA requires individuals to file a suspicious transaction report as soon as reasonably practicable when individuals know (or have reasonable grounds to suspect) that any property represents the proceeds of criminal conduct, in certain circumstances.

38 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

It is advisable to self-report to law enforcement even if the company has no legal obligation to do so as it may amount to a mitigating factor or a factor to be considered by law enforcement authorities to be lenient. It will also provide a basis for dialogue between the company and the relevant law enforcement authorities to ensure damage control.

Companies should note that self-reporting to Singapore law enforcement authorities may trigger breaches of reporting obligations in other jurisdictions. Hence, it is usually advisable to self-report to foreign authorities as well after obtaining legal advice from the relevant jurisdictions.

In any event, once disclosure has been made to Singapore law enforcement authorities, it is likely that information would be shared with foreign law enforcement authorities under the provisions of MACMA.

39 What are the practical steps you need to take to self-report to law enforcement in your country?

Before self-reporting to law enforcement, it would be ideal and advisable to first conduct an internal investigation. The internal investigation should be governed by terms of reference (see question 19). Once internal investigations are complete, counsel (internal or external) should be consulted to determine whether there is any positive obligation on the company to disclose misconduct and the extent to which disclosure should be made.

Counsel (internal or external) should also be consulted to ensure privilege is maintained over any information that may come to light and to advise on possible statutory leniency provisions.

Responding to the authorities

40 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

The company will typically engage lawyers immediately and seek advice on compliance with the notice or subpoena.

Lawyers will also advise companies on the leniency provisions. Depending on the investigating authority, it is possible to enter into a dialogue with the authority. Also, plea bargaining exists in the criminal procedural law in Singapore by way of the Criminal Case Management System. However, this typically only takes place after the charge is brought.

41 Are ongoing authority investigations subject to challenge before the courts?

An ongoing investigation by the authorities may theoretically be subject to a prohibitory or quashing order. However, this is subject to whether the person seeking the prohibitory or quashing order has standing, whether the authority is amenable to judicial review and whether the decision taken by the authority is justiciable.

42 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

The company should engage lawyers in each of the jurisdictions who will then reach a common position on the approach to be taken regarding the investigations in each country. It is very important to maintain a consistent position given the provisions for co-operation between Singapore's and other countries' law enforcement agencies (see questions 7 and 8).

43 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

If the material is within the custody or control of the company, the company must search for and produce the material. In practice, companies often do so to appear co-operative.

Often, the location of data servers abroad can complicate searches for documents. Further, locating the custodians of documents abroad may, depending on the location, prove to be a stumbling block once news of an investigation breaks out.

44 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

Yes (see questions 7 and 8).

On 30 May 2017, the MAS announced that Singapore law enforcement agencies responded 'expeditiously to requests for information or assistance from overseas law enforcement and regulatory authorities', which was reciprocated during its review of financial institutions involved in the 1MDB investigations.

45 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

Some of the statutes that govern Singapore law enforcement authorities have provisions for confidentiality. However, these provisions are usually not absolute. For example, Section 40A of the CDSA only permits information disclosed under the CDSA to be used in civil or criminal proceedings if the Singapore courts are of the view that the information provided was either false or if justice cannot be done without disclosure of the information of the identity of the informer.

Singapore law enforcement authorities also do not typically share information obtained during investigations with any third parties except for other law enforcement authorities.

46 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

Lawyers in the foreign country should be engaged to determine potential civil and criminal liability in that other country. Lawyers from both countries should work together to ascertain whether it is possible to resist production. Typically, document production cannot be resisted on the ground that production would violate another country's laws.

47 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?

The Personal Data Protection Act (PDPA) governs the collection, use, disclosure, transfer and security of an individual's personal data. Corporate and personal information is also protected under various statutes (such as the Banking Act, CDSA and SFA), subsidiary legislation and the common law of confidentiality.

Companies need to be aware of potential exposure, whether civil or criminal, based on the documents that have been disclosed.

48 Are there any data protection issues that cause particular concern in internal investigations in your country?

See question 47.

49 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

Material voluntarily presented to law enforcement authorities may be used for collateral purposes if third parties obtain such material.

Material obtained by parties pursuant to search warrants taken out under the CPC in criminal proceedings cannot be used in civil proceedings to assert rights unrelated to those protected by those criminal proceedings.

If the material is in the possession of law enforcement authorities, it is not likely to be easily discoverable from them.

That being said, if the company disclosing documents is listed, it is likely that this information will have to be disseminated to shareholders.

Statutory provisions that compel disclosure of documents to law enforcement agencies often protect against unnecessary infringement of privacy of companies and individuals. Statutory provisions often have carve-outs excepting privileged material. For instance, disclosure of privileged documents under Section 31 of the CDSA is not required.

Further, in practice, law enforcement authorities maintain the confidentiality of documents submitted to them.

Global settlements

50 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

If the company has a presence outside Singapore, it should consider what implications the publicity of the settlement could have on its businesses abroad and treatment by foreign law enforcement authorities.

51 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

Where a company is held criminally liable, the typical sanction is a fine. Individuals may be subject to imprisonment or fines.

Other than criminal and civil liability, companies and their employees may also be subject to warnings or reprimands from regulatory bodies such as the SGX and the MAS.

The court may order a third party who has benefited from misconduct to disgorge benefit arising from such misconduct, on the application of the MAS or any other claimant (see Section 236L of the SFA).

Companies may also be debarred from government contracts in certain circumstances (see question 54).

52 What do the authorities in your country take into account when fixing penalties?

Whistleblowing may be regarded as a mitigating factor when it comes to the sentencing of whistleblowers involved in wrongdoing, provided that the whistleblower initiated contact with the authorities before investigations began.

Also, in deciding the penalties, the authorities can have regard to the level of co-operation given by the company in the conduct of the investigation (i.e., where the company self-reports).

53 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

Apart from the CCS's leniency programme for companies coming forward with information on cartel activity cases, deferred prosecution and non-prosecution agreements do not feature in Singapore.

54 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

Yes there is. The Standing Committee on Debarment (SCOD) decides all cases of debarment. The relevant grounds for debarment from government contracts include:

- giving false information that has a material bearing on the award or performance of the contract;
- corruption in connection with a government agency or contract;
- compromise of national security or public interest; and
- bid rigging.

Companies should be aware that settlement in another country could result in the SCOD finding that a ground for debarment has occurred. However, save for investigations by the CPIB and CCS, companies will have a chance to explain themselves – which explanation the SCOD will consider in making its decision. Even in situations involving an investigation by the CPIB or CCS, companies have a right of appeal to the Singapore Permanent Secretary (Finance).

55 Are 'global' settlements common in your country? What are the practical considerations?

To date, no global settlements have been made public.

56 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

Parallel private actions are possible. For civil suits, it is typical to put such suits on hold until the conclusion of the investigation by the authorities. A parallel private prosecution can also be taken out, although the Public Prosecutor can step in to discontinue a private prosecution at any juncture.

There is no obligation on the authorities to provide access to documents and data to private plaintiffs. However, material obtained by parties pursuant to search warrants taken out under the CPC in criminal proceedings cannot be used in civil proceedings to assert rights unrelated to issues in those criminal proceedings.

Publicity and reputational issues

57 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

Anyone publishing statements or publications that pose a 'real risk of prejudice' to ongoing proceedings is liable to be found guilty of *sub judice* contempt of court. At common law, the *sub judice* period commences when a suspect is arrested or charged, or when a warrant is issued or a civil suit is filed and ends when a verdict is passed.

The common law criminal jurisdiction of the court for *sub judice* contempt is now statutorily provided for under the Administration of Justice (Protection) Act 2016.

58 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

Larger companies often have internal marketing, communications or public relations departments that will be trained to handle corporate crises experienced by the company. If a company has not yet experienced a corporate crisis, it may be prudent to (1) have a crisis management plan; (2) have a designated crisis management team; and (3) conduct exercises to test the crisis management plan. Companies may also choose to engage external public relations firms that specialise in crisis communications.

59 How is publicity managed when there are ongoing, related proceedings?

The typical response to media queries to companies on ongoing investigations is 'no comment'.

The company should abide by any internal crisis management plan put into place, or take advice from established public relations firms that specialise in crisis management.

Duty to the market

60 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

Settlements that have been agreed but not yet made public should be disclosed as soon as possible. Such settlements could amount to information that the company is required to disclose under Rule 703 – failure to comply with Rule 703 is a criminal offence under the SFA if the company intentionally or recklessly withholds disclosure.

However, such disclosures ought to be made in conjunction with the relevant law enforcement authorities.

53

Switzerland

Benjamin Borsodi and Louis Burrus[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

In Switzerland, until very recently, the highest-profile corporate investigation was the Odebrecht matter. Odebrecht is a major corporate group, active in construction, with operations across the Americas, Africa and elsewhere, with over 150,000 employees. The company and its directors (mostly family members) were under investigation in the context of Brazil's Operation Car Wash investigation centred on state oil company Petrobras. The Office of the Attorney General (OAG) opened domestic proceedings, targeting the group and several individuals with corruption of foreign officials as well as money laundering. The closely coordinated, speedy and conflict-free (no contradictory decisions, elimination of risk of double jeopardy) recent resolution spanning the three main jurisdictions (Brazil, the United States and Switzerland) involved in the criminal prosecution was a key achievement. The settlement (trilateral agreement) was a landmark novel approach in international co-operation, and resulted in the largest corruption settlement worldwide. It is often described as a 'model case' for future cross-border resolutions. For the Swiss part, the resolution was one of the first corporate criminal liability cases ever settled in Switzerland, and by far the biggest to date.

1 Benjamin Borsodi and Louis Burrus are partners at Schellenberg Wittmer Ltd.

2 Outline the legal framework for corporate liability in your country.

Criminal corporate liability was enacted in Switzerland in October 2013. It concerns all offences in the Swiss Criminal Code (SCC). It focuses on the lack of organisation of a corporation. Liability is two-fold, namely primary and subsidiary corporate criminal liability.

The subsidiary liability is found at Article 102, Paragraph 1, of the SCC and provides that for all offences, the company can be found liable if it is not possible to identify a responsible individual within the corporation due to a lack of organisation of the company.

The primary liability is limited to a catalogue of certain financial offences (corruption, bribery, money laundering, financing of terrorism, etc.), in which case the corporation can be found criminally liable irrespective of the liability of an individual, provided that the corporation has not taken all necessary measures to prevent the perpetration of such offence.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

There are no specific law enforcement authorities regulating corporations in Switzerland, except for financial institutions regulated by the Swiss Financial Market Supervisory Authority (FINMA). However, the Criminal Procedure Code (CrimPC) provides for federal jurisdiction for specific offences (see Articles 23 and 24 CrimPC). This is particularly the case in white-collar matters. All other criminal offences fall within the jurisdiction of the cantons. However, the 26 cantonal prosecution authorities are not subordinate to the OAG.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

Prosecuting authorities must investigate any facts or suspicion that could lead to the finding of a criminal offence. There is no specific threshold, but the authorities must abide by the standard principles of criminal proceedings (speediness, due process, the right to be heard, etc.).

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

Switzerland applies the legal doctrine of *ne bis in idem*, which provides that no legal action can be instituted twice for the same cause of action. It is essentially the equivalent of the double jeopardy doctrine found in common law jurisdictions.

This protection is derived in particular from Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as from Article 14, Paragraph 7, of the 1966 International Covenant on Civil and Political Rights. Since January 2011, this principle is also expressly set out in the Criminal Procedure Code at Article 11, Paragraph 1, CrimPC. However, this merely provides that no person who has been convicted or acquitted in Switzerland by a final legally binding judgment may be prosecuted a second time in Switzerland for the same offence. Because of the territoriality

principle, a foreign prosecution or conviction has generally no impact on the jurisdiction of the Swiss criminal authorities in the context of offences committed in Switzerland. However, the SCC provides that in certain circumstances, the Swiss criminal authorities must take into account a sentence served abroad and allocate it to the sentence they will impose (see Article 3, Paragraphs 3-4, and Article 6, Paragraph 3-4 SCC).

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

In Switzerland, the application of criminal law follows the territoriality principle and therefore does not generally have an extraterritorial effect (see Article 3 SCC).

There are only limited situations in which a Swiss court accepts jurisdiction for offences committed abroad. Swiss criminal law provides for extensive jurisdiction based on the nationality of the offender (active personality principle). It also provides jurisdiction over offences committed against its nationals (passive personality principle). Since the complete revision of the general provisions of the SCC in 2007, those principles can be found in the new provision on jurisdiction under Article 7, Paragraph 1, (a) to (c) of the SCC. They mainly apply in three situations: (1) if the offence is also punishable in the jurisdiction in which the offence was committed (dual criminality); (2) if the alleged offender is in Switzerland or can be brought to Switzerland through extradition proceedings; or (3) if the offence may yield to extradition under Swiss law, yet the alleged offender has not been extradited.

In addition, two further situations in which the Swiss nationality of the offender or the victim is not a requirement have been introduced under Article 7, Paragraph 2, of the SCC: (1) when the request for extradition was denied on grounds unrelated to the nature of the offence; and (2) when the offence is a particularly serious felony within the meaning of generally accepted standards in the international community.

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

The main challenges in cross-border investigations relate to the ability of Switzerland-based individuals or entities to comply with requests addressed directly to them by a foreign authority, because of several Swiss law constraints. For instance, specific provisions of the SCC protecting Swiss sovereignty and the economic privacy of Swiss citizens may prevent those Switzerland-based individuals or entities from disclosing information to a foreign authority. In addition, Switzerland applies a rather strict data protection regime, which, in particular, impacts cross-border data transfer. Those challenges can best be avoided when the foreign authority follows the available mutual legal assistance channels.

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

Swiss authorities tend to assess their own investigations independently. Although they generally favour international co-operation, Swiss authorities do not really let decisions of foreign

authorities influence the conduct of a Swiss proceeding. That being said, one field in which foreign decisions may have an indirect influence is concurrent sentencing (see Article 49 SCC). This rule provides that when a court must pass sentence on an offence that the offender committed before he or she was sentenced for a different one, then the punishment cannot be more harsh than if he or she had been convicted at the same time.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

Recently, authorities have conducted investigations and prosecutions in accordance with the recent developments in the law, including harsher approaches for offences related to corruption and money laundering. For instance, the Swiss Supreme Court issued a judgment whereby money laundering can be perpetrated by omission when the offender holds some type of guarantor position (i.e., a bank's compliance officer) (see DFT 136 IV 188). The recent enactment of new legislation regarding private bribery also reflects this.

10 What are the top priorities for your country's law enforcement authorities?

Current priorities in Switzerland for law enforcement authorities concern the fight against corruption, including private bribery that can take place in the context of large sport organisations (e.g., FIFA). Switzerland has also revised its legislation to allow other countries to better fight tax evasion when tainted funds are located in Switzerland. Finally, the combat against money laundering remains a priority, according to recent statements made by the OAG.

11 How are internal investigations viewed by local enforcement bodies in your country?

Internal investigations are well tolerated. Because of the nature of the Swiss criminal prosecution system, in which the investigation is entirely and actively conducted by the prosecution authorities themselves, internal investigations are still sometimes viewed with caution by local enforcement authorities. However, in many fields, they have now become inevitable and this has entailed a significant learning process for authorities and corporations process in recent years. In large-scale investigations, some authorities have even started to ask for some form of coordination with parallel internal investigations.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

The two main sources for the initiation of criminal proceedings in Switzerland are the suspicious activity and transaction reports filed by Swiss banks with the Money Laundering Reporting Office of Switzerland (MROS) and criminal complaints filed by private individuals and corporations. An example is the case of the Petrobras matter where over 40 banks have reported relationships to the MROS, leading to investigations of thousands of Swiss bank accounts.

13 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Dawn raids and search warrants are common features when prosecutors conduct investigations in Switzerland; the only limitations concern the professional secrecy of certain professions (e.g., lawyers, doctors). In the case of seizure of information or documents subject to such privilege, the holder of the secrecy may request that the information be placed under seal, and it will be then up to the prosecutor to request the lifting of the seal from the competent court.

14 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

Documents or records and property that may not be searched or seized because of a person's right to remain silent or to refuse to testify, or for other reasons, must be placed under seal during a dawn raid or in response to a search warrant (see Article 248 CrimPC). Sealed documents and records may neither be inspected nor used by law enforcement authorities, unless they have successfully obtained an order lifting the seal from the competent court. Various forms of secrets, including attorney professional secrecy, might be alleged as a ground to request a seal order.

15 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

Generally, every person who is capable of testifying must do so and tell the truth (see Article 163 CrimPC). Only in limited circumstances may a person refuse to testify. The most common situation is when a person would incriminate himself or herself by testifying (right against self-incrimination). The right to refuse to testify also applies if a testimony would incriminate a relative.

16 What legal protections are in place for whistleblowers in your country?

The Swiss legal system enjoys no specific protection for whistleblowers. This topic has been discussed for several years before the Swiss parliament without reaching a compromise to date.

17 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

Employees must participate in internal investigations as part of their employment obligations. They do not enjoy specific rights in this respect, except for the duty of the employer to respect the employee's personality. Any right they could claim if they are deemed to engage in misconduct would derive from criminal proceedings rather than employment laws.

18 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

There is no formal step that a company must take in Switzerland when an employee is implicated in or suspected of misconduct. Companies tend to release employees from their day-to-day duties and place them on garden leave during an investigation. Employees will often be reminded that they remain subject to loyalty and confidentiality duties, and that they might also be asked to co-operate in the investigation. Under Swiss law, an ordinary dismissal is possible at any time without specific grounds. Only immediate dismissals require a material ground (i.e., all circumstances on the basis of which the continuance of the employment relationship cannot be reasonably expected). The refusal to participate in an internal investigation does not generally, on its own, constitute a sufficient ground for immediate dismissal.

Commencing an internal investigation

19 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

Switzerland-based clients often expect to receive clear indications on the process that will be followed before the launch of the investigation. It is therefore advisable to prepare an action plan or fact sheet, or both, outlining the scope of the investigation and the work that will be performed. These documents will mainly contain a description of the investigatory measures, an estimate of the necessary resources as well as the anticipated time frame. Of equal importance is status reporting on the investigation's progress.

20 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

There is no specific duty incumbent on a company when it becomes aware of misconduct. On the contrary, there is a right against self-incrimination. However, the authorities are likely to give credit for the spontaneous reporting of misconduct once it comes to light.

21 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

Corporations are not expected to publicly release information regarding investigations or formal proceedings that are ongoing.

22 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

Management would typically brief the board when the decision to conduct an internal investigation is taken and then once the results or recommendations are available. The internal investigation report typically contains an executive summary for the board. However, in

certain circumstances, an internal investigation can be commissioned by the board directly or, more frequently, by the board's audit committee or risk committee.

23 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

Corporations are expected to take all necessary measures to preserve documents and information to be destroyed in case they are required by law enforcement authorities.

Certain provisions from the SCC make it an offence for an individual or company to interfere with the good course of justice, which could be the case if evidence is being tempered with. Therefore, the corporation must have a proper IT system in place and provide proper instructions to all employees for the safe keeping of documents and information.

24 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

Orders issued by law enforcement authorities can be challenged by individuals and corporations before the competent courts. Both the lawfulness and the scope of the order are subject to review.

Attorney–client privilege

25 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

An internal investigation may be protected only if it is conducted by people subject to legal privilege. Under Swiss law, only Swiss attorneys or EU lawyers authorised to practise in Switzerland enjoy legal privilege (attorney professional secrecy). There is, however, some discussion as to the exact extent of the privilege in the context of the work performed during an internal investigation (i.e., when some of the work would fall outside the attorney's core business). Recently, the Swiss Federal Tribunal (Switzerland's supreme court) ruled that legal privilege does not prevent prosecutors from accessing material prepared by outside counsel in the context of an internal investigation based on alleged regulatory and money laundering offences. However, the scope of the access was limited to documents specifically related to compliance tasks that were deemed 'delegated' by the financial institution to its external lawyers. In other words, the bank must conduct its own anti-money laundering duties and cannot invoke legal privilege if these tasks are 'outsourced' to a law firm, as they fall outside the attorney's core business (Decision of the Federal Tribunal 1B_85/2016 of 20 September 2016).

26 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

Generally, in Switzerland the attorney professional secrecy is interpreted more restrictively than in other jurisdictions, in particular compared to attorney–client privilege in common law jurisdictions. A distinction is, however, made as to whether the client is an individual or a corporation. In terms of documents, correspondence with outside counsel regarding a current case – independent of its location – is protected by the attorney's legal privilege. Furthermore, only Swiss attorneys or EU lawyers authorised to practise in Switzerland can enjoy legal privilege.

27 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

The attorney's legal privilege only applies to external counsel. More specifically, it only applies to Swiss attorneys or EU lawyers authorised to practise in Switzerland. In-house counsel do not benefit from any type of protection. In the recent past, the Swiss legislature tried to introduce some level of protection for in-house counsel but the proposed bill (the Act on Corporate Counsel Regulation) was not accepted by the Swiss parliament.

28 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

The common law concept of attorney–client privilege does not apply. Essentially, information entrusted to lawyers is protected by professional secrecy. The lawyer controls this form of privilege, and it cannot be waived by the client. Therefore, there is no situation where a company can waive this privilege and obtain credit in exchange.

29 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

The concept of waiver of privilege does not exist in Switzerland, precisely because of the different concept of legal privilege. The client is the holder of the secrecy to be kept by the outside counsel. In other words, the client can freely decide to disclose information provided by external counsel. Voluntarily producing some information will not result in making all information produced by a Swiss outside counsel subject to disclosure.

30 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

The extent of professional secrecy is not dependent on privilege raised or waived in another jurisdiction. However, the issue of good faith could be at issue if a party was to invoke it in Switzerland while it has been waived in another country.

31 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

There is no common interest privilege available in Switzerland. Rather, defendants sometimes agree to liaise informally and exchange information and strategy.

32 Can privilege be claimed over the assistance given by third parties to lawyers?

Third parties assisting lawyers in the lawyers' core business will be bound by the same secrecy duty and enjoy the same legal privilege. Their work-product should therefore attract privilege. However, this issue has not yet been fully tested by Swiss courts. Existing case law shows uncertainties in this respect.

Witness interviews

33 Does your country permit the interviewing of witnesses as part of an internal investigation?

Internal investigations are not subject to specific laws and regulations. Outside counsel must refrain from influencing possible witnesses (a principle seen as a professional duty under Article 12(a) of the Free Movement of Lawyers Act) and are therefore in general not authorised to conduct formal interviews of witnesses. However, discussions may take place with employees in the context of fact finding in an internal investigation when required.

34 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

The approach of Swiss courts to internal investigations is not fully tested. A recent case of concern is the decision of the Federal Tribunal where a bank's confidential report to FINMA has been declared accessible to the OAG (Decision of the Federal Tribunal 1B_249/2015 of 30 May 2016).

35 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

Because internal investigations are regulated in Switzerland, there is no specific requirement or guidance when interviewing employees or executives of a corporation. However, the practice is largely influenced by systems in common law jurisdictions; therefore, employees are usually informed of their rights at the outset of the interview, including the fact that there is no specific privilege attached to the product of the interview, namely the minutes or transcript. For reasons set out above, interview of third parties is usually not possible.

36 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

In normal circumstances, interviews conducted in internal investigations are operated rather informally (i.e., without recording). There is no specific guidance, so the normal course of

action is to present documents to the witnesses if the situation requires it. Employees have no right to legal representation, but it is often encouraged to facilitate the conduct of the interview and allow the employee to feel more protected.

Reporting to the authorities

37 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

Individuals and corporations have no duty to report misconduct to law enforcement authorities. It is up to the corporation to decide if reporting could be construed favourably.

38 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

Outside counsel should conduct a review of the specific case prior to suggesting to the corporation to self-report. When it appears that the misconduct is likely to surface, self-reporting may be encouraged to seek the authorities' leniency. In the financial sector, banks and financial institutions are expected to report to FINMA. The decision on whether to report should be assessed globally, and not be limited to the boundaries of Switzerland.

39 What are the practical steps you need to take to self-report to law enforcement in your country?

An evaluation is made as to whether contact with the authorities should first be initiated informally or through written submissions. Experience shows that organising a meeting with the authorities prior to filling an explanation brief is often preferable.

Responding to the authorities

40 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

In many instances, companies must provide information before being targeted by the investigation. Orders issued by authorities are usually subject to specific sanctions so that the corporation must comply with the orders. It is normal to approach the authorities to initiate a dialogue in the hope of mitigating the potential charges. In most circumstances, prosecuting authorities agree to meet outside counsel and discuss the way forward.

41 Are ongoing authority investigations subject to challenge before the courts?

Two levels of jurisdiction co-exist for challenging decisions or actions, depending on the nature of the challenge. On the one hand, the court of appeal rules on challenges against procedural acts and decisions of prosecuting authorities (Article 20 CrimPC). On the other, the court for compulsory measures has jurisdiction for ordering the accused's remand and

ordering or approving specific additional compulsory measures (Article 18 CrimPC). This is, for instance, the court that rules on a sealing order on documents.

42 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

In large-scale cross-border matters, investigative authorities from various countries increasingly tend to anticipate and coordinate their actions. A company receiving similar requests in separate countries could address this with the respective authorities to ensure effective co-operation and avoid duplication. This is particularly important given that disclosure out of Switzerland to a foreign authority is often challenging, mainly because of the SCC provisions protecting Swiss sovereignty, the Swiss economy and the economic privacy of Swiss citizens (Articles 271 and 273 SCC). In addition, the company considering complying with a disclosure request needs to make sure that this is done in compliance with the Data Protection Act. In terms of international co-operation, foreign authorities will have to revert to the channels of mutual legal assistance.

43 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

Orders seeking the production of material must relate to documents and information located in Switzerland. Whenever prosecuting authorities wish to access material located abroad, they have to revert to the channels of international mutual assistance.

Mutual assistance in criminal matters with foreign authorities is well developed in Switzerland. This is because Switzerland has always been a place where information was sought by foreign authorities, in particular in terms of bank documents and records. Switzerland will co-operate with other authorities provided that specific requirements are met, such as due process, fair trial, principle of proportionality and reciprocity, the rules of specialty, etc. Recently, new laws have been enacted to allow the Swiss financial intelligence unit (MROS) to communicate directly with its foreign counterparts.

44 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

There are mainly two types of co-operation: international mutual assistance in criminal matters and police co-operation. Mutual assistance encompasses all measures aimed at facilitating the prosecution and punishment of criminal offences and is generally requested by prosecution authorities. Police authorities generally communicate with foreign states via their national Interpol offices. The main difference is that in police co-operation, the dual criminality principle does not apply. In addition, there is no possible challenge proceeding available to persons concerned.

45 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

Law enforcement authorities often share and exchange information available to them. Co-operation between domestic enforcement authorities is regulated by the CrimPC under Article 43 et seq. We have recently witnessed an increasing level of co-operation between the OAG and FINMA in various enforcement proceedings (see for instance FINMA's communication of 23 June 2017 on sanctions for insider trading and market manipulation: 'FINMA also immediately shared its findings with the Office of the Attorney General of Switzerland (OAG), which instituted criminal proceedings against the individual in question. If the OAG's criminal proceedings ultimately result in the disgorgement of profits, these take precedence.').

The situation is different in international mutual legal assistance matters where Swiss law strictly applies the rule of speciality, whereby evidence transmitted pursuant to a request for assistance may only be used for the purpose for which it was sought. In case of breach, Swiss authorities may suspend international co-operation with the concerned jurisdiction as has happened in the past, for instance in matters involving administrative assistance between the CFB (FINMA's predecessor) and the US Securities and Exchange Commission.

46 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

In the situation where the production of documents will potentially violate the laws of another country, the corporation could challenge the order issued by the law enforcement authority before the Swiss competent court.

47 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?

Requests from foreign authorities addressed directly to individuals or companies in Switzerland (with or without a court order or a subpoena) without having recourse to formal administrative channels (e.g., the European Convention on Mutual Assistance in Criminal Matters or the Hague Evidence Convention) can create severe difficulties for the Swiss individuals or companies concerned given the stringent requirements of Swiss law. The SCC contains two provisions protecting Swiss sovereignty, the Swiss economy and the economic privacy of Swiss citizens (Articles 271 and 273 SCC). Article 271 SCC, for instance, prohibits all acts on Swiss territory that fall within the jurisdiction of Swiss authorities and that are performed for or on behalf of a foreign government (e.g., gathering of evidence ordered by and for use in foreign proceedings). Article 273 SCC prohibits the disclosure of trade or business secrets to foreign authorities and private persons. In addition, the Swiss Federal Data Protection Act contains a specific provision on the requirements for cross-border data transfer. One of the main specificities of the Swiss Data Protection mechanism is that it provides the same level of protection to individuals and legal entities alike.

48 Are there any data protection issues that cause particular concern in internal investigations in your country?

The most important issue encountered with regard to data protection relates to cross-border disclosures. Swiss regulation on data protection provides, for instance, that no personal data can be transferred to a foreign country except in limited circumstances, one of them being that the concerned person has given his express consent to the disclosure (see Article 6 of the Swiss Data Protection Act).

49 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

There is no specific risk as long as the production of material is made to a Swiss authority. In the case of a criminal investigation by a prosecution authority, the parties' access to the material produced by them during the investigation depends on the requirements of the Criminal Procedure Code (see Article 101 CrimPC).

Global settlements

50 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

The Swiss legal system offers the possibility of settlement with authorities. Recent experiences have shown that prosecuting authorities can prove pragmatic in approaching global settlements.

51 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

The maximum sanction that a company may face in the application of Article 102 SCC is a fine that cannot exceed 5 million Swiss francs. The court could also order other types of penalties, such as publication of the judgment, if required by reason of public interest or by the interests of the injured party (Article 68 SCC). The SCC also generally provides for the possibility of forfeiting assets (Articles 69–73 SCC). Directors, officers or employees could face jail sentences or monetary penalties, depending on the offence.

52 What do the authorities in your country take into account when fixing penalties?

In the specific context of Article 102 SCC, the court must take into account the seriousness of the offence and the seriousness of the organisational inadequacies, as well as the loss or damage caused. The ultimate penalty should also be based on the economic ability of the company to pay the fine. More generally, criminal courts fix penalties based on an assessment of the level of culpability. They also take into account the motives, the seriousness of the damage, previous conduct, personal circumstances and the potential effect of the sanction.

53 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

Non-prosecution agreements and deferred prosecution agreements are not available in the Swiss legal system. However, in the context of settlements with law enforcement authorities, different solutions can be found, such as disgorgement with a view to transferring part of the proceeds to a charitable organisation. For instance, in a recent settlement with the OAG further to a self-disclosure in a corruption matter, the Swiss subsidiary of German printing press manufacturer Koenig & Bauer agreed to disgorge 30 million Swiss francs of the company's profits and to pay another 5 million Swiss francs to a new fund supporting the strengthening of ethical business standards and compliance procedures.

54 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

Debarment from government contracts is not part of the Swiss legal system. In certain circumstances, corporations and executives may be prohibited from operating in that line of business for a certain period as part of the sanction.

55 Are 'global' settlements common in your country? What are the practical considerations?

Global settlements are not very common, although they are becoming more frequent. The main difficulty lies in the expectations of each authority involved. Another frequent difficulty arises from the procedural differences between the various proceedings (the same party might not have the same standing in one proceeding as in another).

56 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

The filing of a criminal complaint by private individuals and corporations is routine practice in Switzerland. When the individual or corporation is admitted to participate as a plaintiff (victim of the offence), it may access the file of the prosecuting authority and take an active role in the proceeding. This includes the possibility of being present during hearings of parties and witnesses, putting questions to the parties and witnesses, requesting the authorities to appoint experts, taking copies of the file and lodging appeals when necessary.

Publicity and reputational issues

57 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

In Switzerland, there is no publicity surrounding criminal cases at the investigatory stage. On the contrary, criminal investigations are covered by secrecy. The main reason is the presumption of innocence. In the case of an overriding public interest, criminal authorities consider that they can decide to disclose information to the general public.

58 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

The necessity of using a public relations firm depends on the in-house resources available within the company. It is becoming more common to build a small task force including a communications expert to provide guidance on PR strategy. It is also becoming more frequent for large corporations to have a person in charge of public affairs who will maintain close connections with government authorities.

59 How is publicity managed when there are ongoing, related proceedings?

The existence of those proceedings needs to be taken into account when defining the global communication strategy. However, companies tend not to communicate on proceedings to which they are not a party.

Duty to the market

60 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

There is no mandatory disclosure to the market when a settlement is reached with an authority (except for publicly traded companies if the settlement qualifies as a material event).

54

United Kingdom

Barry Vitou, Anne-Marie Ottaway, Laura Dunseath and Elena Elia[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

The highest-profile corporate investigation currently under way is the SFO's criminal investigation into Unaoil in connection with suspected offences of bribery, corruption and money laundering. The multi-jurisdictional investigation into Unaoil began in March 2016 and is particularly noteworthy for a number of reasons.

The matter first came to the attention of authorities following the publication of reports by Fairfax Media and the Huffington Post, based on a multitude of leaked internal emails and documents. A former Unaoil official has also blown the whistle and has told authorities that he bribed senior officials in the Gaddafi regime on behalf of, and while working for, Unaoil in mid 2009. It is understood that he continues to show willingness to co-operate with the authorities and testify against Unaoil.

As Unaoil is headquartered in Monaco, authorities in Monaco first raided offices in March 2016 at the behest of the SFO following a letter of request (LOR) for mutual legal assistance. Acting on the LOR, authorities in Monaco conducted the raids on Unaoil's offices and homes and seized a number of documents, computers and other property. The LOR was later challenged by the claimants, members of the Ahsani family who were the former CEO and COO of Unaoil. The challenge, made by way of judicial review, was based on two grounds: (1) failure to disclose key information, and (2) that the request was so far-reaching that it amounted to a 'fishing expedition'. The court was not persuaded by the claimants'

1 Barry Vitou and Anne-Marie Ottaway are partners, Laura Dunseath is a senior associate, and Elena Elia is an associate at Pinsent Masons LLP.

arguments and found in favour of the SFO. The court, in its judgment in *R (on the application of Unaenergy & Ors) v. Director of the SFO* [2017] EWHC 600 (Admin), indicated that it was 'not attracted to a development in law' that would encourage an increase in challenges to investigations into serious criminality, where the investigators had acted in good faith and that such challenges would only be entertained in exceptional circumstances.

The investigation into the offending is widespread with the SFO pulling the thread opening investigations into a number of other companies connected to the ongoing investigation into Unaoil. Unaoil continues to contest the allegations.

2 Outline the legal framework for corporate liability in your country.

A corporation is a legal entity and can be held criminally liable for the actions of its employees under two principles:

- Vicarious liability – depending on the wording of the legislation, a corporation can be held vicariously liable for strict liability offences committed by its employees. This most commonly occurs under regulatory legislation, for example, sale of food that is unfit for human consumption and other minor offences such as road traffic offences, for example, falsifying tachograph records. The principle of vicarious liability in the United Kingdom is not directly comparable with the *respondeat superior* doctrine that exists in the United States.
- Identification principle – a corporation can be held criminally liable for the actions of its employees who are determined to be a directing mind and will of the company, and therefore the embodiment of the corporation when acting in its business.

Additionally, some specific pieces of legislation create particular corporate criminal offences, such as the Corporate Manslaughter and Corporate Homicide Act 2007 and the Bribery Act 2010, which created the offence of corporate failure to prevent bribery by an associated person (i.e., a third party who performs services on behalf of the corporation; for example, a marketing consultant). In addition the Criminal Finances Act 2017 introduces a new offence of failure to prevent the facilitation of tax evasion.

A corporation cannot be held criminally liable for any offence not punishable by a fine, for example, murder, or any offence that cannot be committed by an official of a corporation in the scope of their employment, for example, rape.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

In England and Wales, corporations are treated identically to individuals in regard to criminal law enforcement, and are subject to investigation or prosecution by all law enforcement authorities, including (non-exhaustively):

- The SFO – this is the lead authority for the investigation and prosecution of large and complex corporate financial crime or corruption.
- The National Crime Agency (NCA) and local police forces – these investigate smaller-scale or less complex corporate crime, which is then prosecuted by the Crown Prosecution Service (CPS).

- Her Majesty's Revenue and Customs (HMRC) – HMRC investigates tax-related offending which is then prosecuted by the CPS.
- The Financial Conduct Authority (FCA) – this is the regulator of the financial services industry. As a regulator, the FCA can impose civil sanctions for misconduct, but also may prosecute regulated firms or individuals for specific market-related offences such as insider trading and market manipulation. Frequently, cases involving financial services companies fall within the scope of both the FCA and the SFO's investigation powers. In those cases the SFO will usually take precedence in relation to the criminal proceedings as it may prosecute a wider range of offences.
- The Competition and Markets Authority (CMA) – the CMA investigates anticompetitive behaviour; it may impose civil sanctions but can also prosecute cartel offences.
- The Department of Business Innovation and Skills (BIS) – this government department investigates and prosecutes activities concerning the affairs of companies, including fraudulent trading, and breaches of bankruptcy or disqualification orders.
- The Information Commissioner's Office (ICO) – the ICO investigates and prosecutes or imposes civil sanctions for data protection offences.
- Health and Safety Executive (HSE) – the HSE investigates and prosecutes or imposes civil sanctions for health and safety offences.

In late 2009, the SFO and CPS published a joint guidance note for corporate prosecutions setting out general principles, and evidential and public interest factors that could be taken into account when making a prosecutorial decision in regard to a corporate.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

Law enforcement authorities must have reasonable grounds to suspect that a criminal offence has been committed to exercise their investigative powers. The threshold for suspicion is low.

The SFO may investigate any suspected offence that appears to the Director of the SFO on reasonable grounds to involve serious or complex fraud. The SFO's compulsory powers under section 2 can be exercised in any case in which it appears to the Director that there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person.

Additionally, and only in relation to bribery and corruption, under section 2A of the Criminal Justice Act 1987 the SFO may apply the even lower test of the 'appearance' that bribery and corruption may have taken place to initiate a 'pre-investigation' (and use its powers under section 2 to determine whether a formal investigation should be undertaken).

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

The principle of double jeopardy exists in the United Kingdom in that a corporation cannot be prosecuted again for the same or similar offences on the same facts following a legitimate acquittal or conviction, or other appropriate disposal, such as a deferred prosecution

agreement, by a court in the United Kingdom or by a court of competent authority in a foreign jurisdiction.

However, even if the predicate offending has been disposed of in one jurisdiction, double jeopardy will not preclude UK authorities from prosecuting ancillary or incidental offences, such as books and records offences that occurred in the United Kingdom. Nevertheless, there is scope to engage with international regulators to ensure that in practice one agency takes primary responsibility for the investigation and enforcement.

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

The jurisdictional basis of criminal law in England and Wales is territorial, as such an offence will only be triable in the jurisdiction in which the offence takes place unless there is a specific provision to the contrary, for instance where specific statutes enable the United Kingdom to exercise extraterritorial jurisdiction. Examples of offences for which extraterritorial jurisdiction has been imposed by statute include:

- Fraud Act 2006: section 1 – fraud (by false representation, failure to disclose information or abuse of position), section 6 – possession of articles for use in frauds, section 7 – making or supplying articles for use in frauds, section 9 – participating in fraudulent business carried on by sole trader, and section 11 – obtaining services dishonestly;
- Bribery Act 2011 – offences of bribery and corruption committed wholly on or after 1 July 2011, including corporate failure to prevent bribery (section 7);
- Theft Act 1968: section 1 – fraud, section 17 – false accounting, section 19 – false statement by company directors, section 21 – blackmail, and section 22 – handling stolen goods; and
- Forgery and Counterfeiting Act 1981 – various forgery offences, including forgery and using or copying a false instrument.

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

The challenges of dealing with cross-border investigations arise from inconsistencies in the approaches of the various law enforcement agencies and the local laws and customs. The topmost issues are:

- the differences in the scope and application of legal professional privilege between the jurisdictions, and ensuring that privilege is adequately protected when dealing with document or information requests from the various authorities or when conducting the internal investigation;
- the differences in data protection laws in each jurisdiction, and ensuring that breaches do not occur in the gathering and transferring of data between jurisdictions for the purposes of the internal investigation or responding to requests from a law enforcement authority;

- whether any of the jurisdictions have a positive statutory obligation to make a formal report once the corporation becomes aware or begins to suspect that a crime has been committed;
- identifying which authorities may claim that the offending conduct occurred in their jurisdiction as a result of the fact that with cloud-based communications (email, WhatsApp, i-Message, etc.), offending behaviour can occur in more than one location, for example, a fraud as a result of email that contains a fraudulent misstatement can occur in the locations of both the email sender and the recipient when the message was sent and received;
- whether evidence-sharing or mutual assistance treaties exist between the relevant jurisdictions; and
- whether there are sensitivities between the authorities in the various jurisdictions, for example, whether one authority is taking precedence, and if so whether the other authorities accepted that position.

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

Law enforcement authorities in the United Kingdom generally try to co-operate with counterparts in foreign jurisdictions. Usually at the outset of an investigation, the authorities will agree whether one jurisdiction should take precedence in the investigation and prosecution of the matter (e.g., if the majority of the misconduct took place in that jurisdiction or in the jurisdiction of incorporation).

Even if it is agreed that the predicate offending in a matter should be prosecuted in one particular country, incidental offences such as books and records offences can still be prosecuted in the other jurisdictions.

Ultimately, UK authorities are responsible for the conduct of their own investigations and prosecutions. The extent to which a decision of a foreign authority would influence a UK investigation will depend on the particular facts of the matter, the relationship between the UK and foreign authorities, and the relationship between the United Kingdom and the other country on a state level.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

In the United Kingdom prosecutors must consider the 'Full Code Test' set out in the Code for Crown Prosecutors before bringing charges against an individual or corporation. This test has two limbs: the evidential and public interest tests. Depending on the seriousness of the offending, evidence of a very ethical corporate culture could be considered to be a public interest factor against prosecution or taken into consideration by a sentencing judge as a persuasive mitigating factor.

Evidence of an ethical corporate culture is particularly important when a corporation is under investigation for failing to prevent bribery by an associated person, as it can assist in proving the statutory defence that the corporation had adequate procedures to prevent bribery in place at the time of the offence. There will also be a similar adequate procedures defence to the new corporate offence of failure to prevent the facilitation of tax evasion.

Similarly, a company's compliance with health and safety legislation, and specifically how senior management organise and manage the company's activities, will have a bearing on any decision to prosecute a company for corporate manslaughter or other associated health and safety offences.

10 What are the top priorities for your country's law enforcement authorities?

International corruption has been a top priority for the UK government and its law enforcement authorities for the last few years. In December 2014, the UK government published its Anti-Corruption Plan, which outlined anti-corruption initiatives, including the introduction of the International Corruption Unit within the National Crime Agency in May 2015.

In May 2016, the United Kingdom hosted the international Anti-Corruption Summit at which David Cameron, the prime minister at the time, pledged that the United Kingdom would be part of a 'more coordinated, ambitious global effort to defeat corruption'.

Tax evasion is also a key priority, which has led to the introduction of a new corporate criminal offence of failing to prevent the facilitation of tax evasion, which came into force in September 2017. In 2016 the government also launched an open call for evidence in relation to an even wider offence of corporate failure to prevent economic crime, the results of which, at the time of writing, are awaited.

A further focus is increased transparency of the beneficial ownership of foreign companies investing in UK property or bidding for UK government contracts. This has prompted the imminent introduction of a register of beneficial ownership of foreign investors, which is intended as a measure to reduce both tax evasion and the likelihood of UK properties being used to launder foreign criminal funds.

11 How are internal investigations viewed by local enforcement bodies in your country?

UK authorities have publicly stated that they are not opposed to internal investigations that are carried out in a manner that would not impede a criminal prosecution.

UK authorities expect data gathering exercises to be carried out promptly, covertly and coordinated across multiple sites simultaneously. Digital material should be forensically imaged and preserved by IT specialists. All procedures taken to gather and image data should be recorded and then fully disclosed to the law enforcement authority.

Additionally, UK authorities expect that full and accurate accounts be taken during witness interviews and that the accounts are then disclosed, and are likely to strongly rebut any claims of privilege over those accounts. We anticipate that the authorities' stance will only strengthen following the recent decision in the case of *SFO v. ENRC* [2017] EWHC 1017 (see question 25).

If a matter becomes known to an authority before the internal investigation has begun or been concluded, it is highly advisable to enter into a dialogue with the authority to agree the steps of the internal investigation, preventing any accusation from the authority that the internal investigation obstructed or impeded its criminal investigation, and ensuring credit for co-operation.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

In addition to the normal means for identifying misconduct, such as audits, screening procedures and whistleblowing, UK companies can become aware of allegations of misconduct through cybercrime or data breaches (e.g., the Unaoil and Panama Papers cases) and due diligence carried out in relation to commercial transactions, including mergers and acquisitions.

If a media outlet informs a company of an allegation they intend to publish, the company will need to carefully consider whether it should make an immediate self-report to law enforcement authorities before the matter is made public. The SFO has made it clear that once an allegation enters the public domain, the option of and credit for a 'self-report' will not be available, although this stance seems to have relaxed somewhat following the deferred prosecution agreement with Rolls-Royce in January 2017 (see question 38).

Similarly, as employment tribunals and litigation proceedings in civil courts are generally held in public, if allegations are raised during such proceedings the company should consider carefully whether it should make a self-report before the matter proceeds to a public trial or tribunal, as well as the increased risk of a report being made to the relevant authority by the disgruntled opponent.

13 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Authorities that investigate corporate crime in the United Kingdom, such as the SFO, often conduct dawn raids of business or residential premises under the authority of a search warrant issued by a court.

When a raid is carried out under a warrant, the authority may use reasonable force to gain entry to the premises. The authority may only search the premises specified in the warrant and seize items within the scope of the warrant.

Certain categories of material, such as confidential journalistic material or personal records created in the course of a business, for example, patient records in a raid of a medical practice, cannot be seized during a raid. Legally privileged material cannot be seized unless it was created with the intention of the furtherance of a crime (crime-fraud exception), or unless it is inextricably linked to other, seizable material, in which case it can be seized but must be examined by an independent lawyer for privilege before it is examined by the investigating team. The use of this power is subject to the Criminal Justice and Police Act 2001, which entitles the corporate's legal representative to be present at a review of the material and apply to a judge for the material to be returned.

The CMA may conduct a dawn raid of business premises without a warrant.

Some authorities have additional powers that can be exercised during a dawn raid, for example, the SFO and CMA may compel a person to answer questions relevant to the search, such as regarding the location of certain documents.

If there are significant errors in either the process of obtaining the warrant or authorising the raid, or in the execution of the raid, the raid can be challenged by judicial review and

rendered unlawful and deemed to be a civil or criminal trespass, or both, and the material seized during the raid could be rendered inadmissible.

14 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

As a general rule, legally privileged material cannot be seized during a dawn raid unless the crime-fraud exception applies or where it is inextricably linked to seizable material as described above.

However, in relation to competition investigations, the European Commission does not regard advice from in-house lawyers as legally privileged, so it may seize such material during raids or inspections.

The authorities who investigate corporate crime are generally accompanied during raids by an independent lawyer specifically tasked with reviewing onsite any material that the company asserts as privileged. It is, therefore, important to be aware of where privileged material is likely to exist so that assertions can be made before items are seized.

Where there is a dispute as to privilege, the authority will seize the material by sealing it in an opaque bag for review by an independent lawyer at a later date. The company may have its legal representative present during that review.

Digital devices containing both privileged and non-privileged items that cannot be separated may be seized or imaged during a raid. In practice, the privileged material will then be quarantined by digital forensic experts within the authority by applying search criteria provided by the company.

15 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

There is a qualified right to claim privilege against self-incrimination when being interviewed as a suspect or voluntary witness. The privilege is qualified as adverse inferences can in certain circumstances be drawn at trial by the interviewee's refusal to answer questions.

This privilege does not apply where an authority such as the SFO, FCA and CMA exercises specific statutory powers by issuing a notice compelling a witness to answer questions or produce documents. Failure to comply with such a notice without a reasonable excuse can result in a criminal offence. However, the contents of a compulsory interview cannot be used against the individual except in a prosecution specifically for making a false or misleading statement in that interview.

16 What legal protections are in place for whistleblowers in your country?

The Public Interest Disclosure Act 1998, as amended, offers statutory protections to whistleblowers.

The dismissal of an employee or employee shareholder will be automatically unfair if the principle reason for their dismissal is that they have made a qualifying 'protected disclosure'. Workers, employees and employee shareholders are also protected from detrimental

treatment (e.g., harassment or reduction in pay) on the ground that they have made a qualifying protected disclosure.

There is no requirement for a minimum period of service or any financial cap on the amount of compensation that can be awarded.

Useful guidance is available to employers, including guidance by the Whistleblowing Commission (Whistleblowing Code of Practice) and the Department for Business, Innovation and Skills (BIS) (Whistleblowing: Guidance for Employers and Code of Conduct).

17 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

Suspension pending investigation

Employment legislation does not specifically deal with suspension but case law and guidance issued by ACAS (a public body in the United Kingdom) in the form of the ACAS Code of Practice on Disciplinary and Grievance Procedures (the ACAS Code) requires that employees only be suspended where this is necessary and that the period of suspension be as short as possible. It is also important that employees be informed of the nature of the allegations made against them (whether in relation to an internal or external investigation) and, in most cases, suspension should be on full pay and with no loss of benefits. Any failure to follow these principles can result in a breach of the ACAS guidance and a repudiatory breach of contract.

Right to a fair hearing

The disciplinary process should be carried out in accordance with the ACAS Code. As a minimum, the disciplinary process should include a disciplinary investigation to establish the facts of the case. If the investigation finds that there is a case to answer, there will be a disciplinary hearing. The employee must be informed of the right to be accompanied by a colleague or a trade union representative at any disciplinary hearing or appeal, to be informed of the issue and to be given a full opportunity to put his or her case in response before any decision is made by the employer.

Employers should carry out their own disciplinary investigation and disciplinary hearing rather than relying on the police's or an external organisation's investigation. If an employee has been convicted, or charged with wrongdoing by the police or another external organisation, this does not mean that the employer can move straight to dismissal. The applicable employment law should be complied with, and the ACAS Code should be followed as far as possible.

The right not to be unfairly dismissed

All employees with over two years' continuous service with an employer have the right not to be unfairly dismissed. In the case of a successful claim, an employment tribunal can award compensation. In most cases compensation is capped at £93,332, although in certain situations employees can argue that this compensation cap should be disapplied.

Company director considerations

Directors may also be employees (in which case the above will apply in tandem with any specific issues of directors' duties). Directors are subject to general duties, which are set out in the Companies Act 2006 and contained within the company's articles. It may be that the director has acted in breach of one or more of his or her duties as director. If this is the case, both the Companies Act and the company's articles include provisions regarding the removal of a director. Additional regulations should be considered for directors of public companies.

18 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

Generally there is no strict legal requirement from an employment law perspective to suspend or discipline those suspected of misconduct. Some heavily regulated employers, for example, within the financial services sector, may be required by their regulatory body to suspend and take disciplinary action against employees who carry out regulated activities. Employees may also be regulated themselves and will have specific obligations towards the regulator.

Failure to take disciplinary action could be regarded by an authority as evidence of poor corporate culture. Furthermore, failure to suspend or dismiss an employee who is capable of impeding a criminal investigation by destroying documents or alerting or interfering with witnesses, could be regarded as obstruction of the criminal investigation.

If an employee refuses to participate in an internal investigation, the employer may carry out the disciplinary process without the employee's engagement, having first warned the employee in writing. Generally speaking, a request to participate in an investigation will be a reasonable management instruction and any unreasonable refusal to engage in this process may constitute misconduct in itself. However, it is important that the employer does not interrogate or pressurise the employee into making admissions of guilt.

Commencing an internal investigation

19 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

It is good practice to prepare an investigation plan before commencing an internal investigation, setting out the purpose of the investigation, the issues to be investigated, the investigation team and reporting lines, how legal privilege will be established and maintained (e.g., the investigation team is instructed by and reports to a lawyer), how digital and hard copy material will be collected and preserved, how staff interviews will be conducted, and any other necessary immediate controls or steps, for example, ceasing all future payments to suspect third parties.

20 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

A company should always investigate an issue as soon as it comes to light to enable the company to take the following steps.

Stop the offending behaviour

If it was later established by an authority that the conduct had continued after the company had become aware of it, the company could be exposed to further criminal liability.

Additionally, if the conduct had ceased and the company was aware or suspected that it possessed funds obtained from the conduct, but it failed to take any action in regard to those funds, for example, making a suspicious activity report to the National Crime Agency, the company could commit a money laundering offence.

Preserve all documents and material relevant to the issue

In the event that a law enforcement authority becomes aware of the matter, it would expect the company to have taken all necessary steps to protect and preserve all material that would be relevant to its criminal investigation (including by taking forensic images of digital material) so that the material could be eventually provided to them. Failure to protect and preserve relevant material could impede a criminal investigation and would be viewed as a lack of co-operation by an authority.

Furthermore, it is a criminal offence to destroy, falsify, conceal or dispose of relevant documents when a person knows or suspects an investigation of serious or complex fraud is already being, or is likely to be, undertaken by the police or SFO.

Take remedial or preventive action

Preventive measures should be implemented to ensure that the offending behaviour cannot occur in the company again.

If a company failed to take any steps to address an allegation of bribery, it is unlikely that it would be able to rely upon the 'adequate procedures' defence in the event of a prosecution of corporate failure to prevent bribery under the Bribery Act 2010.

21 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

Privately owned companies are not required to publicly disclose the existence of internal investigations or contact from law enforcement.

Under the UK Listing Rules, publicly listed companies must, without delay, issue a market announcement of any major new development that may affect their business, if the development may lead to a substantial share price movement. A notice compelling the provision of documents would be unlikely to require an announcement, but confirmation from the authority that the company was a suspect in a criminal investigation would be likely to require an announcement.

22 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

If the allegations are serious and could expose the company or directors to criminal liability or reputational damage, the board of the company is typically briefed at the outset and kept abreast of progress.

However, to the extent that members of the board are implicated in the issues under investigation, it may not be appropriate to brief the whole board. In addition, for legal privilege reasons, it may also be beneficial for the company to convene a subcommittee of the board to whom briefings are given.

23 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

Upon receipt, the notice or court order should be sent immediately to the appropriate person within the business (usually the legal department). The exact scope of the request should be determined and clarifications sought if the scope is unclear. The deadline for responding should also be diarised. It is advisable to seek external legal advice if the legal department is inexperienced in dealing with such matters.

To the extent the company has an internal policy setting out the steps to be taken upon receipt of a notice or court order, this should be followed. The company should consider circulating document retention notices to ensure all relevant data is preserved, taking forensic images of all potentially relevant data sources (e.g., laptops, PCs, tablets, phones), and compiling a database that can be interrogated for documents falling within the request.

Once reviewed for relevance, the results should be double-checked for privilege and copies retained of anything provided to the authorities.

24 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

Depending on the authority and type of notice, it may be possible to informally agree a narrower scope of information to be produced without having to formally challenge the lawfulness or scope. Otherwise the company may challenge the lawfulness or scope of the notice or production order by way of application to the court for a judicial review.

Attorney–client privilege

25 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

Legal professional privilege has traditionally been claimed over various aspects of internal investigations, which, in recent years, has increasingly been disputed by law enforcement authorities. In May 2017, the SFO successfully challenged claims to privilege by Eurasian Natural Resources Corporation Ltd (ENRC) over various documents that were produced by lawyers and forensic accountants during an internal investigation into allegations of bribery

and corruption. At the time of writing, ENRC is seeking permission to appeal the decision. The documents in question fell into four categories:

1 notes taken by lawyers of interviews conducted during the internal investigation;
2 materials generated by forensic accountants as part of a 'books and records' review;
3 documents, such as a presentation slides, containing or surmising factual evidence, that were used by lawyers to present to ENRC; and
4 emails between a senior executive and the head of mergers and acquisitions at ENRC, who was a Swiss qualified lawyer.

The court held that, except for the factual updates provided in category (3), the remainder of documents were not protected by litigation privilege or legal advice privilege.

In short, the court held that ENRC failed to establish on the facts that it was 'aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility'. It held that a criminal investigation by the SFO is not 'litigation' for privilege purposes and that the investigation was merely a preliminary step taken before a decision to prosecute is taken. Privilege could only be claimed when prosecution is in reasonable contemplation. It concluded that ENRC did not therefore contemplate prosecution when the documents in question were produced and was therefore not protected by litigation privilege.

Although the status of privilege during internal investigations is, at the time of writing, left in some uncertainty while an appeal is pending, there are several standard ways to advance and strengthen any claim to privilege, such as:

- involving lawyers (whether external or internal) as soon possible;
- marking all communications pertaining to legal advice as 'privileged and confidential';
- segregating privileged and non-privileged documents;
- refraining from forwarding or creating new documents that summarise legal advice received;
- encouraging employees not to amend or quote extracts from legal advice; and
- only circulating legal advice and privileged material on a strictly need-to-know basis.

The decision in *ENRC* does not mean that parties can no longer obtain legal advice in the context of an internal investigation; communications between a lawyer and a client for the purposes of legal advice continue to be privileged. The judgment may, however, make it more difficult for parties to assert privilege over factual enquiries undertaken to facilitate that advice.

26 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

There are two forms of legal professional privilege in the United Kingdom: advice privilege, which can be claimed over any communication between a client and lawyer where the client seeks or is given legal advice; and litigation privilege, which can be claimed over any communication between a client, lawyer and third party where the dominant purpose of the communication is use in actual, pending or contemplated litigation.

The holder of the privilege is the client. In the case of corporate investigations, the client is the group of individual employees or directors charged with seeking and receiving legal advice on behalf of the company rather than the entire corporate entity. This group of individuals generally includes the in-house legal team and the board of directors.

It is important at the outset of an investigation to identify the group of individuals that will be the client.

27 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

Generally, legal professional privilege applies equally to internal and external counsel, except in the case of competition investigations by the European Commission in which internal advice is not considered privileged.

28 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

UK authorities have frequently stated that they have no interest in communications between a client and its lawyers as to questions of liability or rights, but they do not approve of assertions of legal professional privilege over factual aspects of internal investigations, such as accounts given by third parties in internal investigations, and would expect the waiver of claimed legal professional privilege in those circumstances. This can be contentious as illustrated by the SFO's challenge to ENRC's claims of privilege (see question 25).

The authorities have stated that a refusal to waive a well made-out claim of legal professional privilege will not be held against a company, but a waiver of such a claim would be good evidence of co-operation. False or exaggerated claims of legal professional privilege will be considered strong evidence of not co-operating and will be challenged.

29 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

There is a concept of limited waiver of legal professional privilege, and it is for the individual or entity waiving the privilege to determine the extent of the waiver.

It is important to be very clear as to the scope of the waiver with regard to the purpose for which the privileged information can be used and with whom it can be shared, to avoid the information being shared with other domestic or foreign enforcement authorities or parties in any related civil proceedings.

30 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

This will depend on a number of factors, including the terms of the waiver, the circumstances in which the material was received by the UK authority, and whether the UK authority disputes the claim of privilege, for example, where the UK authority asserts that the material falls within the crime-fraud exception.

31 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

Common interest privilege exists in the United Kingdom and can be used to preserve privilege in documents disclosed to third parties who have a common interest in the subject matter of the privileged document or the litigation for which the document was created.

It is advisable when disclosing information under the common interest privilege to ensure that the recipient understands that the document has been disclosed on this basis and to obtain undertakings from the recipient that the privilege will not be waived.

32 Can privilege be claimed over the assistance given by third parties to lawyers?

Privilege can be claimed over communications with third parties where the dominant purpose of the communication has been use in actual, pending or contemplated litigation.

Witness interviews

33 Does your country permit the interviewing of witnesses as part of an internal investigation?

Yes. An internal investigation is a fact-finding exercise and interviews will often be central to any internal investigation. However, it is advisable to always be sensitive to the expectations of investigating authorities, to avoid any criticism that such interviews could have prejudiced the law enforcement investigation.

34 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

While privilege is often claimed over internal witness interviews, UK authorities such as the SFO have stated that they do not accept that the factual accounts of a witness interview are privileged and disapprove of such claims. This has, at the time of writing, culminated in a successful challenge by the SFO to claims to privilege over materials produced during an internal investigation, including notes of 85 interviews conducted in the course of the investigation by ENRC's external counsel. These included notes of evidence given to lawyers by ENRC's employees, former employees, subsidiaries, suppliers and other third parties.

The court held that factual notes of what is said by a witness to a lawyer is not a privileged document, even in circumstances where the lawyer has interviewed the witness with a view to using the information as a basis for advising its client. The court ruled that ENRC's reasonable contemplation that an investigation by the SFO was imminent was not sufficient to make out a claim for litigation privilege, since an investigation does not constitute 'adversarial litigation'. It found that the documents in question were generated at a time when there was merely a general apprehension on future litigation and this was not enough to be protected by litigation privilege.

In relation to legal advice privilege, the court held that the communications between the interviewees and counsel were not made in the course of giving instructions to counsel on ENRC's behalf but that the documents were intended by ENRC to be used as part of presentations to the SFO in the course of its self-report. Further, the court held that the fact that

the notes were made by external counsel rather than being a verbatim record of the interview did not further advance the claim for legal advice privilege.

It is too early to determine the impact the judgment could have on the practice of internal investigations in the United Kingdom, particularly those that are conducted to address concerns arising from whistleblower allegations or compliance concerns, rather than as a direct result of a formal inquiry, investigation or prosecution from an external regulator or law enforcement authority. Therefore, until an appeal is granted and the decision overturned, companies should be advised to plan any internal investigation activity carefully from the very outset and seek legal advice as to the shape of any investigation.

Privilege can and should be claimed over reports that include issues of liability or rights, but generally the authorities expect to receive a report of factual findings from which the discussion of liability or rights has been redacted.

35 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

Whether the interviewee is an employee or third party, they should be informed:

- that the interview is part of a fact-finding exercise;
- if they are implicated in any wrongdoing;
- that the lawyer conducting the interview represents the company and not the interviewee;
- that the interview notes belong to the company and therefore any privilege rests with the company and the company may choose to provide the notes to an authority; and
- that the interview is confidential and the contents of the interview should not be discussed with other employees or witnesses to avoid contaminating their recollection.

36 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

Generally interviewees are not legally represented in fact-finding interviews; however, companies should not refuse a request from an individual to be legally represented at his or her own expense.

Documents can be put to the interviewee. A copy of each of the documents referred to or an interview pack should be retained as part of the record of the interview.

Reporting to the authorities

37 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

The Proceeds of Crime Act (POCA) places a specific duty on employees of regulated businesses (i.e., financial services firms and professional services such as lawyers and accountants) to make a report to the NCA where they have reasonable grounds to know or suspect that another person is engaged in money laundering and that knowledge came to them within the course of their regulated business. Failure to make a report in those circumstances carries a risk of imprisonment for up to five years or a fine, or both.

All companies (regulated and non-regulated) should make a report to the NCA where the company knows or suspects that it possesses funds obtained as a result of suspected criminal conduct by the company or employees, as this is a money laundering offence under POCA. A report provides a statutory defence to money laundering if made as soon as practicable.

A money laundering report to the NCA is not a self-report for the purposes of a DPA (see question 38) or mitigation of sentence. A self-report must be made directly to the relevant authority, such as the SFO.

38 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

The question of whether to self-report in the United Kingdom has been left in a state of flux following the case of *Rolls-Royce*. A deferred prosecution agreement (DPA) is an agreement reached between a prosecutor and a company under investigation, and approved by a court. The agreement allows a prosecution to be suspended for a defined period provided the organisation meets certain specified conditions. If the conditions are met, the prosecution is formally discontinued. (For further information about the DPA process in the United Kingdom, see question 53.) Prior to the DPA agreed in *Rolls-Royce* in January 2017, it would have been advisable to self-report where the company wishes the matter to be settled by way of a DPA. The SFO had articulated that DPAs would only be available where there had been a genuinely proactive approach by the company, including a full self-report (i.e., complete disclosure of the facts); an acceptance of wrongdoing by the company; reparation (e.g., compensation to the victim); implementation of effective anti-bribery systems to prevent further offending; access to material and information in the company's possession, including that gathered during the internal investigation (in particular the accounts of witness interviews); and full co-operation with the ongoing investigations and prosecution, for example, of individual employees and directors.

However, the stance that a self-report was a precondition to a DPA seems to have been put into some doubt in light of the DPA secured by Rolls-Royce in circumstances that did not follow a self-report. Notwithstanding the company admitting that senior management had been aware of the allegations of bribery since 2010, no internal investigation into the allegations was launched at the time and no report was made to the SFO. Rolls-Royce did not report to the SFO of its own volition and instead, was approached by the SFO for comment after it had instigated its investigation. The SFO, and indeed the court in approving the DPA, has emphasised that the circumstances in which Rolls-Royce secured a DPA, notwithstanding it had not self-reported, were due to the extraordinary level of co-operation with the SFO that followed once it had been caught. The 'extraordinary cooperation' that was commended in the court's judgment included a comprehensive internal investigation that extended beyond the original allegations known to the SFO, the results of which were made available to the SFO; disclosure of unreviewed documents; access to witnesses who had not previously undergone interviews by the company; and a limited waiver of any claim for legal privilege – all of which, the judgment suggests, brought to light conduct that otherwise may not have been exposed.

However, we wait to see whether a DPA in these circumstances was an exception or whether the SFO has set a precedent whereby one may remain available in the absence of

a self-report where a company co-operates fully once its alleged offending has already been brought to the SFO's attention.

DPAs are only available to corporate defendants and not to the individual employees or directors involved in the criminal conduct.

39 What are the practical steps you need to take to self-report to law enforcement in your country?

Before making a self-report a company should undertake the appropriate level of investigation to ascertain the extent and nature of the offending, ensuring that the company will not be taken by surprise by further issues that could arise in the course of a criminal investigation.

UK authorities have advised that for a company to be afforded full credit for making a self-report, it must be made within the context of a genuinely proactive and co-operative approach by the company. The following steps are indications of such an approach:

- gathering and preserving hard copy and digital material the authority is likely to request;
- providing a report of the factual findings of the internal investigation along with key supporting documents;
- ensuring that employees are made available for interview;
- taking appropriate disciplinary measures against offending employees; and
- compensating victims, providing this is feasible.

Responding to the authorities

40 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

It is both possible and desirable to enter into a dialogue with the authority immediately upon receipt of a notice to discuss concerns the company has, for example, that the deadline for compliance with the notice is unreasonable, or the description of the information and documents requested is unclear.

The authorities will generally be happy to discuss such concerns and work with the company to find a reasonable and practical solution, so long as the result is that the relevant information and documents are ultimately received in a timely fashion.

41 Are ongoing authority investigations subject to challenge before the courts?

The exercise of powers by any public authority, such as in undertaking an investigation, can be challenged by application to the court for a judicial review if considered to be unlawful.

If found to be unlawful, the court can order various remedies such as stopping the exercise of that power, rendering it ineffective, or awarding damages.

42 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

While attempting to deal with notices or court orders issued by various jurisdictions as one consistent disclosure package would reduce effort and costs, it is generally advisable to deal with them separately. Court orders and notices issued under compulsory powers usually negate data protection laws and any obligations of confidentiality to third parties. Consequently civil proceedings cannot be brought by third parties against a company for its actions in providing material in response to a lawful court order or compulsory notice as long as the material provided was within the scope of the notice or order. However, if the company provides material beyond the scope of the notice or order, and in doing so breaches a confidentiality obligation or data protection law, it could expose itself to claims.

To avoid creating risks of civil and criminal liability, notices and orders should be responded to separately unless the company is able to satisfy itself that the scope of the orders or notices from each of the jurisdictions are in all important respects identical.

43 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

Generally, if information is in the control of a company (e.g., a parent company with a right to take possession, inspect or take copies of a subsidiary's documents), the company will be expected, but not necessarily required, to search for and produce all requested material, even when it is located in another country. In practice, if the company wishes to seek credit for co-operation, it should comply with any reasonable requests, whether or not it is required to.

The exception is when the data protection legislation in the other country does not permit the removal or transfer of the data from that jurisdiction. In those cases, the requesting authority will generally need to use mutual legal assistance to obtain the material through foreign counterparts.

44 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

The UK authorities can and do share information and investigative materials (for intelligence purposes and the detection and prevention of crime) with authorities in various other countries whether or not there is a mutual legal assistance agreement with that country and regardless of whether the country is providing information or materials in return, although reciprocity is generally expected.

Where material is required for a prosecution a mutual legal assistance request must be made. UK law authorities will only provide assistance that conforms with the UK's laws and international obligations.

A list of the international mutual legal assistance and extradition agreements to which the UK is a party can be found on the UK government website at www.gov.uk/government/publications/international-mutual-legal-assistance-agreements.

The UK authorities can provide further assistance by conducting dawn raids in the United Kingdom on the foreign authority's behalf, interviewing witnesses or suspects, freezing assets, or arresting and extraditing suspects.

45 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

Law enforcement authorities owe a general duty not to disclose information or material received during the course of an investigation, and which is not otherwise in the public domain, unless the public interest in the disclosure outweighs the private interests of the owner. Furthermore, before disclosing information to a third party, the law enforcement agency should provide the owner with sufficient notice of the request to allow opportunity for objections to the disclosure (*Marcel and Others v. Commissioner of Police of the Metropolis and Others* [1992] 2 WLR 50). Any objections should be considered and advance notice should be provided of an intention to disclose regardless. Notice does not have to be given where it would be inappropriate or impracticable to provide notice, for example if it would prejudice the investigation of the law enforcement agency requesting the information (*R (on the application of Kent Pharmaceuticals Ltd) v. Serious Fraud Office and another* [2004] All ER (D) 191 (Nov)).

Section 3 of the Criminal Justice Act 1987 further limits disclosure by the SFO to third parties. Information obtained during the course of an investigation by the SFO can only be disclosed to certain specific government departments or bodies, or competent authorities specified in the Act, and for the purposes of any criminal investigation or criminal proceedings, whether in the United Kingdom or abroad and for the purposes of assisting any public or other authority under the order. The list of competent authorities is wide and includes anybody having supervisory, regulatory or disciplinary functions, but does not, however, include liquidators, provisional liquidators, administrators or administrative receivers.

46 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

In these circumstances the company should not provide the documents, but should inform the requesting authority of the reason that these documents cannot be provided (i.e., that the data protection laws in the other country constitute reasonable excuse for lack of compliance).

47 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?

The collection and use of personal data in the United Kingdom is governed by the Data Protection Act 1998, including restrictions on the disclosure of personal data. Personal data is defined as data that relates to a living individual who can be identified from that data. However, broadly speaking, the non-disclosure provisions in the Data Protection Act do not apply where the material is requested by a notice or court order issued on the grounds that the material is necessary for the prevention or detection of crime, apprehension or prosecution of offenders, or assessment or collection of any tax or duty or of any imposition of a similar nature.

48 Are there any data protection issues that cause particular concern in internal investigations in your country?

Typically, a considerable amount of evidence will be reviewed in the course of any internal investigation, and, as such, the evidence or 'data' will need to be handled carefully to ensure compliance with the Data Protection Act 1998. Decisions taken with regard to the processing and disclosure of data should be made in accordance with the Act, and all reasons for such decisions should be documented. If any of the data reviewed contains or may contain personal data, extra care should be taken. Firms should seek legal advice with regard to what additional measures should be taken in relation to this material. This includes whether redaction of any personal information is required and whether this would be an appropriate mechanism to avoid any data protection breaches. Further, extra care should be taken in circumstances where there may be a transfer of the data outside the European Union or to the United States.

49 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

When material is provided voluntarily and without restrictions, the authority is free to share it with third parties or other authorities, and to use it for any purpose.

Generally it is advisable only to provide material voluntarily having obtained contractual undertakings that agree the restricted basis on which the material has been provided (e.g., only for use by that authority in the course of an investigation and not to be shared with other parties).

While contractual undertakings restrict the authority's ability to voluntarily provide the material to other parties, they do not prevent third parties from obtaining court orders against the authority requiring production of the material. However, production orders should only be granted where it is in the interests of justice, and the fact that the material came into the possession of the authority under the restrictions imposed by the undertakings may lead a court to determine that it is not appropriate to grant a production order against the authority in that context, particularly as the third party could attempt to obtain the documents from an unfettered source, such as the company.

Generally authorities are restricted as to how they can share material they obtain as a result of exercising their compulsory powers or court orders, and customarily such material should only be shared where it is necessary for an investigation and the disclosure is proportionate.

Global settlements

50 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

Before entering into a settlement with a law enforcement authority a company should assess the merits and strength of the prosecution and defence cases; the likelihood of conviction; the expected time, cost, reputational damage and other adverse effects of a lengthy investigation and trial; and the likely penalties in the event of a conviction, including possible debarment from public procurement tenders.

The company should then carefully assess the terms of the proposed settlement, including the impact that ongoing co-operation could have on the business (legal costs, staff resources, etc.); whether the settlement will resolve the matter in all relevant jurisdictions and, if not, the impact the settlement could have in regard to ongoing investigations in other jurisdictions (e.g., whether the authority that has settled will disclose information and assist foreign authorities); and any other adverse impact that the settlement could have on the future of the business.

Ultimately the company should balance the seriousness of the charge and the effect of a conviction (i.e., whether the conviction results in debarment) against the terms of the settlement, as in some circumstances the terms of a settlement, including, for example, the costs of regular review and monitoring by an independent monitor (typically a large accountancy or law firm) could be more disadvantageous to a company than a conviction.

51 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

Penalties on conviction include imprisonment for individuals, fines, compensation and confiscation orders. Individuals can also be disqualified from being a director of a company for up to 15 years. Where DPAs are agreed, monitors may be imposed.

Companies convicted of certain offences, including active bribery and money laundering, must also be debarred from public tendering for up to five years.

Regulatory authorities can impose additional penalties. For example, the FCA can withdraw a firm's authorisation and prohibit it from undertaking specific regulated activities for up to 12 months, prohibit individuals from carrying out regulated activities, or impose fines on firms or individuals. The Prudential Regulation Authority (the authority responsible for the prudential regulation and supervision of around 1,700 banks and other firms) can restrict a firm's permission to conduct regulated activities or impose a fine.

52 What do the authorities in your country take into account when fixing penalties?

When fixing penalties following conviction, courts must have regard to the sentencing guidelines published by the UK and Scottish Sentencing Councils.

Specific sentencing guidelines were published in 2014 in respect of corporate fraud, bribery and money laundering offences providing that, when sentencing a company, the court must first determine whether compensation or confiscation orders should be made. Thereafter the court should consider, *inter alia*, the following issues:

- the level of culpability and financial harm;
- the aggravating or mitigating factors, for example whether the criminal activity was endemic or whether the corporate offered full co-operation with the law enforcement authority during the investigation;
- the financial circumstances of the company; and
- the stage at which a guilty plea was entered (if the matter was not contested).

53 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

DPAs have been available in the United Kingdom (as a result of the Crime and Courts Act 2013) since 2014 as an alternative disposal for corporate offending. DPAs are not currently available in Scotland. Non-prosecution agreements do not exist in the United Kingdom.

The SFO and CPS have published a Code of Practice explaining the DPA process.

A prosecutor may at its discretion invite a corporate suspect into DPA negotiations where it determines that having identified the full extent of the offending, the evidential test has been satisfied and the public interest would benefit from a DPA. Generally a corporate will only be invited to negotiations where a self-report has been made and the corporate has fully co-operated with the authority.

If it is possible to agree the terms of a DPA and a statement of facts, the corporate will be formally charged with the criminal offence or offences and the matter will be brought before a judge for approval. The judge will only approve the DPA if satisfied that it is in the interests of justice and the terms are fair, reasonable and proportionate. The judge can adjourn the matter to obtain further information or clarification as to the facts or terms.

If judicial approval is given, the criminal proceedings will be suspended for a set period as defined by the terms of the DPA. The terms and facts of the DPA will then be published on the authority's website.

If the corporate complies with the terms of the DPA, at the conclusion of the set period the criminal proceedings will be formally discontinued. If the corporate breaches the terms and the breach cannot be remedied, the criminal proceedings will resume.

DPAs carry the advantage of avoiding a conviction, affording the opportunity of speedier resolution (relatively speaking) and to continue trading under agreed parameters. They also enable the corporate to avoid the time and costs of an open-ended, lengthy and uncertain criminal investigation and trial that can adversely impact share price and access to finance, and cause difficulties in tendering.

The obvious disadvantage of entering into a DPA is accepting guilt and penalties based on an untested prosecution case that could result in an acquittal if contested. A further disadvantage to be carefully considered is that the terms of a DPA are likely to include regular monitoring and audit by an independent monitor (typically a large accountancy or law firm) for which the company will bear the costs.

At the time of writing, four DPAs have been agreed in the United Kingdom. In November 2015, a DPA was agreed in relation to a charge of corporate failure to prevent bribery against Standard Bank PLC in payments made by employees of a former sister company in Tanzania. The key terms of the three-year agreement are: financial orders of US$25.2 million; US$7 million in compensation to the Government of Tanzania; £330,000 in prosecution costs; a requirement to undertake a review of the existing compliance programme by an independent monitor and implementation of their recommendations; and full continual co-operation with the SFO and any other domestic or foreign authority as directed by the SFO.

The DPA against XYZ Ltd, anonymised because criminal proceedings are ongoing against individuals, was agreed in July 2016 and involved the payment of bribes to agents across Asia for over eight years. Misconduct was identified at senior levels and so offences of conspiracy to corrupt were accepted by the company as well as a failure to prevent bribery. Its

terms included disgorgement of gross profits of £6,201,085; a financial penalty of £352,000; co-operation with the SFO; and a review and maintenance of the organisation's existing compliance programme.

The third DPA was agreed with Rolls-Royce on 17 January 2017 to cover 12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery. The offending in question took place over 25 years and involved Rolls-Royce's civil aerospace and defence aerospace businesses and its former energy business and relates to the sale of aero engines, energy systems and related services. The conduct took place across seven jurisdictions: Indonesia, Thailand, India, Russia, Nigeria, China and Malaysia. The key terms of the order include a fine totalling £497 million, comprising a disgorgement of profit of £258.17 million, and a financial penalty of just over £239 million and prosecution costs of approximately £13 million. The fine incorporates a discount of 50 per cent reflecting the 'extraordinary cooperation' of Rolls-Royce during the investigation. Rolls-Royce also agreed to pay a further US$170 million and US$25.6 million to settle proceedings taken by the US Department of Justice and Brazil's federal prosecutor respectively.

The fourth DPA was agreed with Tesco Stores Limited on 10 April 2017. The conduct in question relates to false accounting practices undertaken between February and September 2014. The DPA includes a fine of £128,992,500. Owing to reporting restrictions in place at the time of writing, no further information is publicly available on the circumstances and terms of this DPA.

54 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

The 2014 EU Public Sector Procurement Directive was transposed into UK law by the Public Contracts Regulations 2015. Under these Regulations, companies must be excluded from public procurement where they have been convicted in the last five years of any offences from a list that includes, among others, conspiracy, corruption, bribery, money laundering and fraud. The corporate offence of failure to prevent bribery (section 7 of the Bribery Act 2010) is not included in this list of offences and does not require mandatory debarment.

The regulations also provide a list of offences that carry discretionary debarment for up to three years, including professional misconduct, non-payment of tax and distortion of competition.

However, the Regulations allow companies to recover eligibility to bid for public contracts following a debarment by demonstrating evidence of self-cleaning, such as the payment of compensation to the victim of the offending, clarification of the facts and circumstances of the offence in a comprehensive manner, co-operation with the investigating authority, and the implementation of appropriate measures to prevent further criminal offences or misconduct.

55 Are 'global' settlements common in your country? What are the practical considerations?

Global settlements have been known, for example the DPA agreed between the SFO and Standard Bank PLC in November 2015 was coordinated with the settlement between Standard Bank and the US Securities and Exchange Commission.

A coordinated approach between the United States and United Kingdom was also achieved in relation to Innospec Inc and BAE Systems in 2010, although in both cases the court was critical of the coordination.

56 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

Parallel private civil actions are allowed. Generally, but not always, the criminal proceedings will take precedence, and civil proceedings can be stayed for the duration of the criminal investigation so as not to prejudice any criminal proceedings.

Private plaintiffs will only gain access to specified information in the authority's files if they obtain a court order. Before making any such order, the court would carefully consider the reason why the private plaintiff requires the information; whether the plaintiff would be able to obtain the information from any other source; the method by which the authority obtained the relevant information, for example if it was obtained under compulsory powers; and whether the information is likely to contain any confidential, privileged or personal information of third parties.

Publicity and reputational issues

57 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

It is a contempt of court to publish a report that creates a substantial risk that the course of justice in active criminal proceedings will be seriously impeded or prejudiced. Proceedings are active for this purpose after arrest or charge and until the proceedings have been concluded, for example by acquittal or conviction or discontinuance by the authority. As a result there is generally very little media reporting of criminal investigations in the United Kingdom until the end of the trial other than to state the facts of arrests and report court hearings.

58 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

It is common practice for companies to hire a PR firm to manage a large-scale corporate crisis to mitigate potential reputational damage. It is important to ensure a consistent approach by opening good lines of communication between the company's internal marketing and the external PR firm, and to ensure that the PR firm is aware of any legal or corporate issues (including any agreements reached with the investigating authority with regard to press releases, etc.).

It is also vitally important that public statements do not have the potential effect of prejudicing ongoing criminal proceedings, for example trial of the company or individual employees, or contradict any defence that the company may later seek to reply on. For those reasons statements issued by a company under investigation should be brief and factual, and should always be approved by the company's criminal law advisers.

59 How is publicity managed when there are ongoing, related proceedings?

As stated above, it is vitally important that public statements issued by the company do not have the potential effect of prejudicing ongoing criminal proceedings, such as related prosecution of employees or third parties. Statements issued by a company in those circumstances should always be brief and factual, and approved by the company's criminal law advisers until the conclusion of all related proceedings.

Duty to the market

60 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

Under the UK Listing Rules, publicly listed companies must issue a market announcement without delay of any major new development that may affect their business, if the development may lead to a substantial share price movement. A settlement of criminal proceedings would generally require such an announcement.

If the matter is settled by way of a DPA, the matter is not settled until it has actually been approved by a judge at a court hearing. In practice, prior to the final hearing (at which the parties will generally expect approval to be given as the terms, etc., will have been examined and challenged at preliminary hearings) the company and the authority will have agreed press statements to be released to the market and wider public as soon as approval is given.

55

United States

Michael P Kelly[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

There is never a shortage of high-profile corporate investigations in the United States. In the last 15 years, at least 26 of the US Fortune 100 corporations have been subject to criminal charges, deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs). Similarly, at least 25 of the Global Fortune 100 corporations have been the subject of criminal proceedings, DPAs or NPAs. Many other US and international companies have been subject to criminal investigations not resulting in either formal charges or agreements.

Right now, the investigation of FIFA is the highest-profile corporate investigation in the United States. The investigation, focusing on alleged corruption issues, is noteworthy in a couple of respects. The investigation will highlight the extraterritorial reach of US law enforcement authorities. It may set standards for the conduct of business for international athletic organisations. Finally, the Justice Department's commitment to pursuing individuals in this matter may lead to some high-profile trials. The investigation has already resulted in guilty pleas by 40 individuals or companies.

2 Outline the legal framework for corporate liability in your country.

Criminal and civil corporate liability can be imposed in the United States under the legal theory of *respondeat superior*. That theory allows a corporation to be liable for the conduct of employees who are acting within the scope of their employment, including low-level

1 Michael P Kelly is a partner at Hogan Lovells US LLP.

employees, where one or more employees conduct all the acts necessary to commit a criminal offence. For instance, a corporation can be criminally prosecuted for fraud even if a low-level employee was responsible for the actions and his or her actions were not approved by or known by company management. Law enforcement authorities in the United States are given discretion whether to prosecute a corporation, and they weigh many factors in deciding how to exercise that discretion. Civil claims can be brought against corporations by either the federal or state law enforcement authorities or by private plaintiffs.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

In the United States, corporations are generally regulated by a variety of law enforcement authorities from the federal government and each of the 50 states. The United States Justice Department is principally responsible for prosecuting violations of federal criminal law, while each state has its own Attorney General (or an equivalent) to enforce state criminal laws. Depending on the subject matter, there are a variety of federal law enforcement agencies that investigate and assist the Justice Department in bringing criminal prosecutions of federal law, including the Federal Bureau of Investigation, the Drug Enforcement Agency, the Department of Treasury, the United States Postal Service, the Food and Drug Administration and the Environmental Protection Agency.

There are also federal and state agencies that have the power to bring civil complaints against corporations. The Securities and Exchange Commission is one of the most prominent examples.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

There is no threshold of suspicion necessary to trigger an investigation in the United States. Federal or state prosecutors may initiate an investigation simply to satisfy themselves that no criminal violation has occurred. Federal grand juries have broad powers to conduct investigations and issue subpoenas.

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

Double jeopardy does not prevent a corporation from facing exposure in the United States after it resolves charges on the same set of facts in another country. However, prosecutors in the United States consider similar prosecutions as a discretionary factor in determining whether and how to prosecute a corporation in these circumstances, including whether to consider fines paid to foreign law enforcement authorities. For instance, in 2016, the Justice Department entered into a DPA with the telecommunications company VimpelCom Limited to settle a foreign bribery investigation, and gave VimpelCom credit for approximately US$230 million that it paid to prosecutors in the Netherlands for the same conduct.

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

There is a general presumption against extraterritoriality, but that presumption can be rebutted. The Supreme Court recently described this analysis in the case of *RJR Nabisco, Inc v. European Community*. Absent clearly expressed congressional intent to the contrary, federal criminal laws apply to conduct in the United States and not abroad. However, if the statute gives a clear, affirmative indication that Congress intended for the statute to apply extraterritorially, then the presumption has been rebutted and criminal statutes can be given extraterritorial effect. Foreign bribery laws give one example of a statute where the presumption against extraterritoriality has been rebutted. Even if the statute does not indicate that it should be applied extraterritorially, then the court must determine whether the case involves a domestic application of the statute. Under this rule, '[i]f the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus of the statute occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in US territory.'

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

The principal challenge in cross-border investigations is to provide full co-operation to US law enforcement while fully complying with the laws of other countries, including foreign data privacy laws, blocking statutes, bank secrecy laws and labour restrictions. US law enforcement has voiced great scepticism about the scope of foreign laws restricting the ability of corporations to disclose information to the US government, and prosecutors often pressure companies to disclose information notwithstanding those foreign laws. In deciding what information to collect and provide to US law enforcement authorities, corporations often must weigh the risk that a foreign country may disagree with their legal interpretation of foreign laws (which may impose criminal or civil penalties for violations) against the risk that US law enforcement authorities will conclude that the corporation is not co-operating with the US investigation and that the US government must therefore bring criminal charges against it.

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

In some circumstances, the decision of foreign authorities can influence an investigation in the United States. If US law enforcement authorities have confidence in the rigour of the investigation being conducted by the foreign authority, and if the matter principally relates to events in that country, US law enforcement authorities have sometimes agreed to monitor the investigation and allow foreign law enforcement authorities to take the lead. In other cases, the Justice Department will not defer to foreign authorities and will conduct its own investigation independently from foreign authorities. This might occur where the US

law enforcement authorities have concerns about the execution of the foreign investigation, intend to prosecute individuals in the United States, believe that there is a strong nexus to the United States, or believe that the investigation is important to the interests of the United States.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

Corporate culture is a very important factor for US law enforcement authorities. The Justice Department carefully examines the 'tone at the top' of every corporation that it investigates. If the Justice Department believes that the corporation's leadership created an atmosphere contributing to or permitting the unlawful conduct, the corporation will be treated more harshly. The Justice Department will be more likely to bring criminal charges and to seek higher penalties against that corporation. The Justice Department will be more likely to seek the imposition of a corporate monitor in any settlement, and the monitor will be responsible for reporting extensively on the corporation's remedial efforts. The Justice Department is unlikely to trust the representations of corporations that have not committed to an appropriate culture of compliance, and the Justice Department will expect such a corporation to undertake more drastic remedial measures, including the dismissal of more high-ranking executives.

10 What are the top priorities for your country's law enforcement authorities?

The Justice Department's priorities are continually evolving. In the first year of the Trump administration, the Justice Department identified its current top priorities as the investigation and prosecution of terrorism and national security violations, violent crimes, drug offences, cybercrime and illegal immigration. The Justice Department has also emphasised the importance of prosecuting culpable individuals and not simply accepting corporate settlements when companies break the law. However, it is still early in the Trump administration, and it is expected that the administration's priorities will evolve as new senior officials become more settled in their positions at the Justice Department.

11 How are internal investigations viewed by local enforcement bodies in your country?

Internal investigations are generally viewed favourably by US law enforcement authorities, provided they believe that the investigation (1) is being conducted by experienced lawyers and other professionals (such as accountants); (2) is being overseen by a trustworthy corporate decision maker not involved in the conduct being investigated; and (3) is not interfering with law enforcement interests. Law enforcement authorities recognise that internal investigations can benefit the government by sparing resources and by providing information in a timely way that the authorities might not be able to obtain through their own efforts.

At the end of President Obama's administration, the Justice Department expressed concern that some internal investigations had not fully identified all the evidence relating to culpable individuals and prevented the government from prosecuting them. Prosecutors were instructed to withhold all credit from corporations if they do not identify all evidence concerning culpable individuals.

In other instances, the Justice Department may ask a company to defer its internal investigation if it may interfere with the objectives of the Justice Department's own investigation. For example, if the Justice Department intends to conduct its own interviews or to conduct undercover work, it may ask corporate counsel to delay its investigation. However, the Justice Department has suggested this would be unusual.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

Allegations of misconduct come to light in many ways, but they arise most often through allegations of whistleblowers, internal audit and media reports. There are a variety of statutes and programmes designed to incentivise whistleblowers to come forward. For instance, pursuant to the Dodd-Frank Act, the SEC has established a programme that can award whistleblowers between 10 to 30 per cent of monetary awards recovered by the SEC and other law enforcement agencies in enforcement actions involving US securities laws.

Regardless of the source of the allegation of the misconduct, corporations must treat allegations of misconduct seriously and investigate them appropriately. The size and shape of the review will depend on the circumstances. Some allegations will require a more comprehensive investigation than others. But law enforcement authorities and courts will make judgments about corporations based on how corporations responded to allegations even when no one else was looking. Corporations can hurt themselves by retaliating against whistleblowers or dismissing significant allegations without basis, and can help themselves by carefully investigating allegations appropriately.

13 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Search warrants and dawn raids are a feature of law enforcement in the United States, though they do not arise daily. A search or an arrest warrant is required for a dawn raid, and US law enforcement authorities must follow the terms of the warrant (which will set forth the property sought and the location to be searched) as approved by a court. To obtain a search warrant, law enforcement authorities must show there is probable cause (or a fair likelihood) to believe that a crime occurred and that specified evidence of a crime will be found at the location listed in the search warrant. If law enforcement authorities fail to comply with the terms of the warrant, or if they were not truthful when obtaining it, a court may preclude law enforcement from using any improperly seized document as evidence in a court proceeding. If law enforcement authorities obtain other evidence derived from illegally obtained evidence, courts may exclude the derivative evidence too.

14 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

While a search warrant is being executed, a lawyer for the company can notify law enforcement authorities that privileged material exists and describe the existence of privileged material. The government will generally establish a taint team, consisting of law enforcement officers not involved in the investigation, who will review the materials to determine whether there is a colourable privilege claim. If those officers agree that those materials may be privileged, those materials will either be returned to the corporation or will be separated so the parties can later ask a court to resolve any dispute as to whether the materials are privileged and subject to seizure. If the taint team determines that the documents are not privileged, a corporation can file a motion with a court and request the return of privileged material. Throughout this process, lawyers and corporations must be exceedingly careful not to obstruct the execution of a search warrant or to do anything that could be construed as removing or concealing privileged materials while the search warrant is being executed.

15 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

If the government attempts to compel an individual to provide testimony, that individual can claim the protection of the Fifth Amendment right against self-incrimination and decline to answer questions that might incriminate him or her. The Fifth Amendment right extends not only to answers that themselves would directly support a conviction, but extends to innocuous answers that would provide a 'link in the chain of evidence' needed to support a conviction. This right against self-incrimination also extends to the act of producing documents. However, only people can claim Fifth Amendment rights, and corporations do not have a right to refuse testimony or refuse to produce documents.

The government can compel an individual to provide testimony if the questions do not have the potential to incriminate that individual. For instance, the government may be able to persuade the court that the question has no tendency to incriminate. Alternatively, the government may provide the individual with immunity and request the court to order the individual to testify. If testimony is compelled, it cannot be used to prosecute the individual.

16 What legal protections are in place for whistleblowers in your country?

There are a series of patchwork laws providing protection to whistleblowers, but there is no omnibus statute or regulation that protects every whistleblower in every situation. For instance, the Dodd-Frank Act gives whistleblowers the right to bring a civil lawsuit against employers who retaliate against them for providing information to the SEC about violations of US securities laws. Moreover, the Dodd-Frank Act requires the SEC to protect the confidentiality of the whistleblower's identity. However, if the same whistleblower brings a tip to the Justice Department about violations of sanctions laws at his employer, he or she may not have the same right to a bring a civil lawsuit for retaliation if fired, and the Justice Department may or may not protect his or her identity. Legal protection for whistleblowers depends greatly on the context.

17 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

Employees generally do not have rights under local employment laws if a company conducts an internal investigation. An employee can refuse to be interviewed by company counsel, though a company may terminate that individual's employment for refusal to co-operate with the investigation. Companies usually have the right to review the work email of employees to determine whether there was misconduct, and notice or consent of the employee is typically not necessary. Most employees in the United States are subject to at-will employment, and their employment can be terminated at any time. The same is true for officers and directors.

Under local law, corporations are sometimes required to pay the legal fees of officers, directors and employees if they are involved in an investigation. This right depends on state law and the corporation's by-laws and other governing documents. This can be the most important right for individuals accused of misconduct, because it can be the only way that officers, directors or employees can afford to mount an aggressive defence of their conduct.

18 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

A company cannot discharge its duties to shareholders while turning a blind eye to misconduct. Corporations typically have the freedom to take any number of disciplinary actions against employees suspected of misconduct, including suspension or termination. In most circumstances, a corporation may dismiss an employee if he or she does not co-operate with an investigation.

Commencing an internal investigation

19 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

Corporations and their lawyers sometimes prepare a document setting forth the scope of an investigation. It depends on the type and complexity of issues being investigated, the level of detail needed to brief members of the board of directors or management about the scope of investigation, and the preferences of the companies and the professionals running the investigation.

20 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

The issue must be elevated to the board of directors or company management, which must decide whether internal or external counsel are needed to advise on the issue. With advice

of counsel, the corporation must ensure that the appropriate documents and materials are preserved. Through counsel, the company should conduct an appropriate review of the issue. The corporation should take appropriate remedial measures to fix any problem that is identified. Throughout the process, the board of directors or company management must decide whether the corporation should voluntarily disclose the issue to law enforcement.

21 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

It depends on the circumstances. Privately held corporations with no reporting obligations under the securities laws are generally not required to publicly disclose the existence of an internal investigation or contact from law enforcement. It is more complicated for corporations whose securities are publicly traded or who have reporting obligations under the federal securities laws. These corporations must consider a complex series of rules and principles governing the disclosure of litigation and threatened proceedings, including whether the disclosure of an investigation or contact from law enforcement would be considered 'material' under the federal securities laws.

22 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

It again depends on many factors (including the nature of the internal investigation or the law enforcement contact), but management generally should inform the board as soon as there is a possibility that the investigation or the law enforcement contact could affect the corporation's operations in some substantive way. In many cases, the notification should occur immediately. For instance, management obviously should not wait if the Justice Department serves a subpoena demanding a large swathe of the company's financial records. In other cases, the notification may occur at the next scheduled board meeting. There is not the same urgency to report to the board about an internal investigation concerning a small-scale theft of goods at one of the company's thousand locations. As a general rule, management should be keeping the board of directors (and specifically the audit committee) informed of potential risks facing the company in a timely way.

23 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

A company should work with outside counsel and ensure that the relevant data has been preserved. Litigation-hold notices to relevant employees are usually the first step in this process, but the corporation and its counsel must ensure that no email or electronic data are being deleted and should suspend document destruction procedures. Depending on the size and scope of the investigation, counsel may need to image the laptops and other electronic devices maintained by employees and may need to collect hard copy documents. The company's counsel should also meet with the government to discuss how the subpoena can be narrowed and how the company can prioritise the production of the documents.

24 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

A corporation can file a court action to quash a subpoena from a law enforcement authority. Federal prosecutors and federal grand juries are usually given wide discretion to conduct investigations, and federal courts are usually reluctant to quash a subpoena for overbreadth. However, there are circumstances in which courts will decline to enforce a subpoena. For instance, in *United States v. Microsoft Corp* (*Microsoft*), the 2nd Circuit Court of Appeals recently declined to enforce a subpoena because it sought documents held outside the United States, which was beyond the scope of the particular statute authorising the issuance of the subpoena.

Attorney–client privilege

25 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

Companies can protect the confidentiality of internal investigations in the United States by asserting the attorney–client privilege. To protect the privilege and the confidentiality of the information, companies must ensure that the information is not shared with any third party. For this reason, during the course of interviews in an internal investigation, witnesses are routinely warned not to disclose their communications with company attorneys to anyone. Companies can also assert the work-product doctrine, which protects the confidentiality of the attorney's work prepared in anticipation of litigation.

26 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

Corporations enjoy the protection of the attorney–client privilege in the United States. The attorney–client privilege protects communications between an attorney and a company (including its employees) made in confidence and for the purpose of providing legal advice to that company. Communications between company lawyers and lower-ranking employees are still protected so long as the communications were made for the purpose of providing advice to the company. There are well-recognised exceptions to the privilege, including the crime-fraud exception (which provides that a client's communication to the attorney is not privileged if made for the purpose of committing a crime). The privilege can be waived if the client reveals the advice to third parties to advance its interests. The same general principles apply to the attorney–client privilege when the individual is a client.

27 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

The attorney–client privilege applies equally to inside and outside counsel in the United States. However, particularly with respect to inside counsel, courts will carefully examine whether they were acting as lawyers (whose communications are protected by the privilege) or as business advisers (whose communications are not protected by the privilege).

28 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

The Justice Department has consistently stated that it is not interested in waiver of the attorney–client privilege by corporations and that waiver of the attorney–client privilege is not a prerequisite to obtain credit for co-operation. Instead, the Justice Department has stated that it evaluates the co-operation of the corporation based on whether the corporation has disclosed the relevant facts. Where it is necessary to learn the underlying facts, there may be instances where the Justice Department might request a waiver of privilege from a company.

29 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

The concept of a limited waiver of the attorney–client relationship exists, but it has been rejected by most federal courts of appeals. If a company provides privileged information to the government, it must be prepared for the possibility that a court may order the disclosure of the information to third parties if that information is potentially relevant in another litigation.

30 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

For the reasons described above, it will usually be difficult to maintain privilege in the United States in those circumstances.

31 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

Common interest privileges exist in the United States. Sometimes called a joint defence privilege, it protects communications between attorneys representing different clients when their respective clients share a common legal interest in a legal matter. Parties cannot establish a common legal interest simply because they merely desire the same outcome or share a financial interest in the outcome of a litigation. Some form of joint strategy is necessary to establish a common legal interest. Once a common interest privilege is established, it cannot be waived without the consent of all the parties to the privilege.

32 Can privilege be claimed over the assistance given by third parties to lawyers?

If the lawyers have retained professionals to assist them in rendering legal advice to the client, that assistance may be protected by the attorney–client privilege. For instance, lawyers typically hire accounting firms to assist in the investigation of claims of accounting improprieties, and the work performed by the accounting firm under the direction of the lawyer generally would be protected by the attorney–client privilege. However, if the accounting firm was not acting under the direction of the lawyer and was not retained to assist the lawyer in providing legal advice, the work of the accounting firm may not be protected by the attorney–client privilege.

In other contexts, the attorney–client privilege generally does not apply to assistance given by third parties to lawyers, but a similar protection may be provided by the work-product doctrine. For instance, if a lawyer interviews a third party unaffiliated with the client, that conversation may not be protected by the attorney–client privilege, but the lawyer may be able to invoke the work-product doctrine to protect the confidentiality of the communications.

Witness interviews

33 Does your country permit the interviewing of witnesses as part of an internal investigation?

Yes.

34 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

Yes, unless an exception to the privilege applies.

35 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

To avoid potential conflicts, company counsel must inform an employee being interviewed that counsel represents the company and not the individual and that the interview is protected by the company's attorney–client privilege. To maintain the company's privilege, counsel must inform the employee that the communication must be kept confidential and that the employee should not discuss the contents of the communication with any third party. To prevent the employee from being potentially misled, counsel must also advise that the company may decide to waive the privilege and could reveal the communications to third parties. This is known as an *Upjohn* warning, which is usually given to current and former employees at the beginning of an interview.

36 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

The corporation typically arranges for its counsel to meet with employees at the corporation's offices. With limited exceptions (such as corporate in-house counsel), other company employees are generally not present for the interview. When the interview begins, counsel advises the employees about the nature of the interview, including the *Upjohn* warning. The substance of the interview will generally cover topics such as the employee's professional history, the employee's current and past responsibilities, the company's procedures or training with respect to the issue in controversy, the chronology of the relevant events, and the employee's understanding of those events. Unless they are unavailable, documents are usually shown to the employee during the course of the interview. There are many circumstances where employees may have their own legal representation at the interview, but this may not be an absolute entitlement. There are also many circumstances where the corporation would not be required to pay for individual counsel for their employees.

Reporting to the authorities

37 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

There is no general duty to report misconduct, but there can be specific situations where it is mandatory. This is particularly true in closely regulated industries such as insurance or banking. See, for example, Section 405 of the New York Insurance Code (requiring insurers to report insurance fraud).

38 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

A lawyer might advise the company to self-report if the benefits of self-disclosure outweigh the costs. Context is critical in deciding whether to recommend self-disclosure because the benefits and costs will be different for each potential self-disclosure and company, and because each company will have a different tolerance for risk. To cite an obvious example, all other things being equal, an attorney might advise a company to self-disclose to the federal government if it is closely regulated by federal and state regulators and does substantial business with the US government. For that company, the loss of regulator confidence or a major customer could be devastating to the viability of the company as a going concern. Similarly, other clients may be interested in reducing their potential exposure as much as possible, and a lawyer may recommend a voluntary self-disclosure as the most effective way to give the company its best opportunity to obtain a declination or obtain a reduced penalty, or both, from the Justice Department.

39 What are the practical steps you need to take to self-report to law enforcement in your country?

An attorney must obtain permission from the board of directors or company management (as the case may be) before self-reporting, but the permission does not need to be recorded in a specific document. Once the company directs the attorney to self-report to law enforcement authorities, the process is informal, and the attorney will call the contact in the law enforcement agency as promptly as possible to ensure that the corporation receives credit for its timely self-reporting. A meeting in person with the law enforcement agency will generally follow the initial telephone call to discuss the self-report in greater detail. A company should not wait to make the self-report, because it might discover that the law enforcement agency learned of the underlying conduct days earlier through a whistleblower. In that situation, a law enforcement agency might threaten to withhold credit for self-reporting from the corporation.

Responding to the authorities

40 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

A company should generally rely on its outside counsel to respond to a notice or subpoena from a law enforcement authority. Outside counsel can initiate a dialogue with the law enforcement agency about the scope of the subpoena, including whether it can be narrowed without risk to law enforcement objectives. Outside counsel are often in the best position to conduct a broader dialogue with law enforcement about the concerns that prompted the notice or subpoena.

41 Are ongoing authority investigations subject to challenge before the courts?

In the absence of very unusual circumstances, courts in the United States do not consider broad challenges concerning how law enforcement agencies conduct investigations. Courts can hear challenges that may be relevant to some aspect of an ongoing investigation, such as whether a law enforcement search improperly seized privileged materials from its owner. But that is a much more limited oversight and does not regulate who should be investigated and how extensively.

42 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

It depends on a number of factors, including whether the law enforcement agencies are co-operating with each other and whether the company is co-operating with the investigations of each country. There may be situations where it would make sense to negotiate a consistent disclosure package with multiple countries even if it exceeds what the initial notices or subpoenas sought. In other cases, it may be in the company's best interests to respond separately to each subpoena or notice, including where the law enforcement authorities are antagonistic to one another.

43 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

A notice or subpoena in the United States generally requires the recipient to produce relevant documents under their control, custody or possession. In the past, if the record was located in another country and a company could obtain that record from its custodian as a business matter, courts in the United States tended to conclude that the document was under the 'control' of the subpoenaed party and must be produced. As a result of the 2nd Circuit's recent *Microsoft* decision (see question 24), it is likely that courts will give closer scrutiny in deciding whether Congress has authorised the issuance of subpoenas to obtain records outside the United States.

If a court concludes that the subpoena has the power to compel the production of documents outside the United States, the next difficulty arises if the production of documents would potentially violate the law of the country where the documents are held. The primary difficulty arises when the production of those documents would potentially violate the law of the country where the documents are held. That situation leads to a more complicated and fact-intensive analysis where courts evaluate whether it would be appropriate to compel production even if it means exposing the company and its agents to criminal liability in another country.

44 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

It is not unusual for law enforcement authorities to share information or investigative materials with their counterparts so long as they are persuaded that their own investigations will not be compromised or weakened as a result. Co-operation can occur through formal mechanisms, such as mutual legal assistance treaties, or through more informal discussions.

45 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

Law enforcement authorities may generally use information received during an investigation to pursue their own investigations and to seek criminal convictions. There are some confidentiality obligations. With limited exceptions, Rule 6(e) of the Federal Rules of Criminal Procedure generally prohibits law enforcement authorities from disclosing any matter before a federal grand jury. Moreover, as discussed below, law enforcement authorities generally guard information as confidential and do not publicise information they receive from internal investigations. However, there is no ironclad confidentiality obligation that would preclude information from being released if the law enforcement authorities concluded there was no legal restriction and it was in their interest to release it.

46 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

The company must take a hard look at the laws of the other country and determine whether the production would truly violate them. If it would, the company should obtain a legal opinion from a well-respected lawyer from that country, present that opinion to the law enforcement authority in the United States and explore whether there are other avenues for the US government to obtain that information. The company should also explore whether it would be feasible to produce the documents through a mutual legal assistance treaty request. If none of the options work, the company must face a difficult decision about whether to produce.

47 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?

There is no data protection statute in the United States comparable to EU Directive 95/46/EC, and there is no blocking statute comparable to the French Blocking Statute. Depending on the nature of the information sought, there may be information covered by privacy statutes, and a company would have to ensure that it complies with any applicable privacy statute.

48 Are there any data protection issues that cause particular concern in internal investigations in your country?

No specific data protection issues in the United States generally cause particular concern during an investigation.

49 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

Voluntary productions are usually preferable to the compelled production of material in the United States, because voluntary production helps the company to show that it is co-operating with law enforcement authorities and because compelled production of documents requires a subpoena from a federal grand jury. The primary risk in a voluntary production is that a third party may argue that the production of privileged material resulted in a waiver of privilege as to all privileged material, but that risk exists with respect to compelled production too.

Productions made pursuant to grand jury subpoenas are generally treated under the law as confidential. The company can request that the government treat materials as confidential under exceptions to laws such as the Freedom of Information Act. Law enforcement authorities also generally resist requests for disclosure from third parties, such as civil litigants. However, once a company has produced documents, it should be prepared for the possibility that the documents could be distributed to other parties.

Global settlements

50 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

Corporations must be aware of collateral consequences of any settlement with US law enforcement authorities. The public announcement of a settlement may prompt scrutiny from law enforcement authorities from other jurisdictions, including foreign regulators and state regulators, and it may prompt civil litigation. Federal or state governments might suspend or debar the company or key officers from participation in government contracts. The market might have an adverse reaction, and there might be negative publicity that could harm the company. Before entering into a settlement, a company must carefully analyse these potential outcomes and develop a plan to address these risks.

51 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

Companies can face fines, restitution, disgorgement, forfeitures, suspension or debarment, installation of corporate monitors, and other administrative penalties. In addition to suspension and termination from their employment, individuals can face imprisonment, fines, restitution, disgorgement, forfeitures, suspension or debarment, and other collateral consequences flowing from a conviction.

52 What do the authorities in your country take into account when fixing penalties?

Law enforcement authorities consider a wide variety of factors, including those set forth in criminal statutes, sentencing guidelines (such as the United States Sentencing Guidelines), and policy guidelines adopted by the relevant law enforcement agencies (such as the Principles of Federal Prosecution for Business Organizations adopted by the Justice Department). Broadly speaking, the most important factors usually include the history and characteristics of the company or individuals being sentenced, the nature and severity of the offence, the role that the corporation or individual played in the offence, the amount of money gained or lost because of the offence, the extent of any other harm caused by the offence on victims or society as a whole, and the assistance provided to authorities by the corporation or individuals being penalised. For corporations, law enforcement also considers the existence (or lack) of an effective ethics and compliance programme.

53 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

Non-prosecution and deferred prosecution agreements are available and frequently used in the United States, particularly with respect to corporations. The primary advantage of an NPA is that the government does not file charges against the corporation with a court. The primary advantage of a DPA is that the government promises to dismiss the charges within a definite period if the corporation complies with its obligations under the agreement. The primary disadvantage of these agreements is that they can allow prosecutors in some situations to make unreasonable demands on corporations and to stretch statutory interpretations without significant judicial oversight when the facts do not support the filing of any charges.

54 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

A suspension and debarment regime exists in the United States, and corporations must be very careful to investigate the potential for suspension and debarment before entering into a settlement agreement with domestic or foreign authorities. Otherwise, the corporation may unwittingly agree to a settlement containing terms that automatically trigger a suspension or debarment and jeopardise the corporation's business. In many situations, in negotiations with prosecutors and regulators, the corporation may negotiate terms that avoid or mitigate the potential for suspension or debarment.

55 Are 'global' settlements common in your country? What are the practical considerations?

Global settlements are becoming increasingly common as US law enforcement authorities establish stronger relationships with their international counterparts. Global settlements can be attractive to companies because they provide a greater sense of finality and ensure that companies received full credit for payments to other law enforcement authorities. However, global settlements can be more complicated, and companies must be careful that the dynamics of the negotiations do not lead law enforcement authorities to compete against each other and make higher settlement demands on the company than they would have made individually.

56 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

Depending on the type of civil claim, parallel private actions may be allowed. Securities fraud, for instance, can give rise to criminal liability and to civil liability in parallel private actions. Private plaintiffs generally may not gain access to the entirety of the government's files, but might gain access to some materials in the government's files through subpoenas to the company, Freedom of Information Act requests, and access to public dockets in ongoing criminal cases.

Publicity and reputational issues

57 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

At the investigatory stage, the federal government is required under the Federal Rules of Criminal Procedure to conduct its grand jury proceedings in secrecy. Companies are free to make public statements about criminal cases at the investigatory stage, but generally decline to make lengthy statements concerning an ongoing investigation. Once the case is before a court, lawyers for the company and the government have an ethical duty to refrain from making statements out of court that might materially prejudice the court proceeding, and the court can issue a gagging order on the parties if necessary. General public denials of misconduct or of liability are usually permitted.

58 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

Corporations must ensure that corporate communications are carefully coordinated with their litigation strategy. Although not universal, it is common for companies to use a public relations firm to advise on how to respond to corporate crises in the United States. However, no public relations release should be made that has not been thoroughly examined and approved by the legal team. Corporate communications can be used against the corporation in criminal or civil cases.

59 How is publicity managed when there are ongoing, related proceedings?

When there are ongoing, related proceedings, companies need to follow the same principles, coordinating closely between their attorneys and public relations officials. Statements about ongoing litigation should be brief and comply with local court rules. As a general rule, companies are usually best served by trying cases in the courtroom and not in the media.

Duty to the market

60 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

For corporations with reporting obligations under the securities laws, disclosure will generally be required for settlements resolving claims of potential liability asserted by the government in these circumstances. There may be exceptions in unusual cases (such as where the settlement with the government did not involve an issue material to the company's financial statements qualitatively or quantitatively), but those situations will be relatively rare. For corporations with no reporting obligations under the securities laws, there is no law requiring public disclosure of settlements with the government.

Appendix 1

About the Authors

Anupreet Amole
Brown Rudnick LLP

Anupreet Amole is counsel in Brown Rudnick's white-collar crime and regulatory investigations group. Anupreet has handled sensitive investigations in a wide range of multi-jurisdictional business crime matters, many involving allegations of bribery and corruption, fraud, misuse of confidential information, tax evasion, and money laundering. Past and present clients include various FTSE 100 companies, senior executives, investment advisory firms, professional services firms, and high net worth individuals. In addition, Anupreet is co-leader of the firm's cybersecurity group, advising on legal issues both before and after a cyber incident. Before joining Brown Rudnick in January 2017, Anupreet was a senior associate at Freshfields Bruckhaus Deringer in London.

Ilias G Anagnostopoulos
Anagnostopoulos

Ilias G Anagnostopoulos has appeared as lead counsel in most of the significant corporate and criminal cases in Greece during the past 20 years and is an associate professor of criminal law and criminal procedure at the School of Law at the University of Athens. He has extensive experience in most types of business crime, financial fraud, European criminal law, tax and customs fraud, medical malpractice, product criminal liability, environmental liability, compliance, money laundering, corruption practices, anti-competitive practices and cartel offences, anti-terrorism, extradition and mutual assistance. His many publications in Greek, English and German deal with matters of Greek, European and international criminal law, business and financial crimes, reform of criminal procedure and human rights.

He is chair of the Hellenic Criminal Bar Association and a member of the Criminal Law Committee of the Council of the Bars and Law Societies of Europe (chair, 2007–2013); the Criminal Law Experts Commission (Ministry of Justice); and FraudNet of the Commercial Crime Services of the International Chamber of Commerce.

Jodi Avergun
Cadwalader, Wickersham & Taft LLP

Jodi Avergun is a partner in the white-collar defence and investigations practice in the Washington, DC, office of Cadwalader, Wickersham & Taft LLP. Her practice focuses on representing corporations and individuals in criminal and regulatory matters involving, among other things, the Foreign Corrupt Practices Act (FCPA). Her experience in FCPA matters includes directing due diligence reviews in connection with mergers and acquisitions in a number of industries and jurisdictions; designing and implementing robust FCPA compliance policies, systems and training for corporate clients; and counselling clients in voluntary disclosures of FCPA violations. Jodi also advises clients in securities enforcement, healthcare and other white-collar matters, and has successfully represented both companies and senior executives in internal investigations, matters before regulatory bodies, including the SEC, and civil and criminal matters in federal court.

Jodi was an assistant US attorney and senior trial counsel in the US Department of Justice for 17 years. She was recognised in the 2014 edition of *The Legal 500 US* as a 'Key Individual' in the white-collar criminal defence area, and was named one of the 2016 '150 Women in White Collar' by *Corporate Crime Reporter*. Additionally, Cadwalader was named a 'Highly Recommended' firm for FCPA by *Global Investigations Review* in its 2016 rankings of Washington, DC's FCPA Bar.

Kevin Bailey
Brunswick Group LLP

Kevin is a partner in Brunswick's Washington, DC, office focusing on litigation and crisis communications and related reputational issues. Kevin has spent nearly two decades counselling major corporate clients at reputational crossroads, often against the backdrop of Congressional, SEC or other federal government investigations. Prior to joining Brunswick, Kevin served as BP's head Washington lawyer for over seven years and was a key strategist on the company's response to myriad issues related to the Deepwater Horizon accident in the Gulf of Mexico. Kevin also helped to shape BP's public affairs strategies across the United States and served as a key risk management adviser to executives and members of the board of directors for nearly a decade. Before he joined BP, Kevin practised law at WilmerHale in Washington and represented dozens of major companies before Congress and government agencies and in complex litigation.

Mark Beardsworth
Brown Rudnick LLP

Mark Beardsworth is co-head of Brown Rudnick's global white-collar crime and regulatory investigations department. Mark focuses his practice on the defence of serious fraud and has been involved in prosecutions brought by the Serious Fraud Office, the Financial Conduct Authority, HM Revenue and Customs, the Financial Reporting Council and the Environment Agency. Mark has a special interest in cases with ancillary civil and professional disciplinary proceedings and has a practical knowledge of representing a client's wider interests in these situations.

Mark conducts investigations for corporates, regulators and other entities and advises companies and their directors on governance issues. He helps clients to avoid compliance and criminal risk in a wide range of scenarios.

Mark is recognised as a leader in the field of commercial fraud for both corporates and individuals in *The Legal 500* and Chambers and Partners directories.

Benjamin Berringer
Clifford Chance US LLP

Benjamin Berringer is an associate at Clifford Chance US LLP, where he focuses on cross-border investigations and complex commercial litigation. Ben represents both corporations and individuals in connection with regulatory investigations before the Commodity Futures Trading Commission, the Department of Justice, and the Securities and Exchange Commission. Ben also advises on matters arising under cybersecurity, privacy and data protection laws. Ben received his BA from Williams College, his MS in economics from SOAS, and his JD from NYU School of Law.

Peter Binning
Corker Binning

Peter Binning is a leading individual in international criminal and regulatory litigation. He has consistently achieved top rankings in the leading legal directories for many years. His career includes serving as a prosecutor with the Crown Prosecution Service and the Serious Fraud Office. His practice now focuses on the defence of a wide range of business, regulatory and general crime cases ranging from fraud and corruption to environmental crime and financial regulatory investigations. He has many years' experience of criminal and civil tax investigations as well as health and safety, sanctions and export control violations representing companies as well as individuals. Most of his cases have an international element, often requiring collaboration with overseas lawyers in investigations or defending clients in proceedings.

Caroline Black
Dechert LLP

Caroline Black is a criminal defence and investigations lawyer focused on cross-border regulatory or internal investigations. She advises organisations, boards and audit committees on conducting investigations and interacting with relevant national authorities, including the Serious Fraud Office, HM Revenue and Customs and the police (and their overseas equivalents). Ms Black focuses her practice on the investigation and defence of business crimes, particularly matters involving corruption, money laundering, fraud and tax concerns. She has received awards for training and management and was also included in the 2015 edition of *Global Investigations Review*'s 'Women in Investigations' profile, which highlights 100 remarkable women from around the world for their accomplishments in this area of law.

Benjamin Borsodi
Schellenberg Wittmer Ltd

Benjamin Borsodi is Schellenberg Wittmer's managing partner and head of the internal corporate investigations group in Geneva. His areas of practice include fraud and business crime, international mutual legal assistance, corporate investigations, asset tracing and recovery, as well as compliance. With extensive experience in complex fraud matters, Benjaminis recognised as a highly recommended practitioner in white-collar crime by both Chambers Global and Chambers Europe, and Who's Who Legal. According to quotes from Chambers Global, Benjamin is 'dynamic, responsive and very client-friendly'. Sources say he 'brings a fresh and imaginative approach to cases' and is 'bright and articulate'.

Nicolas Bourtin
Sullivan & Cromwell LLP

Nicolas Bourtin is a litigation partner and the managing partner of Sullivan & Cromwell's criminal defence and investigations group. His practice focuses on white-collar criminal defence and internal investigations, regulatory enforcement matters, and securities and com-plex civil litigation. He is one of the coordinators of S&C's FCPA and anti-corruption prac-tice group.

Mr Bourtin has represented individuals, corporations and financial institutions in numer-ous high-profile matters involving accounting fraud, antitrust, FIRREA, the FCPA, insider trading, money laundering, mortgage orientation and servicing, OFAC sanctions, securities fraud, tax fraud and trading. He has extensive experience representing financial institutions in parallel regulatory and criminal investigations and representing non-US companies and individuals in connection with US investigations.

Mr Bourtin has conducted numerous jury trials and has argued frequently before the US Court of Appeals for the Second Circuit.

He is frequently recognised as a leading practitioner in the area of white-collar crimi-nal defence.

Mr Bourtin also serves, *pro bono*, on the Criminal Justice Act panel for the Eastern District of New York, representing indigent defendants in federal criminal proceedings.

Mr Bourtin served for four years as an Assistant US Attorney in the Eastern District of New York, where he was involved in investigations, prosecutions and trials involving fraud, corruption, money laundering and other white-collar offences.

Michael Bowes QC
Outer Temple Chambers

Michael Bowes QC specialises in business crime, corruption, civil fraud, financial services and economic sanctions. He acts for corporate clients and senior managers in global inves-tigations and for the SFO, FCA, CMA and Lloyd's of London. He advises companies in respect of US and EU sanctions. He acts for overseas regulators and is instructed in overseas cases as an expert in English law. He is regarded as an expert in civil and criminal 'cross-over' work and is described as 'one of the few specialist criminal practitioners in this area' (*The Legal 500* 2015) and as 'Very clever and has wide expertise, so is comfortable with criminal and

civil work.' (Financial Crime: Corporates, *Chambers*, 2017). He is listed as a leading silk in the fields of financial services, financial crime (corporates) and financial crime (London) in *Chambers*, 2017, and for banking and finance, business and regulatory crime, and fraud in *The Legal 500*. He is listed in *Who's Who Legal* 2016 as an expert in business crime defence. He is a joint head of Outer Temple Chambers. He sits as a Deputy High Court Judge (Queen's Bench Division) and a Recorder of the Crown Court.

Elisabeth Bremner
Norton Rose Fulbright LLP

Elisabeth is a partner in the financial services regulatory investigations team at Norton Rose Fulbright. She has more than 20 years' experience representing clients in matters involving both UK and overseas regulators. Her experience includes acting in relation to insider dealing, market abuse and trader mismarking investigations in the investment banking and hedge fund sectors. She also has considerable experience in the retail industry in investigating fraud, sanctions breaches, mis-selling and complaints mishandling. In 2010–2011 she spent a year on secondment to a major bank where she managed the global retail bank internal investigations team. She has acted as a Skilled Person for the FCA.

Matthew Bruce
Freshfields Bruckhaus Deringer

Matthew is co-head of Freshfields' global investigations group in London, a member of the corporate crime group and an experienced commercial litigator. Highlighted as one of the world's 40 leading investigations specialists under the age of 40 by GIR and recommended by directories (including being listed as a leading investigations and/or litigation lawyer in *Chambers*, *Who's WhoLegal* and *The Legal 500*), Matthew has led a number of major corporate internal and external investigations for blue-chip clients in all sectors arising from allegations of bribery and corruption, fraud, misaccounting and human rights abuses. Recent matters have engaged Asia, the Middle East, former CIS territories and Africa. Matthew has been a partner since 2012.

William Burck
Quinn Emanuel Urquhart & Sullivan, LLP

William Burck is the co-chair of the white-collar and corporate investigations group at the law firm Quinn Emanuel Urquhart & Sullivan, LLP and co-managing partner of the firm's Washington, DC, office. He was formerly special counsel and deputy counsel to the President of the United States and a federal prosecutor in the US Attorney's Office for the Southern District of New York. He is a trial lawyer who represents companies, boards of directors and senior executives in investigations, sensitive matters, corporate crises, litigation and other disputes involving the federal and state governments of the United States and governments of Europe, Latin America, the Middle East, Asia and Africa.

Peter Burrell
Willkie Farr & Gallagher (UK) LLP

Peter Burrell is a partner and heads Willkie's compliance and enforcement, and white-collar defence practices in the London office of Willkie Farr & Gallagher.

Mr Burrell is recognised as one of the UK's leading specialists in corporate crime and compliance matters. His practice includes advising on compliance issues relating to money laundering, bribery and corruption, sanctions and fraud; conducting complex internal corporate investigations; and defending companies and individuals in investigations and enforcement actions by the Serious Fraud Office, Financial Conduct Authority, Competition and Markets Authority, HM Revenue and Customs, and other law enforcement and regulatory agencies. He also handles complex High Court litigation and arbitration proceedings in London, with a particular focus on financial fraud, securities disputes and financial reporting issues.

Chambers and *The Legal 500* cite Mr Burrell as a leading practitioner in his areas of practice in the United Kingdom.

Louis Burrus
Schellenberg Wittmer Ltd

Louis Burrus is a partner in Schellenberg Wittmer's dispute resolution group in Geneva. He is dual-qualified in Switzerland and in England and Wales (solicitor). He specialises in domestic and international commercial litigation, in particular in banking and financial disputes. He also has extensive experience in conducting corporate internal investigations, including in cross-border white-collar matters. He regularly represents companies and individuals before Swiss and foreign authorities. According to Who's Who Legal, Louis is 'a great talent' in cross-border corporate investigations and "wins praise as a very knowledgeable and practical lawyer." Louis is also ranked as a 'Rising Star' in the Litigation category by Euromoney Legal Media Group (Expert Guides, Legal Media Group's Rising Stars 2016 and 2017) and was recognized as a top global investigations practitioner in GIR's 40 under 40 list in 2017.

Bret Campbell
Northstar Consulting LLC

Bret Campbell is a principal at Northstar Consulting LLC. Previously he was a partner in the white-collar defence and investigations group and co-managing partner of the Washington, DC, office of Cadwalader, Wickerhsam & Taft LLP. Bret represents clients in a broad range of complex criminal, regulatory and civil litigation matters involving international corrup-tion and the Foreign Corrupt Practices Act, money laundering and export controls, as well as securities, healthcare, accounting and commercial fraud. He has extensive experience manag-ing internal corporate investigations and cross-border criminal and regulatory matters, often in proceedings before the US Department of Justice and the US Securities and Exchange Commission. Bret can be contacted at: campbell@northstarconsultingfirm.com.

James Carlton
Fox Williams LLP

James Carlton is a partner at Fox Williams LLP specialising in all areas of business crime and regulation. Sources say he 'inspires total confidence from his clients, has a wonderful knack of making them feel comfortable and superbly represented, while not pulling any punches in terms of problems they may face' (*Chambers*, 2017).

James has been instructed in a number of the largest and most complex white-collar investigations and prosecutions brought by the UK regulatory and prosecuting authorities, including the Serious Fraud Office and the Financial Conduct Authority, relating to, among other things, allegations of fraud, money laundering, insider dealing, market abuse, and bribery and corruption. Increasingly these have significant international dimensions and considerations.

James also has great expertise in the conduct of public inquiries. He has been instructed by interested parties in a large number of the highest-profile public inquiries, including, among others, the BSE, *The Marchioness*, Leveson, Pollard and Victoria Climbié inquiries.

He has been instructed on a number of complex and cross-border regulatory investigations for senior executives. He has also been instructed in relation to the regulatory investigations into the manipulation of LIBOR, EURIBOR and FX. He has extensive experience of high-profile corporate investigations involving complex issues of financial crime, bribery and corruption, employee fraud and significant acts of dishonesty.

Isabel Costa Carvalho
Hogan Lovells US LLP

Isabel Costa Carvalho understands how business and markets work, and is recognised as a leading international capital markets and corporate and compliance lawyer for the great majority of Brazilian financial institutions and companies. Over the past 20 years, she has assisted Brazilian companies in international transactions, including listing their shares on the NYSE, guiding them in corporate governance structuring and setting up anti-bribery compliance programmes, and carrying out internal and cross-border investigations.

Isabel advises and speaks extensively on anti-bribery laws and corporate governance issues, an area in full development in Brazil. She assists clients in setting up compliance programmes to fit their unique needs, industries and risks, and guides them in solving problems when they arise, including leading investigations and dealing with relevant authorities. She received her LLB from the Pontifical Catholic University of São Paulo (PUC-SP) and her LLM from King's College London.

Isabel is regularly quoted in journals and featured at seminars concerning corporate governance, compliance and anti-bribery laws, and is a lecturer on the well-known FGV São Paulo Law School postgraduate course on compliance. She's recognised as an outstanding practitioner by publications including *Chambers* and *Best Lawyers*.

Winston Y Chan
Gibson, Dunn & Crutcher LLP

Winston Y Chan is a partner in the firm's San Francisco office. He is a member of the firm's white-collar defence and investigations, securities enforcement, False Claims Act, FDA and healthcare, life sciences, FCPA, environmental litigation, and antitrust practice groups. Mr Chan has particular expertise leading matters involving government enforcement defence, internal investigations, compliance counselling and civil trial litigation.

Gavin Costelloe
Gavin Costelloe's practice focuses on corporate crime, financial crime, and serious, complex and high-profile criminal offences.

Now an associate at Kirkland & Ellis in London, Gavin represents and advises clients in a wide range of criminal matters through all aspects of an investigation. He has extensive experience of proceedings initiated by the CPS, SFO, FCA, HMRC and the NCA.

Gavin is a member of the Honourable Society of Gray's Inn, the Young Fraud Lawyers' Association, Co-operation Ireland's legal committee and the International Association of Young Lawyers. Gavin is contactable at: gavin.costelloe@kirkland.com.

Srijoy Das
Archer & Angel

Srijoy is a partner at Archer & Angel and is the head of the firm's anti-corruption and compliance practice. He has headed several internal investigations for companies to determine compliance of Indian entities with the US FCPA or the UK Bribery Act, as well as into employee misconduct, allegations of corporate fraud, embezzlement, leakage of sensitive data, kickbacks from vendors to employees and related issues. He also advises on implementation of comprehensive compliance programmes and is involved in the training of employees. He also focuses on government enforcement action pertaining to the Prevention of Corruption Act and related legislation in India. He regularly assists companies being investigated by the UK Serious Fraud Office, the US Department of Justice or the US Securities and Exchange Commission in responding to issues relating to Indian law, customs and procedures, as well as the Directorate of Revenue Intelligence and the Enforcement Directorate in India.

He has authored a number of articles and given presentations on the legal aspects of doing business in India, including at ACI's 2015 National FCPA Conference in Washington, DC, and the 3rd Asia-Pacific Summit on Anti-Corruption, Compliance and Risk Management held in Singapore in December 2014.

Christopher David
Wilmer Cutler Pickering Hale and Dorr LLP

Christopher David's practice focuses on representing both individuals and companies in international white-collar crime matters mainly involving allegations of fraud, bribery and corruption, insider dealing or money laundering. Mr David has considerable experience in cross-border investigations, corporate and internal investigations, export controls and

economic sanctions advice, and his contentious case work predominantly involves matters under investigation by the Serious Fraud Office (SFO) or the Financial Conduct Authority.

Mr David is currently instructed in relation to the SFO investigations into Alstom (alleged corruption) and ENRC (alleged corruption) as well as conducting a global compliance review of over 100 agent relationships in 60 countries. In addition, he is also leading a number of internal investigations on behalf of multinational corporations and major financial services clients. Mr David has particular experience in providing advice within the context of multi-jurisdictional investigations involving UK-specific issues such as data protection or banking confidentiality.

Mr David also advises multinational companies and financial institutions in relation to their anti-money laundering, ethics and anti-corruption programmes, with particular focus on the UK Bribery Act and the concept of adequate procedures, as well as the broader issues of anti-bribery risk management, compliance and training.

In addition to his white-collar work, Mr David is a trustee and board member of the Centre for Criminal Appeals. Mr David has also represented *pro bono* clients in inquest proceedings through the Royal British Legion and was recently part of the team that secured a significant result for the families of four British servicemen who died in a road traffic collision while on active service in Afghanistan.

Benita David-Akoro
Sofunde Osakwe Ogundipe & Belgore

Benita obtained a bachelor of laws degree from the University of Lagos, Nigeria and was called to the Nigerian Bar in November 2016. She is also a member of the Chartered Institute of Arbitrators (UK) Nigeria branch. She has worked as an intern and a trainee associate with Ajumogobia & Okeke LP and Akinwunmi & Busari LP respectively. She is currently a trainee associate with Sofunde, Osakwe, Ogundipe & Belgore.

Eleanor Davison
Fountain Court Chambers

Eleanor Davison is a barrister at Fountain Court Chambers specialising in cross-border white-collar crime, fraud, corruption and contentious regulatory cases. Consistently recognised as an expert in the fields of financial crime, financial crime (corporates) and financial services, Chambers 2017 describes her as 'very responsive, and clearly an expert in her field' and 'very user-friendly, very organised, very clever'. Eleanor's core practice is defending corporates and individuals in some of the highest-profile SFO and DOJ investigations. She is known for her depth of involvement in cases, with Chambers 2017 describing her as 'very responsive and not in any way hierarchical . . . she's very prepared to help with disclosure and drafting skeleton arguments and more than willing to get her hands dirty' and 'a strong team player with superb communication skills who provides high quality input under challenging conditions'. During 2016 and into 2017, Eleanor has been leading an investigation for the enforcement division of the Financial Conduct Authority into cross-border money laundering at a global financial institution, giving her a deep insight into how enforcement conducts financial crime investigations. Eleanor was seconded from the Bar to the legal division of Barclays Bank in 2011, giving her expertise in the competing commercial and

regulatory priorities of financial institutions. Eleanor's practice extends to civil proceedings in the Commercial Court and the Employment Tribunal such that she is ideally placed to advise on the myriad issues that can arise in cross-border global investigations.

Caroline Day
Kingsley Napley LLP

Caroline specialises in complex fraud and financial crime. She represents corporates and individuals in complex global investigations. She has conducted numerous internal investigations on behalf of companies in relation to allegations of financial crime and misconduct, including fraud, theft, corruption, money laundering and environmental crime. She advises companies and individuals subject to investigations and prosecutions by various agencies including the Serious Fraud Office (SFO), the Financial Conduct Authority (FCA), HM Revenue and Customs (HMRC), the Crown Prosecution Service (CPS) and the Competition and Markets Authority (CMA, formerly the Office of Fair Trading). Caroline has a particular interest in cross-border cases and her experience extends to MLA requests and extradition. Caroline sits on the committee of the Fraud Lawyers Association (FLA).

Tapan Debnath
Nokia Corporation

Tapan Debnath is legal counsel for Nokia handling ethics and compliance investigations in West Europe and the Middle East. He identifies and mitigates risks to Nokia by managing and conducting internal investigations into alleged breaches of law and Nokia's code of conduct. Prior to joining Nokia in January 2016, Tapan was a prosecutor at the UK's Serious Fraud Office where he investigated and prosecuted major international economic crime cases. Tapan, an experienced English-qualified solicitor specialising in corporate crime, is currently studying for a master's degree in finance and banking law.

William H Devaney
Baker McKenzie LLP

William (Widge) Devaney is a partner in Baker McKenzie's North America litigation group in New York and co-chair of the North American government enforcement practice. He was an assistant United States attorney in the District of New Jersey, where he was a member of the Securities Fraud Unit. Mr Devaney's main areas of practice are white-collar criminal defence, investigations, compliance and complex civil litigation.

Mr Devaney is the author of multiple publications involving such topics as the FCPA, investigations and corporate compliance programmes. Mr Devaney appears often in the print media commenting on current criminal matters.

Mr Devaney received an AB and JD from Georgetown University, and an LLM from Cambridge University. He clerked for the Hon. Oliver Gasch on the US District Court for the District of Columbia. He is a member of the New York bar, among others.

Alexei Dudko
Hogan Lovells CIS

Alexei offers clients the benefit of over 18 years' experience as an accomplished litigator, investigator and adviser. He is a recognised authority on Russian and international fraud and asset tracing litigation. Alexei has developed a strong track record of conducting corporate internal investigations for major corporations, as well as their senior management and top executives, and advising on all aspects of bribery, corruption and fraudulent activities.

Alexei's diverse commercial litigation background enables him to offer clients mature and knowledgeable representation across a broad range of matters. Dedicated to achieving the best possible outcome for his clients, Alexei's track record has made him the 'go-to' litigator for major clients involved in complex domestic and international cases.

Clients describe Alexei as a 'strong litigator' (*Chambers Global*, 2015) and praise him for 'strategic vision' and 'excellent management and tactical litigation skills' (*The Legal 500*, 2015). In 2014, Alexei was ranked by *Global Investigations Review* as one of the top 40 investigations practitioners worldwide under the age of 40.

Kylie Dunn
Russell McVeagh

Kylie Dunn leads Russell McVeagh's national employment law practice. She routinely deals with regulatory and internal investigations, including providing advice on data protection, employment law and search orders.

Laura Dunseath
Pinsent Masons LLP

Laura is a senior associate and barrister qualified in England and Wales (Middle Temple), and Northern Ireland.

Formerly a case controller in the city and corporate division of the UK's Serious Fraud Office, Laura specialises in business crime and corporate internal investigations. She provides clients with advice on all aspects of investigations relating to allegations of fraud, bribery, corruption and money laundering. She also provides advice on mitigating the risks to corporates through the implementation of effective compliance programmes.

Prior to joining Pinsent Masons, Laura spent six years at the Serious Fraud Office working on numerous complex financial crime investigations and prosecutions involving accounting fraud, market abuse, financial services fraud, the prosecution of corporate entities, whistleblowing, self-reporting, defendant-assisted investigations, plea-bargaining, formal plea negotiations, proceeds of crime, and dealing with domestic and international prosecuting authorities, including the DOJ, FBI and SEC in the United States, and the FCA in the United Kingdom.

Elena Elia
Pinsent Masons LLP

Elena is an associate barrister in the corporate crime, investigations and enforcement team at Pinsent Masons. She has over eight years' experience and specialist knowledge in both financial services enforcement and corporate crime investigations, and prosecutions involving allegations of fraud, bribery and corruption, money laundering and insider dealing across a range of sectors and types of businesses. Elena spent four years at the criminal bar specialising in criminal and regulatory law before joining a leading white-collar crime law firm and then Pinsent Masons LLP in 2015. Elena brings extensive practical experience of criminal law gained at the criminal bar to private practice representing both individuals and corporates and has significant experience in large-scale, multi-jurisdictional and multi-witness investigations. She also has extensive experience in anti-corruption compliance, having advised companies all over the world in connection with developing their anti-corruption and money laundering compliance.

Tom Epps
Brown Rudnick LLP

Tom Epps is a partner in Brown Rudnick's white-collar crime and regulatory investigations group in London. Tom is recognised in the United Kingdom and internationally as a leading white-collar crime lawyer specialising in business crime and regulatory investigations. He has been involved in many of the United Kingdom's largest and most complex fraud investigations and prosecutions over the past 15 years.

Tom has substantial experience representing those facing investigations brought by all major UK enforcement agencies, particularly with international investigations. He is engaged on seven matters identified by the Serious Fraud Office as among its most significant investigations.

He frequently advises companies and senior individuals facing sensitive investigations and regulatory issues and is often called on to assist suspects, whistleblowers and witnesses in fraud and corruption cases. Tom also advises corporate clients on anti-corruption systems and controls.

Tom is a former committee member and law reform officer for the London Criminal Courts Solicitors' Association (LCCSA), and a member of the Association of Regulatory and Disciplinary Lawyers (ARDL) and the International Chamber of Commerce (ICC). He has lectured to professional and commercial organisations including the British Bankers' Association and is an established speaker on the UK white-collar crime conference circuit.

Jaime Orloff Feeney
Ropes & Gray LLP

Jaime Orloff Feeney is an associate at Ropes & Gray in Chicago, who frequently advises multinational corporations and individuals involved in government-initiated and internal investigations of cross-border anti-corruption and anti-money laundering matters, in addition to other matters involving alleged fraud.

Paul Feldberg
Willkie Farr & Gallagher (UK) LLP

Paul Feldberg is counsel in Willkie's compliance and enforcement, and white-collar defence practices in the London office of Willkie Farr & Gallagher. Mr Feldberg has practised for over 15 years in the area of criminal fraud, money laundering and corruption, gaining valuable experience from his work in both the private sector and at two major fraud regulators: HM Revenue and Customs, and the Serious Fraud Office. Mr Feldberg led the eastern European section of the Serious Fraud Office investigation into BAE Systems, working closely with both Eurojust and the Department of Justice in the United States. In recent years Mr Feldberg has advised on compliance issues relating to money laundering, bribery and corruption, sanctions and fraud, and conducted complex internal corporate investigations. Mr Feldberg has also worked for multilateral development banks such as the EBRD, advising on their internal investigations and governance processes.

Kaitlyn Ferguson
Clifford Chance US LLP

Kaitlyn Ferguson represents clients in white-collar and government investigations and regulatory proceedings, with experience handling anti-fraud, anti-corruption/FCPA and anti-money laundering matters. She has represented clients facing scrutiny from the Department of Justice, Securities and Exchange Commission, and Commodity Futures Trading Commission, and has designed and conducted confidential internal investigations spanning multiple jurisdictions.

Lloyd Firth
Wilmer Cutler Pickering Hale and Dorr LLP

Lloyd Firth focuses his practice on white-collar criminal defence work, regulatory and internal investigations and compliance in the corporate sector.

Mr Firth has defended clients in respect of investigations and enforcement proceedings initiated by authorities including the Serious Fraud Office, the Financial Conduct Authority, the Prudential Regulation Authority, the Bank of England and HM Revenue and Customs, further to allegations of corruption, money laundering, tax fraud, insider dealing and various regulatory breaches.

Mr Firth is a member of the Young Fraud Lawyers Association and the Proceeds of Crime Lawyers Association.

Rod Fletcher
Herbert Smith Freehills LLP

Rod has been practising for over 30 years in all aspects of white-collar and business crime. He represents both corporate and individual clients under investigation by regulators and prosecutors in many jurisdictions, including the Serious Fraud Office, the Financial Conduct Authority, the Department of Justice, the Securities and Exchange Commission, the Office of Fair Trading, the Crown Prosecution Service and Her Majesty's Revenue and Customs. This work often involves assisting clients with internal corporate investigations.

Rod led the team advising ICBC Standard Bank plc in relation to the groundbreaking first-ever deferred prosecution agreement entered into in the United Kingdom. The case was also the first disposal in England of the new corporate offence of failure to prevent bribery under the Bribery Act 2010, and involved a coordinated global settlement involving the US Department of Justice and the Securities and Exchange Commission. The case had no precedent and has set the template for DPAs in the United Kingdom.

Rod also acts in the global LIBOR and FX investigations, and has extensive experience in cartel investigations and prosecutions, including appellate proceedings in the Supreme Court. He is currently representing clients in the SFO investigations into Rolls-Royce, Barclays Bank, Tesco and the Bank of England.

William Fotherby
Dechert LLP

William Fotherby focuses his practice on white-collar and securities matters. He acts for companies and individuals faced with serious criminal charges, often brought by the prosecuting authorities of different jurisdictions simultaneously. Most often these charges involve bribery, corruption or securities fraud. He also provides advice to state governments about criminal prosecution strategy, asset recovery and mutual legal assistance.

Mr Fotherby has acted for foreign states and individuals in often high-profile extradition matters. He also has extensive knowledge of British Overseas Territories law.

Prior to joining the firm, Mr Fotherby worked as a barrister and solicitor at Meredith Connell, the Office of the Crown Solicitor for Auckland, New Zealand. In that role, he conducted numerous jury trials and other criminal hearings. He also represented the New Zealand government on immigration matters, parole and *habeas corpus* hearings, defamation suits and other regulatory matters. He has argued appeals in criminal and civil cases up to and including the New Zealand Supreme Court.

As part of Dechert's *pro bono* programme, he has helped a number of prisoners convicted of murder to challenge their convictions.

Ryan Galisewski
Sullivan & Cromwell LLP

Ryan Galisewski is a litigation associate at Sullivan & Cromwell. He represents global companies and financial institutions in securities, banking and other complex commercial litigation, as well as regulatory and criminal investigations.

Sona Ganatra
Fox Williams LLP

Sona Ganatra is a partner at Fox Williams LLP specialising in financial services regulatory issues and disciplinary and internal investigations both inside and outside the regulated sector. She has extensive experience in advising corporates and individuals on a broad range of regulatory issues, including matters such as anti-money laundering, bribery and corruption, fraud, the market abuse regime, consumer-credit-related activities, payment services, the change in control regime, and related insolvency issues. She is regularly instructed in relation

to FCA and SFO investigations, prosecutions and enforcement action against corporates and senior individuals. She also has extensive experience of high-profile corporate investigations involving issues of financial crime, bribery and corruption, and employee fraud.

Earlier in her career, Sona was seconded to the Enforcement Division of the (then) Financial Services Authority, where she appeared before the Regulatory Decisions Committee and participated in settlement discussions with financial institutions. This provided her with invaluable insight into regulatory investigations and disciplinary actions.

She has published numerous articles and led training sessions in relation to the Money Laundering Regulations and Handbook requirements, the Bribery Act 2010, and the Fraud Act 2006. Sona is a solicitor-advocate (higher courts civil).

Stephen Gentle
Simmons & Simmons LLP

Stephen Gentle is a partner in the crime, fraud and investigations team at Simmons & Simmons in London. He specialises in assisting corporate and individual clients in complex fraud and financial regulatory matters, frequently with multi-jurisdictional aspects. He has particular expertise in advising in anti-bribery compliance, investigations and proceedings and financial conduct authority matters (with an emphasis on insider dealing, market misconduct and international regulatory issues). Stephen is also experienced in money laundering prevention, investigations and prosecutions. His international criminal practice covers extradition proceedings, financial sanctions breaches and mutual legal assistance requests where he acts for corporations, individuals and governments.

Hector Gonzalez
Dechert LLP

Hector Gonzalez advises corporations and executives on a wide range of matters, with a focus on complex commercial litigation, criminal and related civil and administrative matters, SEC and CFTC enforcement proceedings, and internal, grand jury and state attorneys general investigations. In addition, he regularly represents clients in all aspects of Foreign Corrupt Practices Act (FCPA) and Racketeer Influenced and Corrupt Organizations Act (RICO) matters.

Mr Gonzalez has been consistently recognised for his white-collar criminal defence practice and his securities and shareholder litigation practice by *The Legal 500 US*, which praises him as 'a great lawyer' in commercial litigation, having 'an extraordinary amount of expertise' in securities shareholder litigation, and being 'an excellent trial lawyer and strategic thinker who won't waste clients' time or money.' *Benchmark Litigation 2015* named Mr Gonzalez a Litigation Star for his white-collar defence practice and described him as 'one of the sharpest and most promising talents doing this work right now'.

Mr Gonzalez has significant trial experience, having tried more than 20 federal and state jury trials and argued more than 30 cases before federal and state appellate courts. Mr Gonzalez was previously an Assistant US Attorney in the US Attorney's Office for the Southern District of New York, where he served as Chief of the Narcotics Unit and was twice awarded the Department of Justice's Director's Award for Superior Performance.

Ruby Hamid
Freshfields Bruckhaus Deringer

Ruby is a barrister and senior associate in Freshfields' dispute resolution practice, and a member of the corporate crime group, where she specialises in financial crime and financial regulation. She advises a wide range of companies on their interactions with regulators and prosecutors. She joined the firm in 2015 having spent 13 years at the Bar acting for and against prosecutors and regulators in cases of corporate crime. Notably, she acted for the FCA in its most complex criminal prosecutions arising from misconduct in financial markets.

Kevin J Harnisch
Norton Rose Fulbright US LLP

Kevin Harnisch joined Norton Rose Fulbright's Washington, DC, office in November 2015 and is currently the firm's head of SEC enforcement. He is a litigator who defends clients before the United States Securities and Exchange Commission (SEC), the US Commodity Futures Trading Commission Financial Industry Regulatory Authority and other self-regulatory organisations, the Department of Justice, US attorneys' offices and in federal courts. He handles matters relating to securities enforcement defence, internal investigations and anti-corruption issues, and he represents corporations and their directors and officers, broker-dealers, hedge funds, private equity funds and investment banks.

Kevin served as a branch chief in the Division of Enforcement of the SEC, where he led cases regarding financial fraud, market manipulation, insider trading, the Foreign Corrupt Practices Act, and municipal bond offerings. He has authored numerous articles and he frequently lectures on federal securities law and anti-corruption issues.

Stephanie Heglund
Sullivan & Cromwell LLP

Stephanie Heglund is a litigation associate at Sullivan & Cromwell and a member of the firm's criminal defence and investigations group. Her practice focuses on regulatory enforcement matters, white-collar criminal defence and internal investigations, and securities and complex civil litigation.

Louise Hodges
Kingsley Napley LLP

Louise specialises in all fraud and business crime litigation, including investigations and prosecutions by the Financial Conduct Authority (FCA), the Serious Fraud Office (SFO), HM Revenue and Customs (HMRC), the City of London Police and the Crown Prosecution Services (CPS). She is head of the Kingsley Napley financial services group and lead partner in the internal investigations team. Louise's practice spans a wide variety of allegations, most notably criminal and regulatory offences on behalf of companies and individuals; in particular she is part of the team representing Tesco. Louise is past-chair of the Fraud Lawyers Association (FLA) and vice-chair of the European Criminal Bar Association (ECBA).

Eugene Ingoglia
Allen & Overy LLP

Gene Ingoglia is a partner in the investigations and litigation practice at Allen & Overy LLP based in New York. His practice focuses on criminal, civil and regulatory securities and anti-corruption matters as well as trial-ready civil litigation. He has extensive experience in handling sophisticated securities and business crime matters and has achieved notable results for a wide variety of clients. He has represented clients in actions and investigations by various US attorneys' offices, the SEC, the CFTC, FERC, FINRA as well as other US federal and state regulatory agencies in actions and investigations involving allegations of securities fraud, accounting fraud, insider trading, market manipulation, FCPA violations, money laundering, tax evasion and healthcare fraud.

Previously, Gene was an Assistant US Attorney for the Southern District of New York and a member of the Securities and Commodities Fraud Unit, serving as the lead attorney in numerous federal jury trials and complex white-collar investigations. In that position, he represented the government in the trial and conviction of former SAC Capital portfolio manager Mathew Martoma in the largest insider trading scheme ever charged; led the investigation in the 'London Whale' case alleging the deliberate mismarking of complex securities in order to hide losses and resulting in charges against two former traders at a multinational financial institution; and led the investigation that resulted in the conviction of former bank executives and traders for deliberately overstating the value of certain real-estate-backed securities in *United States v. Kareem Serageldin*, one of the few successful criminal prosecutions arising out of the financial crisis.

Ryan Junck
Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Ryan Junck represents corporations and individuals in US and multinational regulatory investigations, including those brought by the Department of Justice, the Securities and Exchange Commission, state attorneys general, district attorneys, the Office of Foreign Assets Control, the Federal Reserve, the US Congress and various international regulators, such as the Serious Fraud Office. Mr Junck has conducted numerous internal investigations and has substantial experience representing clients in cross-border matters, including investigations concerning insider trading, financial fraud, the Foreign Corrupt Practices Act and economic sanctions laws. He is ranked as a leading lawyer in *Chambers UK* and is described by sources as 'truly excellent' in the UK edition of *The Legal 500*. Mr Junck was also named a Transatlantic Rising Star at the 2016 American Lawyer Transatlantic Legal Awards.

Michael P Kelly
Hogan Lovells US LLP

Michael P Kelly represents corporations and individuals in a wide range of matters involving US criminal law. He has successfully defended companies and individuals facing criminal cases and investigations brought by the United States Department of Justice. He has successfully helped boards of directors and corporations respond to allegations of potentially illegal conduct.

In defending clients in criminal cases, Mike has helped them resolve issues involving a wide range of US criminal law, including the Foreign Corrupt Practices Act (FCPA), money laundering, conspiracy, tax fraud, wire fraud, mail fraud, healthcare fraud and sanctions issues. He has conducted investigations in numerous countries, including the United Kingdom, France, Switzerland, Austria, the Czech Republic, Poland and Brazil. Martindale-Hubbell has awarded Mike with its highest rating in white-collar crime, criminal law and litigation. Prior to entering private practice, Mike served as a law clerk to US District Judge Ewing Werlein Jr of the US District Court for the Southern District of Texas.

Arla Kerr
Ropes & Gray LLP

Arla Kerr, an associate in Ropes & Gray's London litigation group, assists clients with matters in the full spectrum of commercial litigation and regulatory matters, including work in Ropes & Gray's special situations and government enforcement groups, on anti-bribery and corruption and contentious insolvency matters. Arla has previously worked in general and commercial litigation in New Zealand, including appearing as junior and sole counsel in tribunals and superior courts in New Zealand.

Michelle de Kluyver
Michelle de Kluyver is a partner at Addleshaw Goddard LLP, and has advised clients on international investigations of bribery and corruption, financial sanctions and money laundering, and on related compliance issues. In April 2015 Michelle was selected by *Global Investigations Review* as one of 100 'remarkable' women investigation specialists operating across the world in the field of investigations.

Michelle's experience in corruption cases extends to the United Kingdom, the United States, France, Germany, Austria, Switzerland, Brazil, Saudi Arabia, Bahrain, China and many offshore jurisdictions. Michelle's experience in financial sanctions and money laundering cases extends to the United Kingdom, France, Germany, Italy, Luxembourg, Belgium, the Netherlands, Spain, the Czech Republic, Turkey, Russia, Poland, the United Arab Emirates, Australia, China and Thailand.

Michelle also represents clients in contractual and company law disputes and in parallel litigation arising out of investigations. Michelle is a qualified solicitor advocate and experienced in all areas of dispute resolution, including litigation, arbitration and alternative dispute resolution.

Bettina Knoetzl
Knoetzl

Bettina Knoetzl, co-founding partner at Knoetzl Haugeneder Netal Rechtsanwaelte GmbH, is a leading Austrian trial lawyer with about 25 years' experience in Austrian and international litigation and business crime matters. She has been a partner in international law firms since 1999 and has tried and resolved hundreds of significant, complex disputes and won important business crime trials for her clients; often under significant media attention.

Bettina specialises in complex litigation, business crime, fraud and asset tracing, compliance and corporate crisis management. Her clients are corporations, multinationals and governments, as well as individuals under their company's protection; her matters usually have complex cross-border aspects. Bettina has been involved in a significant number of internal and external investigations, including FCPA-investigations carried out throughout central and eastern Europe.

For many years, she has been ranked in the top tier by leading international directories, including *Chambers* in 'Litigation' (Band 1) and 'White Collar Crime' (Band 1) and is currently recognised as one of the five 'Most Highly Regarded Individuals' in 'Litigation' and 'Asset Tracing' in Europe (*Who's Who Legal*, 2016). Most recently, she received recognition as international 'Lawyer of the Year' in Asset Recovery (*Who's Who Legal*, 2017).

Bettina is the co-chair of the litigation committee of the International Bar Association and the President of Transparency International – Austrian Chapter.

Daniel Koffmann
Quinn Emanuel Urquhart & Sullivan, LLP

Daniel Koffmann is an associate of the law firm Quinn Emanuel Urquhart & Sullivan, LLP, practising in the firm's white-collar and corporate investigations group.

Keith Krakaur
Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Keith D Krakaur is head of Skadden's European government enforcement and white-collar crime practice. With over 30 years of trial and appellate experience, he represents corporations, their board committees, directors, officers and employees in federal and state criminal and regulatory investigations and at trial. Mr Krakaur represents numerous institutions and individuals in global investigations relating to economic sanctions, corrupt practices, money laundering and tax fraud. He has also defended clients in matters involving allegations of accounting fraud, securities fraud, bank and insurance fraud, healthcare fraud, consumer fraud, customs fraud, public corruption and conflicts of interest. He assists boards of directors and management in conducting internal investigations, and often advises clients about preventive and remedial measures relating to compliance and internal controls. Prior to relocating to London in 2016, Mr Krakaur was based in Skadden's New York office. He has been recognised repeatedly by *Chambers USA* (ranked in Band 1) and *Chambers UK* (ranked in Band 1) as one of New York's and London's top white-collar crime and government investigations lawyers.

Sebastian Lach
Hogan Lovells International LLP

Sebastian is a partner in Hogan Lovells' Munich office. He heads the German investigations, white collar and fraud (IWCF) practice. He is also a member of Hogan Lovells global IWCF steering committee with responsibility for continental Europe and the Middle East. In addition, he is the co-head of the firm's global automotive sector group for litigation.

Sebastian Lach handles all aspects of compliance and investigation issues. In the field of compliance, Sebastian has advised various clients on the creation of global compliance systems. He has advised on further preventive aspects such as dawn raids and personnel training. On the investigations side, throughout his career, he has handled more than 20 multi-jurisdictional investigations, most of them for Fortune 500 and DAX 30 clients. In this regard, he has successfully advised on criminal matters (e.g., bribery, fraud, embezzlement) and internal investigations relating to more than 50 countries worldwide, including FCPA, SEC/DOJ implications. He has handled various cases with prosecutors' offices in Europe and has also given direct presentations to the SEC/DOJ in various international cases.

Margot Laporte
Richards Kibbe & Orbe LLP

Margot Laporte is an associate at Richards Kibbe & Orbe LLP. She focuses her practice on securities regulation and cross-border enforcement matters, including matters involving the Foreign Corrupt Practices Act, anti-money laundering laws and regulations, economic sanctions, insider trading and accounting fraud. She also regularly advises global companies and financial institutions with respect to anti-corruption compliance policies, procedures and training, as well as anti-corruption due diligence relating to potential transactions and investments.

Ms Laporte has represented public companies, audit committees, hedge funds, financial institutions and individuals in matters involving US and foreign authorities, including the US Department of Justice, Securities and Exchange Commission, and Financial Industry Regulatory Authority, as well as the French Financial Markets Authority and other foreign authorities. She has represented companies and individuals in both internal and regulatory anti-corruption and accounting-related investigations regarding conduct in Africa, Asia, Europe, Latin America and Russia.

Carina Lawlor
Matheson

Carina Lawlor is a partner in Matheson's commercial litigation and dispute resolution department and head of the regulatory and investigations group. Having trained with a London City firm, Carina has an international perspective. Her clients include regulators, international companies and a number of the world's leading financial institutions. She has particular experience and specialist knowledge in administrative and public law, investigations and inquiries compliance, white-collar and business crime and corporate offences, banking and financial services disputes, and anti-corruption and bribery legislation.

Carina also advises a wide range of clients in relation to data protection and privacy and document disclosure issues. She has acted in numerous judicial review proceedings and advises on all aspects of administrative decision-making and fair procedures. Carina also advises Matheson's international banking and financial services clients and domestic clients on crisis management and reputational issues.

Carina is a contributing author to a number of publications and regularly gives presentations on investigations, data protection and privilege. She is consistently ranked by leading

legal directories, including *Chambers*, *The Legal 500* and *Best Lawyers*, as one of the top disputes lawyers in Ireland.

Jeffrey A Lehtman
Richards Kibbe & Orbe LLP

Jeffrey A Lehtman is a partner and co-chair of the litigation department at Richards Kibbe & Orbe LLP. Mr Lehtman concentrates his practice on securities enforcement, regulatory investigations, and complex cross-border litigation and regulatory matters. He has particular expertise in counselling clients in connection with civil, criminal and regulatory issues arising in their international operations.

Mr Lehtman advises clients facing parallel investigations by both US and foreign authorities concerning financial reporting irregularities, potential violations of the Foreign Corrupt Practices Act, anti-money laundering regulations, and issues related to other legal and regulatory requirements.

Prior to joining RK&O, Mr Lehtman was senior regional counsel at Citigroup, where he was responsible for regulatory, litigation and corporate matters involving Latin America. He also previously served as a trial attorney in the US Department of Justice Office of International Affairs, where he coordinated international criminal matters between the United States and various Latin American countries.

Nico Leslie
Fountain Court Chambers

Nico Leslie is a member of Fountain Court Chambers, London.

He was called to the Bar in 2010 and has since developed a practice involving both national and international disputes. In particular, he has done significant work in Singapore, both in arbitration and before the newly formed Singapore International Civil Court.

Nico's practice comprises mainly complex financial and civil fraud litigation, having acted in some of the largest UK disputes of recent years, including the *Sebastian Holdings*, *Algosaibi*, *Gemini* and *Republic of Djibouti* cases. In light of this experience, Nico was recently identified as one of 10 junior 'Stars at the Bar' by the UK legal press.

Nico is the co-author (with Marcus Smith QC) of *The Law of Assignment* (published by OUP), one of the leading texts on the creation and transfer of intangible property. He has also been commissioned by OUP (with Marcus Smith QC) to write a further book: *Private International Law and Intangible Property*. Nico speaks fluent French, Italian and Serbo-Croat, and is comfortable working in those languages.

Richard Lissack QC
Fountain Court Chambers

Richard Lissack QC is a member of Fountain Court Chambers, London.

He is currently and has been repeatedly recognised by all the directories and his peers as a leading practitioner across many disciplines and in particular the law of banking and financial services, regulation and compliance, and white-collar crime.

He was called to the Bar in 1978, and became a Queen's Counsel, when aged just 37, in 1994. He is also a QC at the Bar of the Eastern Caribbean and the Bar of Northern Ireland, and an FLC at the Bar of New York, and most recently became admitted with full rights of audience at the DIFC. He has for over 20 years sat as a judge and as an arbitrator.

His practice is national and international and is currently involved in litigation in London, New York, San Francisco, Abu Dhabi, Dubai, the British Virgin Islands and Switzerland.

His practice comprises mainly high-profile complex litigation and is heavily weighted towards points at which commercial conduct straddles the line between civil, regulatory and criminal law – and in particular cross-border work involving banking and the financial markets.

Richard is co-author of the leading book on the Bribery Act 2010 and also the only post-*Lehman* review of financial services regulation in the UK. Both are published by LexisNexis.

He is also consulting editor to OUP's *Public Inquiries*.

Rebecca Loveridge
Fountain Court Chambers

Rebecca Loveridge is a barrister practising from Fountain Court Chambers and specialising in all areas of commercial law, including civil and regulatory proceedings relating to financial services. She appeared as junior counsel for the Bar Council in *R (on the application of Prudential and another) v. Special Commissioner of Income Tax and another* [2013] UKSC 1. She will be a contributor to *The Law of Privilege*, published by Oxford University Press, commencing with the third edition.

Nadine Lubojanski
Hogan Lovells International LLP

Nadine is an associate in Hogan Lovells' Munich office and a member of the IWCF practice. She focuses on advising and representing international and German clients (predominantly Fortune 500 and DAX 30 companies) on compliance matters and internal investigations.

Susan C McAleavey
Proskauer Rose LLP

Susan C McAleavey is an associate in the labour and employment law department in the New York office of Proskauer Rose LLP. She is a member of the firm's employment litigation and arbitration, and whistleblowing and retaliation groups. Susan represents employers in a variety of industries, including financial services, sports and entertainment, hospitality services, and healthcare, with respect to a wide range of labour and employment law matters, including compensation disputes, employment discrimination and retaliation, whistleblowing, sexual harassment, wrongful discharge, defamation, breach of contract and wage-and-hour issues. She handles federal and state litigations, arbitrations as well as administrative proceedings. In addition, Susan counsels clients on compliance with employment-related laws and on developing, implementing and enforcing personnel policies and procedures.

Edward McCullagh
Allen & Overy LLP

Edward McCullagh is an associate at Allen & Overy LLP and advises clients on a range of corporate, commercial and financial disputes. Edward has experience of litigation and arbitration, and previously spent time in the international arbitration group at Allen & Overy (Hong Kong). Edward also has experience of advising on international investigations and financial sanctions.

Tara McGrath
Clifford Chance US LLP

Tara McGrath is an associate at Clifford Chance US LLP, where she represents clients in international and domestic white-collar government investigations, and related regulatory and civil proceedings. Her recent representations have involved allegations of securities and accounting fraud, wire fraud and money laundering, in addition to issues of extradition. Tara received her BA from Vassar College and her JD, *cum laude,* from Duke University School of Law.

Anthony M Mansfield
Allen & Overy LLP

Tony Mansfield focuses his practice on enforcement defence, civil litigation and regulatory advice involving commodities, securities and related financial derivatives. He regularly represents clients before US and European regulators including the Commodity Futures Trading Commission (CFTC), the Federal Trade Commission, the Federal Energy Regulatory Commission, other federal and state regulatory agencies, the UK Financial Conduct Authority and the European Commission. Tony works with a broad spectrum of market participants, including US and non-US financial institutions, major integrated oil companies, global trading companies, hedge funds, energy marketers, futures commission merchants and exchanges.

Prior to returning to private practice in 2007, Tony served as a chief trial attorney and counsel to the Director in the Division of Enforcement of the CFTC. While there, he managed a team of lawyers and investigators focused primarily on manipulation in the commodities markets. He was responsible for the Division's investigations of numerous energy and power marketing companies relating to price reporting in the natural gas markets. He also played a central role in the CFTC's subpoena enforcement actions against natural gas price index compilers, involving First Amendment 'Reporter's Privilege' issues, and was central in the CFTC's defence of its exercise of jurisdiction over false reporting in the natural gas markets pursuant to the Commodity Exchange Act.

Tony is a former member of the CFTC's energy and environmental advisory committee and the law and compliance executive committee of the Futures Industry Association.

Mariana Vasques Matos
HL Consultoria em Negócios

Mariana Vasques Matos focuses her practice on internal corporate investigations, advising corporate clients on compliance matters, and on commercial litigation, with expertise in representing clients in the airline sector. She obtained her law degree from the Pontifical Catholic University of São Paulo (PUC-SP) and took specialised courses in compliance at the Fundação Getúlio Vargas – FGV (São Paulo) and in Brazilian civil procedure at the PUC-SP. In 2017 she attended a summer session about the American legal system at Yale University. Mariana is also a certified mediator, having received her certificate in mediation from the Instituto dos Advogados de São Paulo (IASP) in 2015 and has also published articles in *International Law Quarterly*.

Rita D Mitchell
Willkie Farr & Gallagher (UK) LLP

Rita Mitchell received her law degree from the University of Virginia School of Law and is admitted to practise in New York, Virginia and the District of Columbia. She is a partner in the London office of Willkie Farr & Gallagher and is a member of the compliance and enforcement and white-collar defence practices. Her practice includes advising and defending corporations in a variety of criminal and civil investigation and enforcement matters, conducting complex, worldwide internal investigations in relation to bribery, corruption and fraud, advising on and developing and benchmarking compliance programmes, conducting pre-merger and third-party due diligence, and providing day-to-day counselling and training on compliance with US, UK and other anti-corruption laws, including the US Foreign Corrupt Practices Act and the UK Bribery Act 2010.

Disha Mohanty
Archer & Angel

Disha Mohanty is a principal associate in the corporate and anti-corruption and investigations practice at Archer & Angel. She has assisted various companies in conducting internal investigations for employee misconduct, third-party investigations and compliance checks, witness interviews, compiling reports and due diligence. She also advises on a broad range of employment law matters by assisting with investigations into employee fraud, allegations of embezzlement, kickbacks and misconduct. She has extensive experience rendering advice with respect to remedial action – including revamping of employment contracts and employee handbooks, non-disclosure agreements, codes of conduct, employment termination procedures and negotiations, employment-related due diligence and internal audits on compliance issues.

She regularly advises multinational corporations on entry strategies; negotiating joint ventures; distribution, franchising and agency arrangements; and related regulatory approvals required for foreign companies to do business in India. She also advises on structuring of transactions affected by foreign exchange regulations – specifically pertaining to import/export of goods and services, external commercial borrowings and trade credit provisions.

Joseph V Moreno
Cadwalader, Wickersham & Taft LLP

A former federal prosecutor, Joseph has extensive trial and appellate experience handling complex investigations and litigation involving the DOJ, the SEC, and other domestic and international law enforcement agencies. Representative matters include money laundering, cyber fraud, securities and accounting fraud, insider trading, international bribery (including the US FCPA and the UK Bribery Act), and other white-collar criminal and civil matters.

Joseph served in the DOJ's National Security Division's Counterterrorism Section, was appointed a Special Assistant US Attorney for the Eastern District of Virginia, and served on the FBI's 9/11 Review Commission staff. A decorated combat veteran, he is a lieutenant colonel in the US Army Reserve and has served on active duty as a military prosecutor in Europe, the Middle East and Africa.

He earned a law degree from St John's University School of Law, a master of business administration degree from St John's University Peter J Tobin College of Business and a bachelor of arts degree from Stony Brook University. He is dual-qualified to practise in the United States and as a solicitor in England and Wales, and is a certified public accountant.

Christopher J Morvillo
Clifford Chance US LLP

Christopher J Morvillo has extensive experience representing corporate and individual clients in criminal investigations and proceedings, internal investigations, and related regulatory and civil matters. With a particular focus on cross-border government and internal investigations, his many representations have involved allegations of accounting fraud, public and foreign corruption, securities fraud, insider trading, economic sanctions violations, trade secret theft, and computer fraud. Mr Morvillo also advises corporations and businesses on related compliance and policy matters.

From 1999 to 2005, Mr Morvillo served as an assistant US attorney for the Southern District of New York, where he investigated, tried and handled appeals in a wide variety of criminal cases, including in the area of healthcare fraud, insurance fraud, money laundering, obstruction of justice, counterterrorism and narcotics. In 2005, he received the US Attorney General's Award for Exceptional Service – the Justice Department's highest award for prosecutors – in recognition of his role in the investigation and successful prosecution of a large international terrorism case.

Mr Morvillo was named one of the top five most highly regarded lawyers in the US for business crime corporate defence in the 2016 edition of *Who's Who Legal*. Mr Morvillo's expertise has also been recognised by numerous other publications, including Chambers, Best Lawyers in America and Super Lawyers New York. Mr Morvillo speaks and writes frequently on government investigations.

Harris M Mufson
Proskauer Rose LLP

Harris Mufson is a senior counsel in the labour and employment law department in the New York office of Proskauer Rose LLP. He is a member of the employment litigation and arbitration, and whistleblowing and retaliation groups, and is a co-editor of Proskauer's 'Whistleblower Defense Blog'.

Adept at counselling clients at every turn of the litigation process, Harris represents employers in a variety of industries, including financial services, retail, healthcare, entertainment, sports and legal, with respect to a wide range of labour and employment law matters. These include compensation disputes, employment discrimination and retaliation, whistleblowing, sexual harassment, wrongful discharge, defamation, breach of contract, non-competition agreements and wage-and-hour issues. He regularly appears in state and federal courts, as well as in proceedings before the American Arbitration Association, the Financial Industry Regulatory Authority, JAMS, the Equal Employment Opportunity Commission, and other federal and state agencies.

David Murphy
Fox Williams LLP

David Murphy is a legal director at Fox Williams LLP who specialises in guiding senior HR professionals, boards and in-house legal teams through difficult employment situations, and in advising senior individuals when they join and leave their employers or face problems during their employment.

His corporate client base is focused on the financial services and professional services sectors. His individual clients include fund managers, investment bankers, directors of listed companies and lawyers. He has advised several individuals at executive committee level on their departures from a major bank. In the 2015 edition of *The Legal 500*, David was recognised as a 'first class' leading individual.

Stéphane de Navacelle
Navacelle

Stéphane de Navacelle has worked in the field of white-collar crime and corporate crime in New York, London and Paris (at Engel & McCarney and Debevoise & Plimpton LLP).

With over 10 years' experience in French and US white-collar crime, he has participated in several landmark cases involving the FCPA and embargo restrictions (OFAC), charges of market abuse and insider trading, fraud (Forex), benchmark manipulation (LIBOR/EURIBOR), investigations by multilateral development banks (World Bank), as well as criminal and internal investigations in Europe, the Americas and Africa. He advises companies on setting up and auditing compliance programmes.

Stéphane de Navacelle has been identified as a leading practitioner by *Chambers & Partners*, *The Legal 500 France*, *The Legal 500 EMEA*, *Who's Who Legal* and the *Experts' Guide for White-Collar Crime / Business Crime, Investigations and Stock Market Litigation*.

Stéphane de Navacelle is a regular participant in seminars and is consulted on issues relating to regulatory and criminal investigations in Europe and the United States.

Joshua Newville
Proskauer Rose LLP

Joshua Newville is a partner in the litigation department in the New York office of Proskauer Rose LLP. He is a member of Proskauer's white-collar defence and investigations and commercial litigation groups. Josh handles securities litigation, enforcement and regulatory matters, representing corporations and senior executives in civil and criminal investigations. In addition, Josh conducts internal investigations and advises registered investment advisers and other fund managers on regulatory compliance, SEC exams and related risks.

Prior to joining Proskauer, Josh was senior counsel in the US Securities and Exchange Commission's division of enforcement, where he investigated and prosecuted violations of the federal securities laws. Josh served in the enforcement division's asset management unit, a specialised unit focusing on investment advisers and the asset management industry. His prior experience with the SEC provides a unique perspective to help companies and individuals manage risk and handle regulatory issues.

Babajide Ogundipe
Sofunde Osakwe Ogundipe & Belgore

Babajide Ogundipe obtained his law degree from the University of London in July 1978 and was called to the Nigerian Bar in July 1979.

A founding partner of Sofunde, Osakwe, Ogundipe & Belgore in 1989, he has practised as a commercial litigator in Nigeria for more than 35 years. His asset recovery practice is part of his practice as a commercial litigator, and he has acted on behalf of numerous clients to assist in the recovery of assets lost as a result of fraud and other misfeasance. He has, as a result, gained enormous experience and has come to be recognised as one of Nigeria's leading lawyers in the field.

He was elected a fellow of the Chartered Institute of Arbitrators in 1994, and served as the chairman of the Nigerian branch from 2006 to 2009. He was the first president of the Lagos Court of Arbitration, from February 2010 to February 2014.

He is a frequent speaker in Nigeria and abroad on arbitration, anti-corruption and asset recovery issues and on the regulation of the legal profession. He is ICC FraudNet's Nigeria representative, and an officer on the International Bar Association's anti-corruption and regulation of lawyers' compliance committees.

Ben O'Neil
Quinn Emanuel Urquhart & Sullivan, LLP

Ben O'Neil is a partner in the white-collar and corporate investigations group at the law firm Quinn Emanuel Urquhart & Sullivan, LLP. He was formerly a federal prosecutor with the Department of Justice's fraud section in Washington, DC. His practice spans virtually every industry and regularly involves multi-jurisdictional issues throughout Asia, Africa, Europe and Latin America.

Tamara Oppenheimer
Fountain Court Chambers

Tamara Oppenheimer has been practising as a barrister at Fountain Court Chambers since 2002, having previously trained and worked as a solicitor in the litigation department at Allen & Overy. She is a member of the Attorney-General's panel of counsel. She has a broad commercial litigation practice spanning financial services, regulatory, general commercial disputes, professional negligence, insurance and aviation. She is a contributor to *The Law of Privilege*, edited by Bankim Thanki QC. Tamara is regularly instructed on matters concerning privilege and confidentiality, particularly in the regulatory and investigatory context. She appeared as junior counsel for Eurasian Natural Resources Corporation in two recent privilege decisions, *Dechert v. Eurasian Natural Resources Corporation* [2016] 3 Costs LO 327 and *The Serious Fraud Office v. Eurasian Natural Resources Corporation* [2017] EWHC 1017 (QB).

Keji Osilaja
Sofunde Osakwe Ogundipe & Belgore

Keji obtained a bachelor of laws (LLB) degree from the University of Hull, United Kingdom, in July 2002 and was called to the Nigerian Bar in May 2007. She also successfully completed the legal practice course (LPC) at the University of Law, United Kingdom, where she was awarded with a postgraduate diploma in professional legal practice (PgD). In addition, she holds a master's degree in international legal practice from the University of Law.

In 2008, she joined the public sector as a legal counsel to the Lagos State Government where she was primarily responsible for registering limited partnerships and limited liability partnerships and also acted as secretary to the Lagos Home Ownership Mortgage Scheme (LAGOS HOMS) board. She crossed over to the private sector where she now works as a senior associate in the corporate/commercial group in the law firm of Sofunde, Osakwe, Ogundipe & Belgore. She has considerable legal experience in areas of law relating to contract, commercial, corporate, compliance, governance, public administration, advisory, legal secretarial, legal research, dispute resolution, due diligence investigations, acquisitions, joint ventures, project development and management, negotiations and concessions.

Anne-Marie Ottaway
Pinsent Masons LLP

Formerly a prosecutor at the UK's Serious Fraud Office (SFO), Anne-Marie is a partner and specialist in white-collar and business crime and government and internal investigations. Acknowledged for her criminal defence work, particularly with regard to corruption investigations, she provides clients with advice on all aspects of investigations relating to allegations of fraud, bribery, corruption and related money laundering issues and follow-on remediation. She also provides advice on risk management and the implementation of effective compliance programmes.

Anne-Marie had 13 years' experience at the SFO, where she worked on some of the UK's largest fraud and corruption prosecutions and had specific responsibility for managing the corporate self-reporting process introduced by the SFO in 2009, advising on case acceptance, investigation strategy and decisions on the enforcement outcomes.

Since joining Pinsent Masons, Anne-Marie has represented and advised a range of companies, including representing Sweett Group plc in connection with the SFO's first prosecution of a company for a section 7 Bribery Act 2010 failure to prevent bribery offence and advising Brand-Rex Limited in connection with the first Part 5 Proceeds of Crime Act 2002 civil recovery by the Scottish authorities for a section 7 Bribery Act 2010 offence.

Stephanie Pagni
Barclays Bank PLC

Stephanie Pagni has been general counsel of Barclays UK since March 2017 and is a member of Barclays' legal executive committee. Prior to this, she held roles of global head of litigation, investigations and enforcement for Barclays and head of the corporate and investment banking litigation team and the global retail banking litigation team. Ms Pagni joined Barclays in November 2005 from Allen & Overy LLP.

She holds an LLB and a master's degree in international comparative business law.

Jessica Parker
Corker Binning

Jessica is a specialist criminal and regulatory litigator with expertise in all areas of business and general crime. Jessica has experience defending against all of the major prosecuting agencies and is currently acting in several significant SFO investigations. She has acted for an executive in the Sustainable Agro Energy prosecution, the SFO's first prosecution under the Bribery Act 2010. Jessica has substantial experience in regulatory matters and frequently advises clients within the financial services industry. She frequently acts in international investigations, including international requests for evidence and asset freezing. In her general crime practice, Jessica has represented a number of high-profile individuals in relation to the most serious criminal charges, from serious assault to drugs offences.

Jonathan Peddie
Baker McKenzie LLP

Jonathan Peddie is a partner in the dispute resolution department of Baker McKenzie's London office. He joined Baker & McKenzie from Barclays Bank PLC, where he led teams handling litigation, investigations and regulatory enforcement in the decade spanning the global financial crisis. In 2014 he set up the bank's specialist financial crime legal team, handling issues relating to money laundering, bribery and corruption and international sanctions. He has led a number of high-profile regulatory and criminal inquiries in a wide range of jurisdictions and commercial contexts. Jonathan has substantial experience of dealing with UK and US regulators, prosecutors and government departments on issues relating to conduct risk, bribery and corruption, money laundering, counter-terrorism, international sanctions and national security. He advises companies from all sectors on cross-border regulatory and financial crime investigation and enforcement.

Anita Phillips
Herbert Smith Freehills

Anita is a professional support consultant in dispute resolution, based in the Hong Kong office of Herbert Smith Freehills. She has worked in the London, Paris and Hong Kong offices and has over 13 years' experience in all forms of contentious work, including investigations and corruption-related matters.

Anita supports the firm's global corporate crime and investigations practice. She has published widely on anti-corruption laws and trends. Notable recent work includes the *Guide to Anti-bribery Regulation in Asia Pacific* and the *Global Anti-corruption Report*, covering corruption risks and perceptions in close to 100 countries. Anita also supports the firm's leading ADR practice and has led several of the firm's thought leadership projects in this area from London and Hong Kong.

Anita graduated with first-class honours in Law with European Law from the University of Nottingham and a distinction in Legal Practice from the College of Law in London.

Glenn Pomerantz
BDO USA, LLP

Glenn Pomerantz leads BDO USA's global forensics practice with over 30 years of forensic accounting, auditing and consulting experience. Working with multinational organisations and their counsel, Glenn leads cross-border matters that mitigate the risks associated with fraud and corruption. He works with BDO leaders around the globe to respond to clients' needs involving anti-corruption and fraud investigations, forensic technology, compliance and due diligence matters in mature and emerging markets.

Glenn has significant experience managing engagements involving alleged violations of the Foreign Corrupt Practices Act and UK Bribery Act, and embezzlement, theft and financial reporting fraud. In addition, he has spent much of his career providing expert witness testimony on economic damages, as well as providing litigation and dispute advisory services, including evaluating claims under fidelity bonds and employee dishonesty insurance coverage. He has also served as a court-appointed umpire and referee and as a neutral arbitrator.

Polly Pope
Russell McVeagh

Polly Pope is one of New Zealand's leading financial, construction and insolvency litigators. She was named as 'Best Lawyer – Litigation' in 2016 and 2017. She has significant expertise in investigations, originating in the years that she spent in practice at Clifford Chance in London, where she acted on several cross-border internal and regulatory investigations. Polly has been recognised by the profession as a member of the Arbitrators' and Mediators' Institute of New Zealand's appointments panel and is a member of the faculty of the New Zealand Law Society's litigation skills course.

Charlie Potter
Brunswick Group LLP

Charlie advises a broad range of media, telecoms and professional services clients on various communications issues, particularly in the context of legal proceedings, regulatory disputes, mergers and corporate crises. He co-leads Brunswick's litigation, disputes and investigations practice in London. He is also a partner in Brunswick's family business, crisis and cybersecurity practices. Charlie joined Brunswick in June 2012 from his practice as a barrister at Blackstone Chambers, where he specialised in public/administrative and commercial law, in particular broadcasting and media regulation. During his legal practice, Charlie was regularly instructed by statutory regulators in various proceedings, and advised commercial clients on a range of sensitive regulatory issues. Before the Bar, Charlie spent four years at the BBC, including as a producer at the flagship television news and current affairs programme *Newsnight*.

Nicholas Purnell QC
Cloth Fair Chambers

Nicholas's practice in commercial and business crime and in regulatory and professional disciplinary matters has spanned over four decades. Typically instructed at the early stages of investigations pre-charge, he advises clients in cases under examination by global regulatory and prosecuting authorities including the Serious Fraud Office (SFO), the Financial Conduct Authority, the US Department of Justice and the Securities and Exchange Commission.

The development of collaborative investigations across jurisdictions has brought about the need for teams to be in place to provide joint advice on the impact of managing the response to investigations on a global basis. Nicholas has specialist experience in the development of the appropriate strategy to enable businesses to develop and cope with the resource demands imposed by such investigations.

Nicholas acted for ICBC Standard Bank throughout the first-ever deferred prosecution agreement to be approved in the United Kingdom. Following months of negotiations with the SFO, Nicholas appeared before the President of the Queen's Bench Division at the High Court, where the terms of the agreement were finalised. This case marked Nicholas's hat trick of firsts: the first civil settlement with the SFO for Balfour Beatty; the first attempt at a simultaneous global settlement in the United States and the United Kingdom with the SFO in *Innospec*; and the combination of this first charge under section 7 of the Bribery Act in achieving this deferred prosecution agreement with the SFO.

Amanda Raad
Ropes & Gray LLP

Amanda Raad is a partner in Ropes & Gray's government enforcement practice. Based in the firm's London office, she is a US lawyer who is also admitted as a solicitor in England and Wales. She has substantial experience negotiating with US regulators on behalf of companies and individuals on matters involving corruption, money laundering and other forms of financial fraud. In addition to working with corporate clients on complex and multi-jurisdictional investigations, Amanda is highly experienced in advising companies on the design and implementation of global compliance programmes.

Mahesh Rai
Drew & Napier LLC

Mahesh Rai is a director in Singapore's most celebrated dispute resolution practice. He acts for clients in a broad spectrum of complex litigation and international arbitration matters.

He has handled disputes spanning many sectors, including information technology, telecommunications, oil and gas, shipping, construction and commodities. He is adept at handling complex disputes involving multidisciplinary technical issues. He has also assisted companies in conducting internal investigations, and advised on corporate governance and compliance issues. He has acted in shareholder and joint venture disputes, fraud claims and employment disputes.

In 2016, Mahesh was ranked by *Global Arbitration Review*, and he was also listed as one of the most influential lawyers aged 40 and under. In 2017, Mahesh was one of Asialaw's 'Leading Lawyers for Dispute Resolution & Litigation'. He was appointed young *amicus curiae* by the Supreme Court of Singapore in 2014 and he was appointed to assist the High Court on novel points of law in an appeal involving money laundering.

Elizabeth Robertson
Skadden, Arps, Slate, Meagher & Flom LLP

Elizabeth Robertson is a partner in Skadden's government enforcement and white-collar crime practice, based in London. Ms Robertson has more than 20 years of experience advising on multi-jurisdictional white-collar crime cases involving allegations of fraud, corruption and money laundering, and on internal investigations. She regularly represents clients facing prosecution by the Serious Fraud Office, the Financial Conduct Authority and other regulatory agencies around the globe.

Ms Robertson is ranked in the top tier in both *The Legal 500* and *Chambers UK*, and was included in *The Lawyer's Hot 100* in 2013, a feature on the most influential people in the UK legal sector.

Her representations, prior to joining Skadden, include advising a large multinational company that provides services to the government in relation to alleged improper distribution of profits, advising on SFO and City of London Police investigations into the company, and advising its subsidiary on the UK Bribery Act; compliance advice for a Middle Eastern sovereign wealth fund in connection with anti-money laundering and anti-corruption policies; compliance advice for a Canadian-listed mining business operating in Europe relating to whistleblowing, data protection and anti-corruption procedures; and advising media organisations in connection with the 'Diana' Inquiry and the Leveson Inquiry into the culture, practice and ethics of the press.

Cíntia Rosa
HL Consultoria em Negócios

Cintia Rosa focuses her practice on internal corporate investigations and compliance matters, leveraging her experience with criminal proceedings and white-collar crime from when she worked at the Brazilian Federal Police. She earned her law degree (LLB) from the Pontifical Catholic University of São Paulo (PUC-SP) and has a certificate in compliance from the GV São Paulo Law School, where she is also pursuing a specialisation in economic law.

Emmeline Rushbrook
Russell McVeagh

Emmeline Rushbrook specialises in commercial and financial dispute resolution, regulatory compliance and enforcement, and public and administrative law. She has extensive experience advising on regulatory investigations, internal investigations and public inquiries, and regularly advises clients on compliance with New Zealand consumer and financial services laws and on related law reform issues. Emmeline brings a global perspective to her practice, having spent nine years working at Clifford Chance in London. She rejoined Russell McVeagh in 2014 and continues to frequently act on matters that have an international dimension.

David Sarratt
Debevoise & Plimpton LLP

David Sarratt is a partner in Debevoise's litigation department. He is a seasoned trial lawyer whose practice focuses on white-collar criminal defence, internal investigations and complex civil litigation. Prior to joining the firm, Mr Sarratt served as an assistant United States attorney in the Eastern District of New York. As a federal prosecutor, Mr Sarratt supervised and participated in a wide variety of investigations and prosecutions, involving international terrorism, cybercrime, financial and healthcare fraud, racketeering and other crimes. He successfully tried numerous cases to verdict and briefed and argued appeals in the US Court of Appeals for the Second Circuit.

Ali Sallaway
Freshfields Bruckhaus Deringer

Ali is co-head of Freshfields' global investigations practice in London and a member of the corporate crime group, and she has been a partner at the firm since 2005. With a record of acting on significant cross-border and domestic investigations for clients in all sectors, Ali specialises in particular on corporate and financial crime defence and regulatory enforcement actions. She has significant expertise handling fraud, false accounting, bribery and corruption, money laundering and terrorism matters as well as acting in relation to market abuse, disclosure and listing obligations for listed companies. Highlighted as one of the *The Lawyer*'s Hot 100 for 2015, Ali is recognised as a leading individual in corporate crime, contentious financial services and investigations by all the major directories.

Sandrine dos Santos
Navacelle

Before joining Navacelle, Sandrine dos Santos worked in an elite French litigation boutique and at the Paris Prosecutor's Office from 2007 to 2010. She dealt with cases related to economic and financial crime or organised crime and damages to persons or property and acquired a strong expertise in white-collar crime.

Ms dos Santos has worked on complex international corruption matters involving high-profile political stakeholders and large-scale companies in Africa and South America. She also handled sensitive LIBOR-related matters.

Ms dos Santos has assisted clients in setting up global compliance training. She is a regular participant at conferences organised by the French Institute for Higher National Defence Studies (Institut des Hautes Etudes de Défense Nationale, IHEDN).

Seth B Schafler
Proskauer Rose LLP

Seth B Schafler is a partner in the insurance recovery and counselling group. Seth has represented high-profile clients in precedent-setting cases spanning every type of insurance work for more than 25 years. He has extensive experience representing policyholders in coverage negotiations and disputes with their insurance companies, and litigating coverage issues in federal and state courts across the country.

Seth's experience covers a wide variety of insurance products including commercial general liability, directors and officers, professional liability, errors and omissions, fiduciary liability, property, business interruption, fidelity, marine and credit risk insurance, among others.

In addition to his litigation practice, Seth also advises his clients on any and all of their day-to-day insurance and coverage needs, including directors and officers liability insurance (D&O) and errors and omissions (E&O) matters.

Judith Seddon
Clifford Chance LLP

Judith Seddon specialises in national and international white-collar crime, fraud, corruption, and regulatory enforcement investigations and prosecutions. Prior to joining Clifford Chance, Judith was a partner in a criminal law practice for almost 15 years, giving her a depth and range of experience unusual in a magic circle firm. She has deep experience and expertise in advising corporates, financial institutions and individuals in internal investigations and when facing complex criminal investigations and prosecutions, both domestically and cross-border. She has worked and is currently working on some of the SFO's and FCA's most complex and high-profile investigations and prosecutions. She is known for her attention to detail and hands-on, pragmatic approach to cases. She is ranked in the top five most highly regarded individuals for corporate defence in England in the 2016 edition of *Who's Who Legal: Business Crime Defence*. Consistently ranked in the directories, Chambers 2016 describes her as having 'developed an enviable and substantial practice in financial crime. Sources note her keen instincts in this area: "She really understands the criminal process inside out . . . and has a lot of experience in financial crime at the corporate level." Her list of corporate clients includes notable financial institutions.'

Sean Seelinger
Ropes & Gray LLP

Sean Seelinger is an associate at Ropes & Gray in London, who frequently advises multinational corporations and individuals involved in government-initiated and internal investigations of cross-border anti-corruption and anti-money laundering matters in addition to other matters involving alleged fraud.

Arefa Shakeel
Ropes & Gray LLP

Arefa Shakeel is counsel at Ropes & Gray in Chicago, who frequently advises multinational corporations and individuals involved in government-initiated and internal investigations of cross-border anti-corruption and anti-money laundering matters, in addition to other matters involving alleged fraud.

Richard Sharpe
Clifford Chance

Consultant Richard Sharpe practised as a barrister in London for more than 10 years before joining Clifford Chance's Hong Kong office in 2013. He is qualified as a barrister in England and Wales (since 2002) and as a solicitor in Hong Kong (since 2014).

With extensive experience of complex white-collar crime and civil fraud, Richard acts in a wide range of contested matters and investigations predominantly arising out of fraudulent and criminal misconduct. He practises within the regulatory and anti-bribery and corruption, international arbitration, and commercial litigation teams.

Richard is experienced in crisis management, and increasingly acts for companies and financial institutions dealing with cyberattacks, and associated regulatory, criminal and litigation issues. *The Legal 500* writes that Richard is 'praised' by Chinese clients as 'enthusiastic and smart'.

Daniel Silver
Clifford Chance US LLP

Daniel Silver is a partner at Clifford Chance US LLP, where he focuses on regulatory enforcement and white-collar criminal defence. Dan represents both individuals and corporations in matters before the Justice Department and other federal and state enforcement agencies, and counsels clients on risk mitigation strategies with respect to cybersecurity, anti-corruption, sanctions and anti-money laundering issues. Prior to joining Clifford Chance, Dan spent 10 years as a federal prosecutor, serving in several senior leadership positions and overseeing the national security and cybercrime unit within the United States Attorney's Office for the Eastern District of New York. Dan received his undergraduate degree from Brown University and his JD, *magna cum laude*, from NYU School of Law.

Ilana B Sinkin
Norton Rose Fulbright US LLP

Ilana Sinkin is an associate in Norton Rose Fulbright's Washington, DC, office, where she focuses her practice on regulatory and government investigations, white-collar criminal defence, compliance and internal investigations for both corporations and individuals. Ilana has experience in a broad range of government and internal investigations, including investigations related to the US Foreign Corrupt Practices Act (FCPA), securities enforcement, insider trading, financial fraud, the False Claims Act and market manipulation.

Andrew Smith
Corker Binning

Andrew specialises in business crime, including SFO, NCA and police investigations relating to fraud, bribery and corruption and money laundering, as well as regulatory inquiries brought by the FCA into market abuse and market misconduct. Andrew also regularly acts for individuals facing extradition to a range of countries and provides related advice on INTERPOL and criminal mutual legal assistance. Case highlights include acting for individuals in the SFO investigations concerning Tesco, GSK, Olympus, LIBOR and EURIBOR; a defendant in the FCA's largest prosecution of insider dealing (Operation Tabernula) and FCA regulatory investigations concerning LIBOR and FX; advising businesses on alleged breaches of export controls and trade and financial sanctions; acting for executive counsel to the Financial Reporting Council on disciplinary investigations into major firms of accountants; and representing Shrien Dewani in the South African request for his extradition for the offence of murder.

Catrina Smith
Norton Rose Fulbright LLP

Catrina Smith is a partner in the Norton Rose Fulbright employment team in London. Catrina advises on all aspects of employment law, including corporate transactions, regulatory investigations, discrimination issues and the full spectrum of contentious and non-contentious work. She also advises on corporate governance and remuneration issues and executive appointments and terminations. Much of her work has an international angle. She is a member of the Employment Lawyers Association legislative and policy committee.

Pedro G Soto
Gibson, Dunn & Crutcher LLP

Pedro G Soto is an associate in the firm's Washington, DC, office. He is a member of the white-collar defence and investigations group, and his practice focuses primarily on anti-corruption and fraud matters.

Meghan K Spillane
Goodwin

Meghan Spillane, a partner in Goodwin's securities litigation and white-collar defence group, focuses her practice on white-collar criminal defence, corporate internal investigations, and complex business and financial litigation. Her experience includes federal criminal and civil investigations, securities class actions and derivative suits, SEC actions, and complex civil litigation matters. In addition to her other client work, Ms Spillane represents indigent criminal defendants on a *pro bono* basis in a variety of state and federal matters. Ms Spillane is a member of the bar of the State of New York and is admitted to practise before the US District Court for the Southern District of New York. Ms Spillane has been recognised by Super Lawyers as a 'Rising Star' in the white-collar defence practice since 2015.

Brian Spiro
Herbert Smith Freehills LLP

Brian Spiro is recognised as a leader in his field by all of the independent legal directories. Now a partner at Herbert Smith Freehills in London, Brian specialises in 'high loss' business crime litigation, fraud and regulatory matters and has expertise in international law including mutual legal assistance in criminal matters, environmental offences and breach of UN sanctions.

After a period as a parliamentary adviser, Brian trained as a solicitor with Clifford Chance and Simons Muirhead & Burton, London, qualifying as a solicitor in 1984.

Brian was a member of the Law Society's subcommittee and chair of the London Criminal Court Solicitors' Association subcommittee responding to the UK government's proposals on fraud law reform. He is the lead author of the *Police Station Adviser's Index* (Sweet & Maxwell), now in its fourth edition, and has acted as an international consultant to the WHO, the UN and the British Council on criminal law matters.

Brian is the immediate past chair of the business crime committee of the International Bar Association and is a regular writer and commentator on criminal law and related issues.

Richard M Strassberg
Goodwin

Rich Strassberg, chair of Goodwin's white-collar crime and government investigations practice and a former member of the firm's executive committee, specialises in white-collar criminal defence, SEC enforcement proceedings, FCPA compliance and investigations, internal investigations, and complex business and financial litigation. Mr Strassberg is a Fellow of the American College of Trial Lawyers, one of the premier legal associations in America. He has twice been recognised by *The American Lawyer* as 'Litigator of the Week' as a result of securing extraordinary victories in some of the most closely followed white-collar trials in the country. He is also acknowledged by his peers as being one of the finest white-collar attorneys, twice being cited in Law360 by white-collar partners at other firms as being the white-collar lawyer that impressed them, or that they most feared to go up against in court. Mr Strassberg is consistently ranked in Band 1 by *Chambers USA* as among the top New York-based white-collar defence lawyers, is rated as being among the Top 100 lawyers in New York by *New York Super Lawyers* and is regularly included in *The Best Lawyers in America* and other surveys of the top white-collar litigators in the country. Mr Strassberg co-authors a quarterly column on Federal Civil Enforcement in the *New York Law Journal*, has authored a chapter in the book *Beyond A Reasonable Doubt*, has published numerous articles in various legal periodicals, including several on the FCPA, has been a legal commentator on numerous programmes, including NPR, Fox News, Dateline and the Financial Management Network, and has been a guest speaker for various organisations, including the American Bar Association, the New York Council of Defense Attorneys and the Federal Bar Council. Prior to joining the firm, Mr Strassberg was the Chief of the Major Crimes Unit in the US Attorney's Office for the Southern District of New York, responsible for supervising approximately 25 Assistant US Attorneys in the prosecution of complex white-collar criminal cases.

Bankim Thanki QC
Fountain Court

Bankim Thanki QC is a leading Silk at Fountain Court Chambers in London. His practice spans a wide range of commercial litigation, arbitration, regulatory investigations and inquiries (both public and private). He represented Barclays Bank in the case that saw the first judgment handed down in the new Financial List in London and he is currently acting for Ukraine in defending the US$3 billion Eurobond claim brought on behalf of the Russian Federation in the same List. Bankim represented BP in the first case brought to trial under the Commercial Court's Shorter Trials Scheme. Other notable cases have included leading successfully for GMR in its dispute with the Republic of the Maldives over the international airport at Malé, for Deloitte LLP in its successful appeal against the record fine imposed by the FRC over its involvement in MG Rover, for Vincent Tchenguiz in his civil claim against the SFO, for the Central Bank of Trinidad and Tobago in the public inquiry into the collapse of Colonial Life Insurance, for Lloyds Bank in the OFT test case on Bank Charges, for the son of the King of Bahrain in his dispute with the late Michael Jackson, for the Bank of England in the Three Rivers litigation and for Qantas in *The Deep Vein Thrombosis and Air Travel Group Litigation*. Bankim has been instructed to advise the central banks of a number of countries including the Deutsche Bundesbank and the Bank of England. Among other works, he is the editor of *The Law of Privilege*, published by Oxford University Press.

Femi Thomas
Nokia Corporation

Femi Thomas is global head of ethics and compliance investigations at Nokia. Femi is a US-qualified attorney who prior to joining Nokia in April 2017 worked in the white-collar and regulatory enforcement practice at Crowell & Moring LLP, Washington, and then at Weatherford International in both legal and compliance roles and executive business roles. Femi has a juris doctorate degree and is a candidate for an executive MBA at the University of Oxford.

Luke Tolaini
Clifford Chance LLP

Luke Tolaini is a partner in Clifford Chance's international investigations practice. He has 20 years' experience of investigations in white-collar, antitrust and financial regulatory matters for corporates – many involving cross-border enforcement. His domestic focus has been on matters involving the UK's Serious Fraud Office, Financial Conduct Authority, and the Competition and Markets Authority, while his international practice has frequently involved engaging with the US, European and Asian authorities on matters involving corruption, cartels and money laundering. He is also a lead partner in Clifford Chance's risk team advising clients on the management and prevention of business conduct risk. Directories describe him as being 'an incisive and creative thinker who is very speedy in getting to grips with complex multi-jurisdictional issues' as well as 'calm and methodical in a crisis'. He is a member of the editorial board of *Global Investigations Review*.

Anne M Tompkins
Cadwalader, Wickersham & Taft LLP

Anne represents companies and financial institutions, as well as their officers and directors, in criminal, civil and administrative investigations. She has extensive experience in crisis management, internal investigations and enforcement matters across a variety of industries, including financial services, telecommunications, pharmaceutical/healthcare and government contracting.

Anne was the US Attorney for the Western District of North Carolina from April 2010 to March 2015, where she led numerous high-profile, complex criminal and civil investigations, including a public corruption case involving the former mayor of Charlotte, the national security case against former general and CIA Director David Petraeus, various securities and financial fraud cases, as well as significant matters involving the mortgage-backed securities industry. Previously, Anne was an Assistant US Attorney in the Western District of North Carolina, which included a detail to the Regime Crimes Liaison Office in Baghdad to assist the Iraqi Special Tribunal investigation into international humanitarian crimes committed by members of Saddam Hussein's regime.

Anne received a law degree from the University of North Carolina School of Law, a master of public administration degree from the University of North Carolina at Chapel Hill, and a bachelor of arts degree from the University of North Carolina at Charlotte.

Jo Torode
Ropes & Gray LLP

Jo Torode, an associate in Ropes & Gray's London government enforcement group, assists clients with matters in the full spectrum of business crime, commercial litigation and regulatory investigations with a particular focus on the conduct of high-profile, cross-border matters. She is qualified as an English barrister.

Alexandros Tsagkalidis
Anagnostopoulos

Alexandros Tsagkalidis is a member of the Athens Bar (2009). He received his education at the School of Law, National University of Athens (2007) and completed his postgraduate studies at the same university in Criminal Law and Criminal Procedure (LLM, 2011). He is experienced in money laundering and asset recovery cases. Alexandros is a member of the legal experts advisory panel of Fair Trials International.

Nicholas Turner
Clifford Chance

Nicholas Turner is a registered foreign lawyer in Clifford Chance's Hong Kong litigation and dispute resolution team, and specialises in financial crimes including economic sanctions and anti-money laundering advisory in the financial services sector. He is admitted in the State of New York and is a certified anti-money laundering specialist (CAMS).

Nicholas's experience in North America and Asia includes anti-money laundering and sanctions consent-order remediation for a major US financial institution, anti-money

laundering and sanctions risk assessments for a US financial institution, and sanctions advisory for a major US financial institution in Asia. His practice covers new-product approval, know-your-customer, and product advisory, analysis of wire transfers, customer accounts, investment banking deals, and other transactions under anti-money laundering and sanctions regulations. He offers counsel on investigations, testing, and remediation of know-your-customer, sanctions screening, and related internal compliance controls, and analysis/advisory in line with US, UN and national sanctions regulations in North America and Asia, and anti-money laundering and sanctions training.

Barry Vitou
Pinsent Masons LLP

Barry Vitou heads the firm's global corporate crime team and leads the broader regulatory and investigations and administrative law group.

He is a regular speaker on corruption, money laundering and the UK Bribery Act on TV and radio. He writes www.thebriberyact.com, the leading resource for the UK Bribery Act.

Barry advises corporates and individuals complying with or defending investigation and prosecution by law enforcement under criminal law as prosecutors increasingly place corporates, business owners and executives in the cross-hairs.

Barry is highly recommended in *The Legal 500* and *Chambers* directories for white-collar and corporate crime.

Donna Wacker
Clifford Chance

Donna Wacker is a partner in the Hong Kong litigation and dispute resolution practice and a core partner of the firm's Asia regulatory group. She is admitted in Hong Kong, Australia, and England and Wales and has been practising in Asia since 1999.

Donna advises on contentious and advisory regulatory matters in the financial sector, as well as complex banking and commercial litigation. She has advised investment banks and brokerages in a wide range of regulatory investigations, including into insider dealing and other forms of market manipulation, global investigations into rate fixing, short selling, algorithmic trading issues, IPO sponsor work, reporting failures, and a range of system and control issues. Donna is also currently advising on a number of litigation matters involving alleged mis-selling of derivatives and other structured products. Donna also leads the firm's contentious insolvency practice and is advising a number of financial institutions in respect of their resolution planning activities.

Donna is ranked as a leading individual in *Chambers* for litigation, contentious regulatory, and restructuring and insolvency work, and is also recognised in *The Legal 500*.

Rebecca Kahan Waldman
Dechert LLP

Rebecca Kahan Waldman is a partner in the white-collar and securities litigation group. Ms Waldman focuses her practice on complex commercial and securities disputes with an emphasis on litigation involving the banking and financial services sectors, white-collar and internal investigations, and e-discovery. She also has significant trial experience and has served as trial counsel in a number of federal, state and bankruptcy litigations.

Her significant representations include advising the former chief executive officer of registered futures commission merchant and broker dealer in civil litigations and congressional and regulatory inquiries arising out of bankruptcy of former employer; the former chief risk officer of Fannie Mae against securities fraud charges filed by the SEC in the Southern District of New York; individuals and companies in class action lawsuits alleging violations of federal securities laws; individuals and companies in investigations commenced by the SEC, CFTC, Department of Justice, state attorneys general and Congress; and The Bank of New York Mellon in all aspects of litigation and SEC and CFTC investigations relating to the bankruptcy of Sentinel Management Group.

Michael Wang
Clifford Chance

Michael Wang is a senior associate in Clifford Chance's litigation and dispute resolution practice. Admitted in Hong Kong in 2012, Michael is a native Mandarin speaker and fluent in Cantonese.

Michael advises on a broad range of contentious regulatory matters, and complex banking and commercial litigation. He regularly advises banks, investment funds, brokerages, asset managers and listed companies in a wide range of regulatory investigations and compliance issues, including market misconduct, sponsor liability, algorithmic trading and reporting failures. Michael also advises and represents banks and high net worth individuals in a number of high-profile court and tribunal hearings, both local and cross-border, involving mis-selling of structured products and general commercial disputes.

F Joseph Warin
Gibson, Dunn & Crutcher LLP

F Joseph Warin is chair of the litigation department of Gibson, Dunn & Crutcher's Washington, DC, office. Mr Warin also serves as co-chair of the firm's white-collar defence and investigations practice group. His expertise includes white-collar crime and securities enforcement – including FCPA investigations, False Claims Act cases, special committee representations, compliance counselling and complex class action litigation.

Mair Williams
Ropes & Gray LLP

Mair Williams, an associate in Ropes & Gray's London litigation group, assists clients with matters in the full spectrum of commercial litigation, as well as assisting on government enforcement matters. She is dual-qualified as an English barrister and California attorney.

Nicholas Williams
Freshfields Bruckhaus Deringer

Nick is a partner within Freshfields' dispute resolution practice in London and a member of the corporate crime group. As well as handling a broad range of large-scale, multi-jurisdictional commercial disputes, Nick has advised on a range of internal corporate, regulatory and criminal investigations (including a number of investigations by the SFO) for major corporate clients, including in the professional services, retail and pharmaceuticals sectors.

Kyle Wombolt
Herbert Smith Freehills

Kyle is the global head of Herbert Smith Freehills' corporate crime and investigations practice. Based in Hong Kong, he has more than 15 years of experience in Asia and has led investigations and compliance projects in more than 40 countries worldwide. He focuses on multi-jurisdictional anti-corruption, regulatory, fraud and accounting investigations, as well as trade and sanctions issues involving multinational and major regional corporates. He has extensive experience in dealing with a broad group of government agencies and regulators in the key jurisdictions in Asia, Europe, Australia and the United States.

Kyle also has a diverse range of experience implementing anti-corruption compliance programmes for a broad range of clients, including investment banks and other financial institutions and multinational companies. He regularly advises clients on corruption risks associated with a wide range of transactions, including IPOs, mergers and acquisitions, and joint ventures.

Kyle is admitted to practise in Hong Kong, California and New York, and is a registered foreign lawyer in England and Wales.

William Wong
Clifford Chance

William Wong is a Hong Kong based consultant in Clifford Chance's litigation and dispute resolution practice. He is admitted in Hong Kong, and England and Wales, and he has more than 10 years of experience in banking litigation, white-collar crime and all aspects of contentious regulatory work. He regularly advises a broad range of institutional clients (investment banks, private banks, insurance companies, hedge funds and asset managers) and individual clients (senior executives of listed corporations and financial institutions) in local and cross-border regulatory investigations. He also advises on commercial litigation and employment-related matters from time to time.

Before joining Clifford Chance, William had held in-house positions at two bulge-bracket investment banks, advising on their regulatory and compliance issues and internal investigations. With his in-house experience and trilingual capability, William is a popular counsel of choice, particularly where clients require first-class advice and Chinese language support. He is ranked as a Next Generation Lawyer in Hong Kong for dispute resolution in the 2017 edition of *The Legal 500*.

Wendy Wysong
Clifford Chance

Wendy Wysong leads Clifford Chance's Asia-Pacific anti-corruption and trade controls practice, maintaining offices in Hong Kong and Washington, DC. Her practice focuses on regulatory compliance and white-collar defence under international law, including the Foreign Corrupt Practices Act, International Traffic in Arms Regulations, Export Administration Regulations, Office of Foreign Assets Control economic sanctions, and US anti-boycott laws, as well as government fraud and public corruption.

As a former Assistant US Attorney in DC and the Deputy Assistant Secretary for Export Enforcement, Bureau of Industry & Security, Department of Commerce, Wendy counsels and defends clients based on her unique combination of experience and insight as both a prosecutor and regulator before courts and agencies.

Wendy represents clients throughout Asia and the United States in the logistics, defence, aerospace, healthcare, telecommunications, gaming, consumer goods and energy sectors. Wendy and her team received unprecedented dual recognition in 2017 as the 'Export Controls Law Firm of the Year, USA' and the 'Export Controls/Sanctions Law Firm of the Year, Rest of the World' by *World Export Controls Review*. Wendy led and coordinated the international team that represented a Chinese telecommunications company charged with violating US export controls and sanctions, securing the first-ever temporary general licence enabling the company to stay in business during the multi-agency investigation.

In 2015 Wendy was named by *Global Investigations Review* as one of 100 remarkable women operating in the field of investigations around the world.

Bruce E Yannett
Debevoise & Plimpton LLP

Bruce Yannett is deputy presiding partner of the firm and chair of the white-collar and regulatory defence practice at Debevoise & Plimpton. He focuses on white-collar criminal defence, regulatory enforcement and internal investigations. He represents a broad range of companies, financial institutions and their executives in matters involving securities fraud, accounting fraud, foreign bribery, cybersecurity, insider trading and money laundering. He has extensive experience representing corporations and individuals outside the United States in responding to inquiries and investigations.

Chambers Global 2017 recognises Mr Yannett as a Band 1 practitioner for FCPA matters, and *Chambers USA* 2017 recognises Mr Yannett as a Band 1 practitioner for both white-collar criminal defence and FCPA matters. Clients praise his work as 'excellent' and describe him as a 'leading light in the field', noting that 'he has real gravitas about him', giving him the 'immediate respect of everybody in the room'. In a similar vein, *The Legal 500 US* calls

him a 'superstar', *Lawdragon* recognises him as one of the 500 leading lawyers in America, and *Benchmark Litigation* names him a 'Litigation Star'. Further, in selecting Debevoise as 'Litigation Department of the Year' in 2014, *The American Lawyer* stated that Mr Yannett's work on the groundbreaking Siemens FCPA internal investigation, which spanned 34 countries, and settlement with US and German authorities, 'cemented his credibility with regulators' on subsequent matters.

He is a member of the American Law Institute. Mr Yannett is on the board of advisers for the New York University programme on corporate compliance and enforcement.

Early in his career, Mr Yannett served in the Office of Independent Counsel: Iran/Contra and as an assistant United States attorney.

Kevin Yeh
Gibson, Dunn & Crutcher LLP

Kevin Yeh is an associate in the firm's San Francisco office, where he practises in the litigation department, specialising in antitrust. A former US Department of Justice trial attorney, he handles merger clearance and cartel matters, as well as commercial litigation, investigations and appeals.

Steve Young
Banque Lombard Odier & Co Ltd

Steve Young spent 20 years in UK law enforcement with the City of London and Metropolitan Police services investigating economic crime. He specialises in the proactive investigation of banking fraud, money laundering, bribery and corruption. He worked internationally with multiple law enforcement agencies in the United States, Europe and Asia. This was followed by six years as Citigroup EMEA regional director of investigations, and eight years as Barclays' global head of investigations for investment banking and wealth management. At Barclays he managed a team of investigators who worked globally on all aspects of internal and external economic crime, whistleblowing investigations, regulatory investigations and litigation support. Steve is currently head of fraud and investigations at Lombard Odier & Co Ltd, based in Geneva. To date, he has 37 years of international economic crime experience in both law enforcement and corporate environments. He speaks frequently on economic crime investigations at legal, corporate and law enforcement events. Steve serves as a UK National Crime Agency 'Special', providing economic crime techniques, advice guidance and training.

Jerina Zapanti
Anagnostopoulos

Jerina (Gerasimoula) Zapanti is a member of the Athens Bar (2001) and the Hellenic Criminal Bar Association (2007). She has considerable experience in cases of corporate compliance, money laundering and cross-border criminal proceedings. She is very actively involved in internal corporate investigations and risk management assessment for national and multinational corporations.

Julie Zorrilla
Navacelle

Julie Zorrilla previously worked as a trainee in the Directorate of Legal Affairs at the French Ministry of Economic Affairs and Finance in 2012 and was a law clerk to the Paris Court of Appeal in 2011.

Over the past few years, Ms Zorrilla has worked on complex cross-border financial and criminal (including embargo, index manipulation and SSA) matters involving top executives and large foreign and French lending institutions. Ms Zorrilla also handled large-scale corruption matters advising on both legal and communication strategies.

Martha Zuppa
Hogan Lovells International LLP

Martha is an associate in Hogan Lovells' Munich office, where she is part of the IWCF practice. She has advised various clients from the automotive industry on issues of criminal liability, compliance systems and cross-border investigations.

Appendix 2

Contributing Law Firms' Contact Details

Allen & Overy LLP
One Bishops Square
London
E1 6AD
United Kingdom
Tel: +44 20 3088 0000
Fax: +44 20 3088 0088
edward.mccullagh@allenovery.com

1101 New York Avenue, NW
Washington, DC 20005
United States
Tel: +1 202 683 3800
Fax: +1 202 683 3999
anthony.mansfield@allenovery.com

1221 Avenue of the Americas
New York, NY 10020
United States
Tel: +1 212 610 6300
Fax: +1 212 610 6399
eugene.ingoglia@allenovery.com

www.allenovery.com

Anagnostopoulos
Odos Patriarchou Ioakeim 6
106 74 Athens
Greece
Tel: +30 210 729 2010
Fax: +30 210 729 2015
ianagnostopoulos@iag.gr
jzapanti@iag.gr
atsagkalidis@iag.gr
www.iag.gr

Archer & Angel
5B, 5th Floor, Commercial Towers
Hotel J W Marriott, Aerocity
New Delhi – 110037
India
Tel: +91 11 4195 4195
Fax: +91 11 4195 4196
sdas@archerangel.com
dmohanty@archerangel.com
www.archerangel.com

Baker McKenzie LLP
452 Fifth Avenue
New York, NY 10018
United States
Tel: +1 212 626 4337
Fax: +1 212 310 1696
william.devaney@bakermckenzie.com

100 New Bridge Street
London
EC4V 6JA
United Kingdom
Tel: +44 20 7919 1000
Fax: +44 20 7919 1999
jonathan.peddie@bakermckenzie.com

www.bakermckenzie.com

Banque Lombard Odier & Co Ltd
rue de la Corraterie 11
1204 Geneva
Switzerland
Tel: +41 22 709 20 19
Fax: +41 22 709 96 93
s.young@lombardodier.com
www.lombardodier.com

Barclays Bank PLC
1 Churchill Place
London
E14 5HP
United Kingdom
Tel: +44 20 3134 4739
stephanie.pagni@barclays.com
www.barclays.com

BCL Solicitors LLP
51 Lincoln's Inn Fields
London
WC2A 3LZ
United Kingdom
Tel: +44 20 7430 2277
Fax: +44 20 7430 1101
law@bcl.com
www.bcl.com

BDO USA, LLP
100 Park Avenue
New York, NY 10017
United States
Tel: +1 212 885 8379
gpomerantz@bdo.com
www.bdo.com

Brown Rudnick LLP
8 Clifford Street
London W1S 2LQ
United Kingdom
Tel: +44 20 7851 6000
Fax: +44 20 7851 6100
tepps@brownrudnick.com
mbeardsworth@brownrudnick.com
aamole@brownrudnick.com
www.brownrudnick.com

Brunswick Group LLP
16 Lincoln's Inn Fields
London
WC2A 3ED
United Kingdom
Tel: +44 20 7404 5959
Fax: +44 20 7831 2823
cpotter@brunswickgroup.com

600 Massachusetts Avenue, NW
Suite 350
Washington, DC 20001
United States
Tel: +1 202 393 7337
Fax: +1 202 898 1588
kbailey@brunswickgroup.com

www.brunswickgroup.com

Cadwalader, Wickersham & Taft LLP
700 Sixth Street, NW
Washington, DC 20001
United States
Tel: +1 202 862 2200
Fax: +1 202 862 2400
anne.tompkins@cwt.com
jodi.avergun@cwt.com
joseph.moreno@cwt.com
www.cadwalader.com

Clifford Chance
Clifford Chance LLP
10 Upper Bank Street
Canary Wharf
London E14 5JJ
United Kingdom
Tel: +44 20 7006 1000
Fax: +44 20 7006 5555
judith.seddon@cliffordchance.com
luke.tolaini@cliffordchance.com

Clifford Chance
27/F Jardine House
One Connaught Place
Hong Kong
Tel: +852 2825 8888
wendy.wysong@cliffordchance.com
donna.wacker@cliffordchance.com
richard.sharpe@cliffordchance.com
william.wong@cliffordchance.com
michael.wang@cliffordchance.com
nicholas.turner@cliffordchance.com

Clifford Chance US LLP
31 West 52nd Street
New York, NY 10019
United States
Tel: +1 212 878 8000
Fax: +1 212 878 8375
christopher.morvillo@cliffordchance.com
daniel.silver@cliffordchance.com
benjamin.berringer@cliffordchance.com
kaitlyn.ferguson@cliffordchance.com
tara.mcgrath@cliffordchance.com

www.cliffordchance.com

Cloth Fair Chambers
39–40 Cloth Fair
London
EC1A 7NT
United Kingdom
Tel: +44 20 7710 6444
Fax: +44 20 7710 6446
nicholaspurnell@clothfairchambers.com
www.clothfairchambers.com

Corker Binning
22 Essex Street
London
WC2R 3AA
United Kingdom
Tel: +44 20 7353 6000
Fax: +44 20 7353 6008
jp@corkerbinning.com
as@corkerbinning.com
pb@corkerbinning.com
www.corkerbinning.com

Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
United States
Tel: +1 212 909 6000
Fax: +1 212 909 6836
dsarratt@debevoise.com
www.debevoise.com

Dechert LLP
1095 Avenue of the Americas
New York, NY 10036-6797
United States
Tel: +1 212 698 3500
Fax: +1 212 698 3599
hector.gonzalez@dechert.com
rebecca.waldman@dechert.com

160 Queen Victoria Street
London
EC4V 4QQ
United Kingdom
Tel: +44 20 7184 7000
Fax: +44 20 7184 7001
caroline.black@dechert.com
william.fotherby@dechert.com

www.dechert.com

Drew & Napier LLC
10 Collyer Quay
Ocean Financial Centre
Unit 10-01
Singapore 049315
Tel: +65 6531 2584
Fax: +65 6220 0324
mahesh.rai@drewnapier.com
www.drewnapier.com

Fountain Court Chambers
Fountain Court
Temple
London
EC4Y 9DH
United Kingdom
Tel: +44 20 7583 3335
Fax: +44 20 7353 0329
eld@fountaincourt.co.uk
rl@fountaincourt.co.uk
nxl@fountaincourt.co.uk
bt@fountaincourt.co.uk
to@fountaincourt.co.uk
rjl@fountaincourt.co.uk
www.fountaincourt.co.uk

Fox Williams LLP
10 Finsbury Square
London
EC2A 1AF
United Kingdom
Tel: +44 20 7628 2000
Fax: +44 20 7628 2100
jcarlton@foxwilliams.com
sganatra@foxwilliams.com
dmurphy@foxwilliams.com
www.foxwilliams.com

Freshfields Bruckhaus Deringer
65 Fleet Street
London
EC4Y 1HS
United Kingdom
Tel: +44 20 7936 4000
Fax: +44 20 7832 7001
ali.sallaway@freshfields.com
matthew.bruce@freshfields.com
nicholas.williams@freshfields.com
ruby.hamid@freshfields.com
www.freshfields.com

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306
United States
Tel: +1 202 955 8500
Fax: +1 202 467 0539
fwarin@gibsondunn.com
wchan@gibsondunn.com

555 Mission Street
Suite 3000
San Francisco, CA 94105-0921
United States
Tel: +1 415 393 8200
Fax: +1 415 393 8306
psoto@gibsondunn.com
kyeh@gibsondunn.com

www.gibsondunn.com

Goodwin
The New York Times Building
620 Eighth Avenue
New York, NY 10018-1405
United States
Tel: +1 212 813 8800
Fax: +1 212 355 3333
rstrassberg@goodwinlaw.com
mspillane@goodwinlaw.com
www.goodwinlaw.com

Herbert Smith Freehills
Herbert Smith Freehills LLP
Exchange House
Primrose Street
London
EC2A 2EG
United Kingdom
Tel: +44 20 7466 2411
Fax: +44 20 7098 5311
rod.fletcher@hsf.com
brian.spiro@hsf.com

Herbert Smith Freehills
23/F Gloucester Tower
15 Queen's Road Central
Hong Kong
Tel: +852 2845 6639
Fax: +852 2845 9099
kyle.wombolt@hsf.com
anita.phillips@hsf.com
www.herbertsmithfreehills.com

Hogan Lovells
HL Consultoria em Negócios
Av. Pres. Juscelino Kubitschek
1.700, 7º andar, Itaim Bibi
04543-000
São Paulo – SP
Brazil
Tel: +55 11 3074 3500
Fax: +55 11 3078 3411
isabel.carvalho@hoganlovells.com
mariana.matos@hlconsultorialtda.com.br
cintia.rosa@hlconsultorialtda.com.br

Hogan Lovells CIS
Summit Business Centre
22 Tverskaya Street, 9th Floor
125009 Moscow
Russia
Tel: +7 495 933 3000
Fax: +7 495 933 3001
alexei.dudko@hoganlovells.com

Hogan Lovells International LLP
Karl-Scharnagl-Ring 5
80539 Munich
Germany
Tel: +49 89 290 12 187/289/193
Fax: +49 89 290 12 222
sebastian.lach@hoganlovells.com
nadine.lubojanski@hoganlovells.com
martha.zuppa@hoganlovells.com

Hogan Lovells US LLP
555 Thirteenth Street, NW
Washington, DC 20004
United States
Tel: +1 202 637 5533
Fax: +1 202 637 5910
michael.kelly@hoganlovells.com

www.hoganlovells.com

Kingsley Napley LLP
Knights Quarter
14 St John's Lane
London
EC1M 4AJ
United Kingdom
Tel: +44 20 7814 1200
Fax: +44 20 7490 2288
cday@kingsleynapley.co.uk
lhodges@kingsleynapley.co.uk
www.kingsleynapley.co.uk

Knoetzl
Herrengasse 1
1010 Vienna
Austria
Tel: +43 1 34 34 000
Fax: +43 1 34 34 000 999
bettina.knoetzl@knoetzl.com
www.knoetzl.com

Matheson
70 Sir John Rogerson's Quay
Dublin 2
Ireland
Tel: +353 1 232 2000
Fax: +353 1 232 3333
carina.lawlor@matheson.com
www.matheson.com

Navacelle
60 rue Saint-Lazare
75009 Paris
France
Tel: +33 1 48 78 76 78
Fax: +33 9 81 70 49 00
sdenavacelle@navacellelaw.com
sdossantos@navacellelaw.com
jzorrilla@navacellelaw.com
www.navacellelaw.com

Nokia Corporation
125 Finsbury Pavement
London
EC2A 1NQ
United Kingdom

femi.thomas@nokia.com
Tel: +44 7785 399 642

tapan.debnath@nokia.com
Tel: +44 7342 089 528

www.nokia.com

Norton Rose Fulbright
Norton Rose Fulbright LLP
3 More London Riverside
London
SE1 2AQ
United Kingdom
Tel: +44 20 7283 6000
Fax: +44 20 7283 6500
elisabeth.bremner@nortonrosefulbright.com
catrina.smith@nortonrosefulbright.com

Norton Rose Fulbright US LLP
799 9th Street NW
Suite 1000
Washington, DC 20001
United States
Tel: +1 202 662 0200
Fax: +1 202 662 4643
kevin.harnisch@nortonrosefulbright.com
ilana.sinkin@nortonrosefulbright.com

www.nortonrosefulbright.com

Outer Temple Chambers
222 Strand
London
WC2R 1BA
United Kingdom
Tel: +44 20 7353 6381
Fax: +44 870 220 3256
michael.bowesqc@outertemple.com
www.outertemple.com

Pinsent Masons LLP
30 Crown Place
London
EC2A 4ES
United Kingdom
Tel: +44 20 7490 6501
Tel: +44 20 7490 6345
Tel: +44 20 7667 0102
barry.vitou@pinsentmasons.com
anne-marie.ottaway@pinsentmasons.com
laura.dunseath@pinsentmasons.com
elena.elia@pinsentmasons.com
www.pinsentmasons.com

Proskauer Rose LLP
11 Times Square
New York, NY 10036
United States
Tel: +1 212 969 3000
Fax: +1 212 969 2900
jnewville@proskauer.com
sschafler@proskauer.com
hmufson@proskauer.com
smcaleavey@proskauer.com
www.proskauer.com

Quinn Emanuel Urquhart & Sullivan, LLP
777 Sixth Street NW, 11th Floor
Washington, DC 20001
United States
Tel: +1 202 538 8000
Fax: +1 202 538 8100
williamburck@quinnemanuel.com
benoneil@quinnemanuel.com
danielkoffmann@quinnemanuel.com
www.quinnemanuel.com

Richards Kibbe & Orbe LLP
Portrait Building, 701 8th Street, NW
Washington, DC 20001-3727
United States
Tel: +1 202 261 2960
Fax: +1 202 261 2999
jlehtman@rkollp.com
mlaporte@rkollp.com
www.rkollp.com

Ropes & Gray LLP
60 Ludgate Hill
London
EC4M 7AW
United Kingdom
Tel: +44 20 3201 1500
Fax: +44 20 3201 1501
amanda.raad@ropesgray.com
joanna.torode@ropesgray.com
arla.kerr@ropesgray.com
mair.williams@ropesgray.com
sean.seelinger@ropesgray.com

32nd Floor
191 North Wacker Drive
Chicago, IL 60606
United States
Tel: +1 312 845 1200
Fax: +1 312 845 5500
jaime.feeney@ropesgray.com
arefa.shakeel@ropesgray.com

www.ropesgray.com

Russell McVeagh
48 Shortland Street
PO Box 8
Auckland 1140
New Zealand
Tel: +64 9 367 8000
Fax: +64 9 367 8163
polly.pope@russellmcveagh.com
kylie.dunn@russellmcveagh.com

157 Lambton Quay
PO Box 10-214
Wellington 6143
New Zealand
Tel: +64 4 499 9555
Fax: +64 4 499 9556
emmeline.rushbrook@russellmcveagh.com

www.russellmcveagh.com

Schellenberg Wittmer Ltd
15bis, rue des Alpes
PO Box 2088
1211 Geneva 1
Switzerland
Tel: +41 22 707 8000
Fax: +41 22 707 8001
benjamin.borsodi@swlegal.ch
louis.burrus@swlegal.ch
www.swlegal.ch

Simmons & Simmons LLP
CityPoint
One Ropemaker Street
London
EC2Y 9SS
United Kingdom
Tel: +44 20 7628 2020
Fax: +44 20 7628 2070
stephen.gentle@simmons-simmons.com
www.simmons-simmons.com

Skadden, Arps, Slate, Meagher & Flom (UK) LLP
40 Bank Street
Canary Wharf
London
E14 5DS
United Kingdom
Tel: +44 20 7519 7006/7100/7000
Fax: +1 650 798 6522/+44 20 7072 7100/
+44 20 7519 7070
elizabeth.robertson@skadden.com
ryan.junck@skadden.com
keith.krakaur@skadden.com
www.skadden.com

Sofunde Osakwe Ogundipe & Belgore
7th Floor
St Nicholas House
26 Catholic Mission Street
Lagos Island
Lagos
Tel: +234 1 462 2501/2502
Fax: +234 1 462 2501
boogundipe@sooblaw.com
maosilaja@sooblaw.com
bdakoro@sooblaw.com
www.sooblaw.com

Sullivan & Cromwell LLP
125 Broad Street
New York
NY 10004-2498
United States
Tel: +1 212 558 4000
Fax: +1 212 558 3588
bourtinn@sullcrom.com
heglunds@sullcrom.com
galisewskir@sullcrom.com
www.sullcrom.com

Willkie Farr & Gallagher (UK) LLP
CityPoint
1 Ropemaker Street
London
EC2A 9AW
United Kingdom
Tel: +44 20 3580 4700
Tel: +44 20 3580 4726
pburrell@willkie.com
pfeldberg@willkie.com
rmitchell@willkie.com
www.willkie.com

Wilmer Cutler Pickering Hale and Dorr LLP
49 Park Lane
London
W1K 1PS
United Kingdom
Tel: +44 20 7872 1000
Fax: +44 20 7839 3537
christopher.david@wilmerhale.com
lloyd.firth@wilmerhale.com
www.wilmerhale.com

Index to Part I

All references are to section number.

Strategic Research Sponsor of the
ABA Section of International Law

Law
Business
Research

ISBN 978-1-912377-34-3