

Defending Parallel Proceedings: Basic Principles & Tactical Considerations

BY LAWRENCE J. ZWEIFACH & ERIC M. CREIZMAN

Lawrence J. Zweifach is a litigation partner in the New York office of Gibson, Dunn & Crutcher LLP. Eric M. Creizman is an associate in that office. This article is based on an earlier version of the article by the same authors. Contact: lzweifach@gibsondunn.com.

The collapse of the financial and credit markets have given rise to a wave of private litigation as well as state and federal regulatory and criminal investigations. A recent study reported that between 2007 and 2009, the number of federal securities class action filings surged, driven by the financial crisis caused by the collapse of the housing and credit markets.¹ According to the same report, 40% of securities class action filings in 2008, and 30% in 2009, were related to the credit crisis.

In response to the financial crisis, federal prosecutors, state attorneys general, and federal regulatory agencies have coordinated their resources in investigating and prosecuting claims on parallel tracks. Such synchronized efforts often have led to greater efficiencies for both criminal and regulatory prosecutions. In recognition of the value of multi-agency cooperation, prosecutors and regulators have institutionalized their relationships in the form of task forces, which are designed to coordinate strategy, set policies, share information, and supervise criminal and regulatory actions relating to the financial crisis. For

example, in May 2008, federal prosecutors in New York formed the Mortgage Fraud Task Force, which is run out of the U.S. Attorney's Office for the Eastern District of New York and consists of several federal, state and local law enforcement agencies. The Mortgage Fraud Task Force's mission is to investigate potential wrongdoing relating to the subprime mortgage industry collapse.² In November 2009, President Barack Obama established the Interagency Financial Fraud Enforcement Task Force, composed of senior-level officers from a broad range of federal agencies, regulatory authorities, and inspectors general.³ The Financial Fraud Enforcement Task Force replaces the Corporate Fraud Task Force established by President George W. Bush in 2002. Its stated mission is to "investigate and prosecute significant financial crimes,

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ensure just and effective punishment for those who perpetrate financial crimes, address discrimination in the lending and financial markets and recover proceeds for victims.”⁴

Coordinated investigations by various government agencies in the wake of the financial crisis have led to several important parallel criminal and regulatory proceedings, including:

- *Bear Stearns Asset Management Portfolio Managers*: In June 2008, the Securities and Exchange Commission (SEC) filed an enforcement action against two former Bear Stearns Asset Management hedge fund managers, alleging that they knowingly lied to investors about the prospects of funds that were heavily invested in collateralized debt obligations based largely on subprime mortgage-backed securities.⁵ On the same day, federal criminal charges were filed against the hedge fund managers based on virtually the same factual allegations.⁶ In November 2009, the defendants were tried and acquitted in the criminal case.⁷ Nevertheless, the SEC announced that it was not deterred from proceeding with its enforcement action.⁸ Citing the different standard of proof in civil actions, Robert Khuzami, Director of the SEC’s Division of Enforcement, said that the SEC “filed a case based on the evidence from our investigation,” and that “we fully expect to proceed with our case.”⁹
- *Credit Suisse Auction-Rate Securities Brokers*: In September 2008, both the U.S. Attorney’s Office for the Eastern District of New York and the SEC brought fraud charges against two former Credit Suisse Group brokers on allegations that they lied to their investors about the nature of their products, which were linked to auction-rate securities.¹⁰ One co-defendant pled guilty to conspiracy, wire fraud, and securities fraud, and the other was convicted at trial.¹¹
- *Credit Default Swaps Investigation*: In October 2008, it was reported that the U.S. Attorney’s Office for the Southern District of New York and the New York State Attorney General’s Office had commenced a joint investigation into manipulative practices in the credit default swaps market.
- *N.Y. State Common Retirement Fund*: The SEC brought fraud charges against a former Deputy Comptroller and political advisor on allegations that he extracted millions of dollars in kickbacks from investment management firms who sought to manage the state’s largest pension fund.¹² Since those charges were brought, both the SEC and the New York Attorney General’s office have brought charges against those involved in accepting and making payments.¹³
- *Beazer Homes USA/Michael Rand*: In July 2009, the SEC brought charges against the former chief accounting officer of Beazer Homes, USA, Inc., on allegations that he conducted a multi-year fraudulent accounting scheme.¹⁴ On the same day, Beazer settled criminal and civil charges with the Department of Justice and the Department of Housing and Urban Development, agreeing to pay \$50 million in fines and restitution to home buyers pursuant to a deferred prosecution agreement.¹⁵
- *Galleon Insider Trading*: In October 2008, both the U.S. Attorney’s Office for the Southern District of New York and the SEC brought charges against a number of individuals in what prosecutors have called the largest-ever insider trading scheme.¹⁶ As of early November 2009, 20 people had been charged in the criminal case, and five had pled guilty.¹⁷ The judge presiding in the SEC action instructed the litigants to be ready for trial in April 2010.¹⁸

The financial crisis has placed an ever-increasing number of companies in the position of being confronted with multiple shareholder class actions, consumer litigation, SEC investigations, arbitrations, state attorney general investigations, and federal grand jury investigations. In defending these private actions and governmental investigations, companies should not attempt to defend each action or investigation as if it were a

“stand-alone” proceeding. Rather, global defense strategies need to be developed so that the defense of each proceeding is carefully coordinated with the defense of all other parallel proceedings. This article provides an overview of certain legal principles and tactical considerations that need to be kept in mind when formulating strategies for defending parallel proceedings.

Tactical Considerations in Litigating Parallel Proceedings

The likelihood of facing parallel proceedings magnifies the challenges of defending a client in a criminal or regulatory investigation. In defending parallel proceedings, counsel must weigh the benefit that the client can obtain through cooperating with prosecutors and regulators against the substantial risk that disclosures to government agencies will be discoverable by private civil plaintiffs. In addition, counsel must evaluate the impact of a individual client’s decision or, in representing a corporation, an employee’s decision, to exercise or waive his or her privilege against self-incrimination. Counsel must also determine whether and under what circumstances it can be beneficial to seek or oppose stays of parallel proceedings, and under what circumstances courts will impose such stays. Finally, in considering whether and how to settle parallel proceedings, counsel must consider how the resolution of one or more proceedings can impact the client’s interests in the remaining proceedings.

Protecting Information Provided to the Government from Disclosure to Third Parties

An important decision facing a corporation under investigation is whether to provide privileged or otherwise non-discoverable materials to prosecutors and regulators in an effort to cooperate and avoid prosecution. The disclosure of such materials, however, gives rise to the risk that the materials will be discoverable by private civil litigants. Moreover, non-privileged information or documents not otherwise subject to discovery—such as information or documents under the control of foreign entities in foreign jurisdic-

tions—can become discoverable by virtue of the fact that they were voluntarily produced to the government in the course of an investigation. Counsel must therefore weigh, from the outset, the benefits and risks of disclosing certain kinds of materials and information to the government, and consider taking steps to limit the scope of any potential privilege waiver vis-à-vis third parties.

In determining whether to produce privileged materials to the government, a company must assume that it will not be able to eliminate completely the risk that the materials will eventually wind up in the hands of private plaintiffs. The federal circuit courts have largely rejected the “selective waiver” doctrine, which would allow a party to waive the attorney-client privilege for the limited purpose of providing materials to the government, without the waiver extending to third parties.¹⁹ The one exception is the Eighth Circuit, which concluded in *Diversified Industries, Inc. v. Meredith* that the selective waiver doctrine was justified on the grounds that it encouraged “the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders, and customers.”²⁰ Since that decision, however, every other circuit to consider the issue has rejected the selective waiver doctrine.²¹

Although courts generally have rejected the selective waiver doctrine, some courts have suggested that, in certain circumstances, voluntary disclosures to prosecutors or regulators may be protected against waiver where the disclosures are made under a confidentiality agreement. In *In re Steinhardt Partners, L.P.*, the Second Circuit refused to adopt a *per se* rule that all voluntary disclosure of attorney work product results in waiver.²² The court said that waiver might not be found where the disclosing party and the government “share a common interest in developing legal theories” or have “entered into an explicit agreement that the [government] will maintain the confidentiality of the disclosed materials.”²³ Likewise, the Tenth Circuit, in *In re Qwest Communications International, Inc.*, left open the possibility that the privilege could be maintained where “a confidentiality agreement... prohibits

further disclosures without the express agreement of the privilege holder.”²⁴

A new Federal Rule of Evidence that addresses the attorney-client privilege and work product doctrine, Rule 502, was signed into law in September 2008. Although a provision relating to “selective waiver” was considered, and deliberately omitted, from the legislation at the recommendation of the Judicial Conference,²⁵ Rule 502 provides a mechanism for protecting voluntary disclosures to government agencies in limited circumstances. Under subsections (d) and (e) of the Rule, disclosure of materials in a litigation or other federal proceeding may be protected from waiver of attorney-client privilege or work product protection by a court order. As the Rule has only been recently enacted, there is scant decisional law addressing the use of these provisions in parallel proceedings. Thus, it is unclear whether and how the Rule will impact the existing law concerning waiver where materials are voluntarily produced to the government under confidentiality agreements.²⁶ Section 4.3.1 of the SEC Enforcement Manual, which addresses confidentiality agreements, instructs staff attorneys to “exercise judgment” when determining whether to enter into a confidentiality agreement with a company under investigation, specifically noting that some courts have held that companies waived the privilege despite producing privileged materials under a confidentiality agreement.²⁷

Although it does not cover the issue of “selective waiver,” the new rule does address the scope of the waiver of the privilege in a federal proceeding. Under Rule 502(a), disclosure of privileged information or attorney work product operates as a waiver with respect to other information concerning the same subject matter if: (i) the waiver is intentional; and (ii) the disclosed and undisclosed information “ought in fairness to be considered together.” The Advisory Committee notes provide that broad subject matter waiver will be found only in “unusual situations in which fairness requires a further disclosure” to prevent the disclosed information from being misleading or to prevent a party from gaining a tactical advantage over an adversary. In *U.S. v. Treacy*,²⁸ Judge Jed S. Rakoff of the U.S. District Court for the

Southern District of New York, citing Rule 502, held that Monster Worldwide’s disclosure to the government of internal investigation interview memoranda did not waive the privilege as to other interview memoranda where Monster’s decision to disclose the information was not designed to seek any tactical advantage against any adversary or former employee.²⁹

Given the scant authority for being afforded protection under the selective waiver doctrine, the safest course for companies or individuals facing parallel proceedings is to negotiate the scope of a document production in a way that avoids, or limits as much as possible, the production of privileged materials, irrespective of whether the materials are covered by a confidentiality agreement. That way, even if a court finds that there has been a waiver of privilege vis-à-vis third parties, the company will be in a position to argue that the waiver is limited in scope. Thus, where possible, disclosure should be general, not specific, and oral, not written.³⁰ For example, in *Treacy*, Monster previously had provided the government only “general summaries, impressions and conclusions” regarding its internal investigation interviews “that did not effectuate any general waiver.”³¹ Judge Rakoff distinguished these summaries from “detailed oral recitations” of other interviews as to which the protection *would be* waived.

Testifying in Parallel Regulatory and Civil Proceedings—The Fifth Amendment Dilemma

Corporations do not have a Fifth Amendment privilege,³² but their employees and former employees do, and an employee’s decision to exercise his or her Fifth Amendment privilege will have implications for the company. The employee’s assertion of the Fifth Amendment privilege in a civil or regulatory proceeding can result in an adverse inference against the company in that proceeding.³³ Further, the employee’s assertion of the Fifth Amendment privilege in a criminal investigation can result in limiting the company’s credit earned for cooperation.³⁴ Alternatively, the employee’s testimony in any proceeding will likely

be deemed as an admission by the company under the Federal Rules of Evidence.³⁵

An individual who is subject to potential or existing parallel criminal, regulatory, and civil proceedings faces more complicated tactical considerations with respect to asserting the Fifth Amendment privilege than one who is the subject of a criminal proceeding alone. In a criminal proceeding, the defendant can assert the Fifth Amendment privilege at any stage, from investigation through sentencing, and no adverse inference from such invocation can be drawn against him by the fact-finder.³⁶ An individual's assertion of the Fifth Amendment privilege in a parallel regulatory or civil proceeding, however, carries with it the risk that the fact-finder will be permitted to draw an adverse inference.³⁷ Where there are parallel criminal and civil proceedings, the decision to assert or not to assert the privilege in the civil proceeding is not costless: One can invoke the privilege in the civil proceeding and risk the possibility of an adverse inference in that proceeding; or one can choose to testify in the civil proceeding, and risk providing the government with evidence that can be used against him in the criminal proceeding. If one chooses to provide testimony in a regulatory proceeding, such as in an SEC enforcement action, there is an additional risk that obstruction of justice or perjury charges can be brought against the individual in a parallel criminal prosecution, in addition to the charges based on the underlying alleged wrongdoing.

Risks of Testifying in Civil Proceedings

Although an individual cannot be compelled to testify in a criminal proceeding merely because he has testified in a parallel civil proceeding,³⁸ any testimony provided in the civil proceeding likely can be used as evidence against him in the criminal proceeding.³⁹ In addition, a party can be deemed to have waived his Fifth Amendment privilege in the civil proceeding as to certain matters if instead of asserting the Fifth Amendment privilege, he makes a testimonial statement in a responsive pleading, an affidavit, an interrogatory response, a deposition or in the production of a document.⁴⁰ Of course, providing false testimony or making false unsworn statements in a regula-

tory proceeding also exposes the individual to charges of perjury and obstruction of justice in a parallel or subsequent criminal proceeding.⁴¹

Risks of Asserting the Fifth Amendment in Civil Proceedings

Adverse Inference Drawn Against an Individual—The U.S. Constitution does not prohibit the use of a party's assertion of the privilege in the context of a regulatory or civil proceeding as evidence in support of the claims involved in the proceeding.⁴² The fact-finder in a regulatory or civil proceeding is allowed, but is not required, to draw an adverse inference against a party based on the party's invocation of the Fifth Amendment with respect to providing testimonial discovery on issues relevant to the case.⁴³

Courts have broad discretion in determining whether to allow such an adverse inference to be drawn in a particular case. "The most important factors considered by the courts are the effect that the claim of privilege has on an opponent's ability to develop his or her position and the evidentiary significance of the adverse inference in light of other facts in the case."⁴⁴

Adverse Inference Against Corporation Based on Employee's or Former Employee's Invocation of Fifth Amendment Privilege—The Second Circuit has identified a number of non-exclusive factors a court should consider in determining whether an adverse inference can be drawn against a party based on a non-party witness's assertion of the Fifth Amendment privilege:

- the nature of the relationship between the non-party witness and the defendant;
- the degree of control of the party over the non-party witness;
- the compatibility of the interests of the party and non-party witness in the outcome of the litigation; and
- the role of the non-party witness in the litigation.⁴⁵

The court added that "other circumstances unique to a particular case" may be considered, but that the "overarching concern is fundamen-

tally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth.”⁴⁶

FINRA Proceedings—As a self-regulating organization (SRO), the Financial Industry Regulatory Authority, Inc. (FINRA)⁴⁷ is not generally considered a state actor.⁴⁸ A witness in proceedings before FINRA, therefore, cannot avail himself of the protections provided by the Fifth Amendment.⁴⁹ Consequently, a securities professional associated with a FINRA member firm who receives a Rule 8210 Request must either comply with the request or risk losing his job and being barred or suspended from working in the securities industry, regardless of the existence of a pending parallel civil proceeding.⁵⁰

FINRA Rule 8210(c)⁵¹ provides that “[n]o member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to this Rule.”⁵² Violation of Rule 8210 also constitutes a violation of FINRA Rule 2010, which requires that “a member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.”⁵³ The standard sanction for a member’s failure to respond in any manner to FINRA’s request for information is a permanent bar from associating in any capacity with a FINRA member, while a member who responds to the request, but fails to do so timely, truthfully or completely is subject to a suspension of up to two years.⁵⁴

Restrictions on Ability to Offer Evidence—While courts are often sensitive to the Fifth Amendment dilemma created by parallel civil and criminal proceedings, they are also aware of the potential for a civil defendant to exploit his Fifth Amendment privilege by initially invoking the privilege during civil discovery only to waive it “at a time when an adverse party can no longer secure the benefits of discovery.”⁵⁵ A defendant who invokes his Fifth Amendment right in civil litigation might be precluded from presenting evidence on his own behalf.⁵⁶

Wells Submissions

Under current SEC practice, targets of SEC investigations are notified whenever Enforcement

Division staff decides, even preliminarily, to recommend charges.⁵⁷ At that point, individuals or entities under investigation are given an opportunity to submit a written statement, called a “Wells submission,”⁵⁸ to the SEC setting forth their factual and legal positions as to why further enforcement actions are unwarranted.⁵⁹ The benefits of filing a Wells submission include the possibility of persuading SEC staff:

- not to recommend an enforcement action;
- to drop certain charges;
- to change the forum for an enforcement action; or
- to request different relief.⁶⁰

In addition, even if a Wells submission is unsuccessful in persuading SEC staff not to recommend an enforcement action, a Wells submission may persuade the SEC to: (i) reject the recommendation for enforcement by SEC staff members who are investigating the case; or (ii) recommend settlement on more favorable terms than those recommended by the SEC staff members.⁶¹

Although there are substantial benefits that can result from a Wells submission, there are also possible tactical disadvantages to submitting one. To begin with, Wells submissions are commonly sought, and sometimes considered discoverable, in private civil litigation.⁶² In addition, the SEC considers Wells submissions to be party admissions, which can be used by the SEC in any future litigation it brings against the person making the submission (and, in appropriate circumstances, perhaps the corporation for whom the person was or is employed).⁶³ A Wells submission might also provide the SEC with a “roadmap” to the defense in the event of litigation. In addition, federal prosecutors can obtain Wells submissions pursuant to an information request from the SEC and, in turn, make use of the Wells submission in a parallel criminal proceeding.⁶⁴

While there are few reported decisions addressing the discoverability of Wells submissions, Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York held that Wells submissions are discoverable so long as

they are: (1) admissible, because they are relevant to a claim or a defense; or (2) will reasonably lead to the discovery of admissible evidence.⁶⁵ Judge Scheindlin rejected the claim that Rule 408 of the Federal Rules of Civil Procedure protects Wells submissions from discovery because they are settlement materials: First, “[o]ffers of settlement are not intrinsically part of Wells Submissions,” and to the extent a Wells submission contains an offer of settlement, the settlement offer is easily severable from the remainder of the submission.⁶⁶ Second, Rule 408 addresses the *admissibility* of settlement discussions, not whether settlement discussions are discoverable.⁶⁷

Given the potential pitfalls, counsel must weigh carefully the benefits and drawbacks of making a Wells submission, and if one is made, give careful consideration to the content of the submission.

Staying Proceedings or Discovery

A defendant facing parallel civil and criminal proceedings can seek to escape the Fifth Amendment dilemma, as well as the burden of defending multiple actions simultaneously, by seeking a stay of the civil proceeding or of civil discovery. The government, usually in the interest of protecting a criminal investigation or proceeding, can also seek to stay discovery in a civil proceeding. Absent “substantial prejudice to the rights of the parties involved,” however, there is no Constitutional requirement to stay a regulatory or civil proceeding pending the outcome of a parallel criminal proceeding.⁶⁸ Courts have substantial discretion in determining whether the circumstances merit a stay of the civil proceedings.⁶⁹ In determining whether the circumstances support a stay of the civil proceedings, courts must weigh the various competing interests involved. The factors that courts generally consider include:

- the extent to which the criminal and non-criminal proceedings overlap;
- the status of the proceedings, including whether the defendant has been indicted;
- whether the government entity that has initiated the criminal case is also a party in the civil case;
- the private interests of the civil plaintiff in proceeding expeditiously weighed against the potential prejudice to the plaintiff as the result of any delay;
- the private interests of and burden on the defendant, including the extent to which the defendant’s Fifth Amendment rights are implicated;
- the interests of persons not parties to the civil proceedings;
- the interests of the public in both the criminal and civil proceedings; and
- the interest of the court in the efficient management of cases.⁷⁰

Courts are also able to balance the parties’ competing interests by crafting various forms of relief short of completely granting or denying a motion to stay the proceeding or discovery. For example, a court can issue a protective order sealing a deposition transcript until the completion of the criminal proceeding, stay deposition discovery while permitting document discovery, or stay discovery only as to certain defendants or non-party witnesses while letting discovery proceed as to others.

Private Actions

Motion by Defendant—A defendant seeking a stay of a private civil proceeding pending the resolution of a related criminal proceeding faces a high hurdle. The mere contention that the defendant will be forced to suffer the consequences of his choice of whether or not to invoke his Fifth Amendment privilege is insufficient to warrant a stay.⁷¹

A court will be more likely to grant a defendant’s motion to stay a private civil proceeding when the defendant has been indicted in a parallel criminal proceeding involving the same conduct, transaction or subject matter as the civil proceeding.⁷² Where the defendant has not been indicted, but instead is merely the subject or target of a criminal investigation, courts are generally less inclined to grant a stay.

In a recent federal securities fraud litigation, the fact that a defendant provided discovery in parallel criminal and regulatory investigations led the court to lift the statutory stay of discovery under the Private Securities Litigation Reform Act (PSLRA).⁷³ In that case—*In re Bank of Am. Corp. Sec., Derivative & Employment Ret. Income Sec. Act (ERISA) Litig.*—plaintiffs brought an action against Bank of America alleging securities fraud in connection with its merger with Merrill Lynch. Before motions to dismiss were filed, plaintiffs requested discovery of documents that defendants “have produced or will produce” to the SEC, Congress, the New York Attorney General, and the North Carolina Attorney General, all of whom were investigating Bank of America’s merger with Merrill Lynch. Although the PSLRA provides that all discovery be stayed pending a motion to dismiss absent a showing of particularized need for the requested discovery,⁷⁴ the court made an exception for the requested materials on the grounds that plaintiffs would be unduly prejudiced if the stay was not lifted for this limited discovery. The court reasoned that while discovery “is moving apace in parallel litigation,” without access to documents produced in the parallel proceedings, plaintiffs “will be less able to make informed decisions about litigation strategy.”⁷⁵ At the same time, the purposes of the PSLRA stay—to discourage strike suits and abusive discovery practices⁷⁶—were not frustrated by lifting the stay under the circumstances. The court found that plaintiffs were not seeking the discovery to engage in a “fishing expedition,” and because the defendants had already “collected, reviewed, and organized the documents for production in other proceedings, ...the burden of making another copy for plaintiffs here will be slight.”⁷⁷

Motion by Government—The government, either state or federal, can intervene in a private civil proceeding to seek a stay pending the resolution of a related criminal investigation or proceeding. Generally, the government is more likely to obtain a requested stay than is a private party because of the significant public interest protected by the government’s law enforcement function. Often when the government intervenes to seek a stay of a civil proceeding or of civil discovery, it

will claim that the requested stay is needed to protect an ongoing criminal investigation or pending grand jury proceeding that involves the same subject matter.⁷⁸ If the defendant has been indicted, the government is also likely to argue that a stay is warranted to prevent the defendant from using the permissive civil discovery rules to obtain information about the government’s case that he would not be entitled to at that time under the more restrictive criminal discovery rules.⁷⁹

Regulatory Investigations and Proceedings

In recent years, the greater degree of cooperation among government agencies has resulted in a corresponding increase in the number of parallel criminal and civil proceedings, particularly in the securities area, where the government is seeking both criminal and civil remedies from the same parties based on the same conduct. In this era of coordinated government action, it is not uncommon for the U.S. Attorney’s Office and the SEC to file an indictment and a civil complaint, respectively, against the same parties on the same day or within days of each other, followed by the U.S. Attorney’s Office moving to intervene to seek a stay of the SEC’s civil proceeding. In support of these stay motions, prosecutors principally have argued that:

- the defendant could obtain discovery in the SEC proceeding which is not available under the Federal Rules of Criminal Procedure;
- while benefitting from unlimited civil discovery, the defendant could deny the government reciprocal discovery by invoking the Fifth Amendment privilege against self-incrimination; and
- discovery might compromise cooperating witnesses in the criminal case.⁸⁰

For many years, courts regularly stayed SEC civil actions on the motions of the U.S. Attorney’s Office—in part, because defendants rarely challenged them. In recent years, however, there has been a palpable shift in the treatment of prosecutors’ stay motions, with many courts denying the motions or imposing limited stays of discovery

where the government is able to demonstrate, with specificity, how its case could be prejudiced.⁸¹

The recent decisions denying government motions for stays of parallel regulatory actions have balanced the prejudice to the government's interest in its criminal prosecution with the prejudice to the defendant's interest in promptly resolving the civil case and clearing his or her name and the ability to obtain evidence to defend him or herself in the civil proceeding.⁸² In assessing prejudice to the government, these courts have noted that the government itself created the potential prejudice to its prosecution by coordinating the simultaneous filings with the regulatory agency.⁸³ For example, Judge Rakoff noted the anomaly of the U.S. Attorney's Office, "having closely coordinated with the SEC in bringing simultaneous civil and criminal actions against some hapless defendant, should then wish to be relieved of the consequences that will flow if the two actions proceed simultaneously."⁸⁴ Rather than issue a blanket stay as courts had done traditionally, courts recently have required the government to identify specific civil discovery that would impact the criminal case before considering whether to stay discovery in those limited circumstances.⁸⁵

Resolving Parallel Proceedings

An attorney defending parallel proceedings must carefully consider the potential preclusive effect that a judgment or settlement in one proceeding might have on the other proceeding(s). The collateral estoppel doctrine limits re-litigation of an issue in an action where (1) the identical issue was decided in a prior action; (2) the issue was actually litigated in the prior action; (3) resolution of the issue was essential to a final judgment in the prior action; and (4) the party against whom estoppel is invoked had a full and fair opportunity to litigate the issue in the prior action.⁸⁶ Thus, the potential collateral estoppel consequences of a disposition in each of the parallel proceedings will be a critical consideration in determining whether to seek a stay of a litigation in a civil or regulatory proceeding, whether to seek a speedy criminal trial or seek a trial date in the distant future, whether and when to settle an action, in what order to settle actions, and on what terms.

Collateral Estoppel Effect of Dispositions in Criminal Cases

Acquittals—The higher burden of proof required in criminal proceedings—beyond a reasonable doubt—precludes a defendant from using an acquittal "offensively" for preclusive effect in a subsequent regulatory or civil proceeding.⁸⁷ An acquittal in a criminal case does not satisfy the requirements of collateral estoppel because it demonstrates only that the fact-finder determined that the defendant was not proven guilty beyond a reasonable doubt; no determination was made, however, as to whether he or she was proven liable by a preponderance of the evidence. Further, while a litigant in a civil case can remedy a judgment through a broad range of avenues such as post-trial motions and appellate review, the government generally has no recourse to remedy an acquittal.⁸⁸

Convictions—A criminal conviction can be used offensively against the defendant in a subsequent regulatory or civil proceeding on any issue that was essential to the conviction.⁸⁹ This is because a determination of guilt beyond a reasonable doubt necessarily encompasses a determination of liability by a preponderance of the evidence on the same issue determined in the prior criminal case. Collateral estoppel applies equally to criminal convictions obtained through jury verdicts as to those obtained through guilty pleas.⁹⁰ Convictions by guilty plea are treated the same as those by jury verdict because a court cannot enter judgment on a guilty plea unless it determines that a factual basis exists for the plea.⁹¹ A state court conviction generally will be given preclusive effect in a subsequent civil action in federal court, provided that the requisite elements of collateral estoppel are satisfied.⁹²

Deferred Prosecution Agreements—A deferred prosecution agreement is not a judgment, and, thus, is not a judgment for the purposes of collateral estoppel. Deferred prosecution agreements, however, generally contain a lengthy "Statement of Facts" section in which the corporate party makes substantial admissions that establish its liability for crimes that could later be prosecuted if the agreement is violated by the corporation.⁹³

These admissions conceivably can be used against the corporation in a civil proceeding under Rule 801(d)(2) of the Federal Rules of Evidence.⁹⁴

Sentencing Findings—The Second Circuit has held that findings in a sentencing proceeding presumptively have no preclusive effect on the same issues in a subsequent regulatory or civil proceeding.⁹⁵ In imposing this presumption, the Second Circuit cited the concerns that:

- defendants are afforded fewer procedural safeguards in sentencing proceedings than in plenary civil trials;⁹⁶
- a defendant's incentive to litigate a sentencing finding "is frequently less intense, and certainly more fraught with risk, than it would be for a full-blown civil trial."⁹⁷
- giving preclusive effect to sentencing findings may encourage sentencing hearings to be transformed into "mini-trials."⁹⁸

Despite all of these concerns, the Second Circuit suggested that sentencing findings can have preclusive effect where it is necessary to preserve the integrity of the judicial system by eliminating inconsistent results.⁹⁹ The Ninth Circuit has since adopted the Second Circuit's presumption against extending the doctrine of collateral estoppel to sentencing findings.¹⁰⁰

Collateral Estoppel Effect of Dispositions in Regulatory and Civil Actions

The Preclusive Effect of a Civil Action Judgment in a Subsequent Civil Action—A civil judgment based on a preponderance of the evidence would be accorded preclusive effect in a subsequent civil or administrative proceeding requiring proof under the same standard.¹⁰¹ Thus, an adverse judgment or findings against a client in a regulatory proceeding can have consequences in subsequent shareholder class actions or derivative lawsuits. The Supreme Court has held that trial courts should have broad discretion to determine when to apply offensive collateral estoppel, and that, in general, courts should not apply it where a plaintiff could easily have joined in the

earlier action or where applying offensive estoppel would be unfair to a defendant.¹⁰²

The Preclusive Effect of a Civil Action Judgment in a Subsequent Criminal Action—Because of the higher burden of proof in a criminal case, the government cannot use a judgment in a prior civil or regulatory proceeding for collateral estoppel effect in a subsequent criminal action.¹⁰³ Conversely, however, a defendant in a criminal case can collaterally estop the government to the extent identical issues were resolved against the government (including the SEC) in the prior regulatory proceeding.¹⁰⁴

Settlements in SEC Enforcement Actions—SEC enforcement actions are generally settled by consent decree, in which the defendant neither admits nor denies any wrongdoing alleged in the complaint. Even where a consent decree contains findings of fact, such findings typically have no preclusive effect because they are the result of private bargaining, as opposed to a decision on the merits by a court.¹⁰⁵

Conclusion

As the financial crisis continues to spawn additional governmental investigations and private actions, defense counsel will be presented with extremely difficult challenges. Unlike stand-alone proceedings, multiple investigations and actions necessitate global defense strategies that take into account the procedural rules, operative substantive law, potential liability and potential collateral estoppel impact of each and every pending proceeding. By developing an all-encompassing and unified strategy for defending parallel proceedings, defense counsel will be in the best position possible to navigate the numerous perils that will confront them.

NOTES

1. *Recent Trends in Securities Class Action Litigation: 2009 Year-End Update*, NERA Consulting, July 15, 2009, available at http://www.nera.com/image/Recent_Trends_Report_1209.pdf. The study also reports that credit crisis related class action filings "gradually declined" over the course of 2009.

2. Amir Efrati, *Wall Street, Lenders Face Subprime Scrutiny*, Wall St. J., May 5, 2008, at A4.
3. See, e.g., SEC News Digest, Issue 2009-220 (Nov. 17, 2009), available at <http://www.sec.gov/news/digest/2009/dig111709.htm>.
4. SEC News Digest, Issue 2009-220.
5. *SEC v. Ralph R. Cioffi, et al.*, No. 08-CV-2457 (FB) (E.D.N.Y., filed June 19, 2008), see also SEC Litig. Release No. 20625 (SEC June 19, 2008).
6. *U.S. v. Ralph Cioffi, et al.*, No. 08-CR-415 (FB) (E.D.N.Y., filed June 19, 2008), see also Press Release, Dept. of Justice, U.S. Attorney's Office for the Eastern District of New York, *Two Senior Managers of Failed Bear Stearns Hedge Funds Indicted on Conspiracy and Fraud Charges* (June 19, 2008), <http://www.justice.gov/usao/nye/pr/2008/2008jun19.html>.
7. Zachary A. Goldfarb, *Former Bear Stearns Executives Acquitted of Lying to Investors*, Washington Post (Nov. 11, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/10/AR2009111010486.html>.
8. Marcy Gordon, *Setback in Bear Stearns Case may Force Government Shift*, Associated Press (Nov. 11, 2009), <http://www.newsvine.com/news/2009/11/11/3491200-setback-in-bear-stearns-case-may-force-govt-shift>.
9. *SEC Expects to Proceed with Bear Stearns Case*, Reuters, Nov. 12, 2009, <http://www.reuters.com/article/idUSTRE5AB5L020091112>.
10. Press Release, Department of Justice, U.S. Attorney's Office for the Eastern District of New York, *Two Former Credit Suisse Brokers Indicted for Securities Fraud, Wire Fraud, and Conspiracy in Connection with a Fraudulent Scheme to Sell Mortgage-Backed Collateralized Debt Obligations*, Sept. 3, 2008, available at <http://www.usdoj.gov/usao/nye/pr/2008/2008sep03.html>; SEC Release No. 2008-187, SEC Charges Two Wall Street Brokers in \$1 Billion Subprime-Related Auction Rate Securities Fraud, Sept. 3, 2008, available at <http://www.sec.gov/news/press/2008/2008-187.htm>; see also (for additional background) Amir Efrati, Liz Rappaport, and Randall Smith, *Auction-Rate Probe Grows Over Clarity from Brokers*, Wall St. J., July 9, 2008, at C1.
11. Thom Weidlich, Patricia Hurtado, and Bob Van Voris, *Ex-Credit Suisse Broker Eric Butler Guilty of Securities Fraud*, Bloomberg.com, Aug. 18, 2009, available at <http://www.bloomberg.com/apps/news?pid=20601110&sid=aoU6KJ4duPnA>.
12. SEC Release No. 2009-62, SEC Charges Former N.Y. State Official and Top Political Advisor for Defrauding New York's Retirement Fund in Multi-Million Dollar Kickback Scheme, Mar. 19, 2009, available at <http://www.sec.gov/news/press/2009/2009-62.htm>.
13. David B. Caruso, *NY AG and SEC Probe Pension Fund Investments*, Seattle Times, Apr. 16, 2009, available at <http://seattletimes.nwsource.com/html/business/technology/2009071651apnypensionprobe.html>.
14. SEC Release No. 2009-146, SEC Charges Former Chief Accounting Officer of Beazer Homes for Fraudulent Earnings Management Scheme, July 1, 2009, available at <http://www.sec.gov/news/press/2009/2009-146.htm>.
15. Press Release, Department of Justice, *United States Settles False Claims Act Allegations Against National Home Builder and Mortgage Lender*, July 1, 2009, available at <http://www.reuters.com/article/pressRelease/idUS189110+01-Jul-2009+PRN20090701>.
16. David Glovin, Katherine Burton, and David Scheer, *Galleon's Rajaratnam Charged in Biggest Hedge Scheme*, Bloomberg.com, Oct. 16, 2009, available at <http://www.bloomberg.com/apps/news?pid=20601087&sid=adJWwUL8rGEE>.
17. Alex Berenson, *14 Charged with Insider Trading in Galleon Case*, N.Y. Times, Nov. 6, 2009, available at <http://www.nytimes.com/2009/11/06/business/06insider.html?r=1&dbk>.
18. David Glovin, *Galleon SEC Judge Wants to Try Case in Five Months*, Bloomberg.com, Oct. 26, 2009, available at <http://www.bloomberg.com/apps/news?pid=20601087&sid=adJWwUL8rGEE>.
19. The selective waiver doctrine has been incorporated into certain federal statutes. For example, Section 607 of the Financial Services Regulatory Relief Act of 2006 adopts the doctrine of selective waiver in connection with the production of privileged information to regulators of banks and credit unions. See 12 U.S.C.A. § 1785(j) (credit unions); 12 U.S.C.A. § 1828(x) (banks).
20. *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611, 1977-2 Trade Cas. (CCH) ¶61591, 1978-1 Trade Cas. (CCH) ¶61879, 23 Fed. R. Serv. 2d 1473, 24 Fed. R. Serv. 2d 1201 (8th Cir. 1977) (rejected by, *Republic of Philippines v. Westinghouse Elec. Corp.*, 132 F.R.D. 384, 17 Fed. R. Serv. 3d 1476

- (D.N.J. 1990)) and (disapproved of by, *U.S. v. Massachusetts Institute of Technology*, 957 F. Supp. 301, 97-1 U.S. Tax Cas. (CCH) P 50269, 37 Fed. R. Serv. 3d 711, 79 A.F.T.R.2d 97-595 (D. Mass. 1997)) and (rejected by, *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002)) (*en banc*). See also *U.S. v. Shyres*, 898 F.2d 647, 657 (8th Cir. 1990); *In re LTV Securities Litigation*, 89 F.R.D. 595, 615 n.13, Fed. Sec. L. Rep. (CCH) P 97969, 8 Fed. R. Evid. Serv. 748, 31 Fed. R. Serv. 2d 1542 (N.D. Tex. 1981) (rejected by, *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002)); *Byrnes v. IDS Realty Trust*, 85 F.R.D. 679, 685-689, Fed. Sec. L. Rep. (CCH) P 97308, 29 Fed. R. Serv. 2d 1431 (S.D. N.Y. 1980) (rejected by, *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002)); *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368 (E.D. Wis. 1979) (rejected by, *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002)).
21. See *U.S. v. Massachusetts Institute of Technology*, 129 F.3d 681, 97-2 U.S. Tax Cas. (CCH) P 50955, 48 Fed. R. Evid. Serv. 66, 39 Fed. R. Serv. 3d 4, 80 A.F.T.R.2d 97-7981 (1st Cir. 1997); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235, Fed. Sec. L. Rep. (CCH) P 97818, 27 Fed. R. Serv. 3d 726 (2d Cir. 1993) (rejected by, *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002)); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 35 Fed. R. Evid. Serv. 1070, 22 Fed. R. Serv. 3d 377 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002); *In re Qwest Communications Intern. Inc.*, 450 F.3d 1179, 1201, 70 Fed. R. Evid. Serv. 492 (10th Cir. 2006); *Permian Corp. v. U.S.*, 665 F.2d 1214, Fed. Sec. L. Rep. (CCH) P 98280, 8 Fed. R. Evid. Serv. 1424, 32 Fed. R. Serv. 2d 429 (D.C. Cir. 1981); *Genentech, Inc. v. U.S. Intern. Trade Com'n*, 122 F.3d 1409, 1417, 19 Int'l Trade Rep. (BNA) 1451, 43 U.S.P.Q.2d 1722, 38 Fed. R. Serv. 3d 592 (Fed. Cir. 1997).
22. *Steinhardt*, 9 F.3d at 236.
23. *Steinhardt*, 9 F.3d at 236. See also *In re Cardinal Health, Inc. Securities Litigation*, 2007 WL 495150 at *9 (S.D. N.Y. 2007) (holding that voluntary production of materials covered by attorney work product protection to the SEC and other agencies did not result in a waiver of that protection because the corporation and its regulators possessed a "common interest" in ensuring that the corporation's financial and accounting practices were legitimate).
24. *In re Qwest Communications International, Inc.*, 450 F.3d at 1182. See also *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1127, 1997-2 Trade Cas. (CCH) ¶ 71962, 39 Fed. R. Serv. 3d 188 (7th Cir. 1997) (rejected by, *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002)) (suggesting that a confidentiality agreement might preserve the privilege from waiver); *Lawrence E. Jaffe Pension Plan v. Household Intern., Inc.*, 244 F.R.D. 412, 432-433, 47 A.L.R.6th 623 (N.D. Ill. 2006) (finding no waiver of work product protection as to documents produced to SEC because of confidentiality agreement); *Maruzen Co., Ltd. v. HSBC USA, Inc.*, 2002 WL 1628782, at *2 (S.D. N.Y. 2002) (finding no waiver of work product protection where company entered into confidentiality agreement with various agencies to which it produced documents from internal investigation). But see *Westinghouse*, 951 F.2d at 1431 (holding that voluntary disclosure of privileged materials to the government resulted in waiver in subsequent litigation despite the existence of a confidentiality agreement limiting the government's use of the documents); *In re Columbia/HCA*, 293 F.3d at 302-304 (finding waiver of work product protection despite the existence of a confidentiality agreement with SEC); *Reyes*, 239 F.R.D. at 604 (holding that confidentiality agreement did not prevent waiver where it permitted SEC and DOJ to share disclosed information "in furtherance of the agencies' discharge of their duties").
25. See Letter from Lee H. Rosenthal, Chair, Committee on Rules of Practice and Procedure, United States Judicial Conference, to Sens.

- Patrick J. Leahy and Arlen Specter (Sept. 26, 2007), available at http://federalevidence.com/pdf/2008/06-June/Hill_Letter_EV_502on9-26-07.pdf.
26. At least one court has addressed Rule 502 in considering whether documents produced by an investment bank to the SEC under a confidentiality agreement waived the attorney-client privilege and work product protections. See *In re Initial Public Offering Securities Litigation*, 249 F.R.D. 457, Fed. Sec. L. Rep. (CCH) P 94580 (S.D. N.Y. 2008). There, the court held that the confidentiality agreement did not protect against waiver, and stated that “selective waiver is not in the long-term best interests of the government, the adversarial system, or litigants.” The court specifically noted the Judicial Conference’s decision not to adopt a selective waiver provision in the final version of Rule 502.
 27. See SEC Enforcement Manual § 4.3.1-. The section includes a model confidentiality agreement.
 28. *U.S. v. Treacy*, 2009 WL 812033, at *2 (S.D. N.Y. 2009).
 29. See also *Adams v. U.S.*, 2009 WL 1117392 (D. Idaho 2009) (holding that disclosure of certain privileged information relating to damages did not require further disclosure of privileged information relating to damages because the information was not disclosed to obtain a tactical advantage against an adversary).
 30. An oral report of an internal investigation may waive the privilege just as would a written report. See *Treacy*, 2009 WL 812033, at *2 (“detailed oral recitations” of what occurred at an interview waives the privilege); *U.S. v. Reyes*, 239 F.R.D. 591 (N.D. Cal. 2006) (oral report to SEC and DOJ summarizing internal investigative interviews resulted in waiver of attorney-client privilege and attorney work product protections; court ordered production of all documents and notes upon which the oral reports were based, including memoranda relating to employee interviews and meetings with the government). Counsel should become familiar with the case law in the relevant jurisdictions before agreeing to provide an oral report to the government.
 31. *Treacy*, 2009 WL 812033, at *2 (S.D.N.Y. Mar. 24, 2009).
 32. See, e.g., *Curcio v. United States*, 354 U.S. 118, 122, 77 S. Ct. 1145, 1 L. Ed. 2d 1225, 40 L.R.R.M. (BNA) 2186, 32 Lab. Cas. (CCH) P 70748 (1957) (“It is settled that a corporation is not protected by the constitutional privilege against self-incrimination.”).
 33. See *infra*.
 34. See, e.g., U.S.A.M. § 9-28.720, n.2 (“There are other dimensions of cooperation beyond the mere disclosure of facts... These can include, for example, ...making witnesses available for interviews.”).
 35. See, e.g., F.R.E. 801(2)(D).
 36. *Baxter v. Palmigiano*, 425 U.S. 308, 317, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976) (citing *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965)).
 37. See *Baxter et al. v. Palmigiano*, 425 U.S. at 318 (stating that prevailing rule is that “the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them”).
 38. See ABA Section of Antitrust Law, *The Right Against Self-Incrimination in Civil Litigation* 75-76 (2001) (citing *Emspak v. U.S.*, 349 U.S. 190, 201 n.24, 75 S. Ct. 687, 99 L. Ed. 997 (1955) and several other cases).
 39. *U.S. v. Teyibo*, 877 F. Supp. 846, 855, Fed. Sec. L. Rep. (CCH) P 98661 (S.D. N.Y. 1995), judgment *aff’d*, 101 F.3d 681 (2d Cir. 1996) (citation omitted). See also *U.S. v. Kordel*, 397 U.S. 1, 90 S. Ct. 763, 25 L. Ed. 2d 1, 13 Fed. R. Serv. 2d 868 (1970) (holding that corporate officer who failed to assert Fifth Amendment privilege in responding to interrogatories directed to corporation cannot later complain in context of criminal proceeding that he was compelled to give testimony against himself).
 40. See ABA Section of Antitrust Law, *The Right Against Self-Incrimination in Civil Litigation* 60-61 (2001) (collecting cases).
 41. See, e.g., *U.S. v. Stewart*, 433 F.3d 273, 69 Fed. R. Evid. Serv. 185 (2d Cir. 2006) (affirming conviction for false statements, obstructing an agency proceeding and conspiracy based on unsworn statements made in interview to representatives of SEC, FBI and U.S. Attorney’s office).
 42. See *Baxter*, 425 U.S. at 318-319; Richard L. Scheff, Scott A. Coffina & Jill Baisinger, *Taking the Fifth in Civil Litigation*, *Litigation*, Fall 2002, at 34. A state’s rules of evidence, however, may prohibit or limit the drawing of adverse inferences based on a witness’s assertion of the Fifth Amendment privilege in a civil proceeding. See, e.g., *Fischer v. Hooper*,

- 143 N.H. 585, 732 A.2d 396, 403-404 (1999) (discussing New Hampshire Rule of Evidence 512, "which prohibits the jury in both civil and criminal cases from drawing negative inferences from the invocation of the right against self-incrimination").
43. See *Baxte*, 425 U.S. at 318-19.
44. Richard L. Scheff, Scott A. Coffina & Jill Baisinger, *Taking the Fifth in Civil Litigation*, Litigation, Fall 2002, at 35.
45. See *LiButti v. U.S.*, 107 F.3d 110, 97-1 U.S. Tax Cas. (CCH) P 50235, 79 A.F.T.R.2d 97-1240 (2d Cir. 1997) (finding adverse inference against plaintiff daughter in wrongful levy action based on father's refusal to answer probative questions regarding effective ownership of property admissible in light of close relationship and identity of interest against the drawing of the inference).
46. *LiButti*, 107 F.3d at 124.
47. FINRA was created in July 2007 through consolidation of the member firm regulatory functions of the NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007) (approving proposed rule change filed by the NASD to amend its certificate of incorporation to reflect name change).
48. See *D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 161 (2d Cir. 2002) ("It has been found, repeatedly, that the NASD itself is not a government functionary.") (citations omitted). *But see, In re Application of Gregg Heinze*, Securities Exchange Rel. No. 56100 (July 19, 2007) (remanding to NYSE to provide applicant "a further opportunity to develop and present his state action claim" after finding that applicant had presented evidence raising "questions about whether the [NYSE's] coordination with Commission staff made the [NYSE] a state actor in its investigation"); *In re Application of Justin F. Ficken*, Securities Exchange Act Rel. No. 54699 (Nov. 3, 2006) (remanding to NASD for similar reasons); *In re Application of Frank P. Quattrone*, Securities Exchange Act Rel. No. 53547 (March 24, 2006) (finding that applicant raised a genuine issue of material fact regarding whether NASD's role in the Joint Investigation rendered the Rule 8210 Request state action).
49. See *D.L. Cromwell Investments*, 279 F.3d at 161 ("[T]he Fifth Amendment restricts only governmental conduct, and will constrain a private entity only insofar as its actions are found to be 'fairly attributable' to the government.") (citing *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)).
50. In contrast, the SEC, as a state actor, cannot sanction an individual based solely on his or her valid assertion of the Fifth Amendment privilege in response to an SEC subpoena. See *Lefkowitz v. Cunningham*, 431 U.S. 801, 805-806, 97 S. Ct. 2132, 53 L. Ed. 2d 1 (1977) (holding that "government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized"). On the other hand, "it is not uncommon for brokerage firms and other entities to terminate an employee who invokes the Fifth Amendment in response to questions about his job." Andrew J. Levander, *Fifth Amendment and Parallel Proceedings*, N.Y. L.J., May 5, 1994, at 1.
51. FINRA has proposed transferring NASD Procedural Rule 8210 to the Consolidated FINRA Rulebook without changes as FINRA Rule 8210. See Securities Exchange Act Rel. No. 58176 (July 16, 2008), 73 Fed. Reg. 42344 (July 23, 2008).
52. FINRA Rule 8210 ("Provision of Information and Testimony and Inspection and Copying of Books"), available at <http://finra.complinet.com/finra/>.
53. FINRA Rule 8210.
54. See FINRA Sanction Guidelines at 35 (2007), available at <http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf>.
55. *S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 190, Fed. Sec. L. Rep. (CCH) P 98230, 29 Fed. R. Serv. 3d 38 (3d Cir. 1994).
56. *S.E.C. v. Cymaticolor Corp.*, 106 F.R.D. 545, 549-550, Fed. Sec. L. Rep. (CCH) P 92216 (S.D. N.Y. 1985) (precluding defendant from "offering into evidence any matter relating to the factual basis for his denials and defenses as to which he continues to assert his fifth amendment (*sic*) rights" 10 days after date of order).
57. See *In re Initial Public Offering Securities Litigation*, 64 Fed. R. Evid. Serv. 420, 2004 WL 60290, at *1 (S.D. N.Y. 2004).
58. The filing is referred to as a "Wells submission" because John H. Wells chaired the SEC Advisory Committee on Enforcement Policies

- and Practices that initially recommended the practice to respond to contemplated charges. *In Re: Initial Public Offering Sec. Litig.*, 2004 WL 60290, at *1.
59. *In Re: Initial Public Offering Sec. Litig.*, 2004 WL 60290, at *1; see also 17 C.F.R. § 202.5(c).
 60. *In Re: Initial Public Offering Sec. Litig.*, 2004 WL 60290, at *2.
 61. *In Re: Initial Public Offering Sec. Litig.*, 2004 WL 60290, at *2.
 62. See, e.g., *In Re: Initial Public Offering Sec. Litig.*, 2004 WL 60290 (S.D.N.Y. Jan. 12, 2004).
 63. See SEC Enforcement Manual § 2.4 (written Wells Notice or written confirmation of an oral Wells Notice should, among other things, “inform the recipient that any Wells submission may be used by the Commission in any action or proceeding that it brings and may be discoverable by third parties in accordance with applicable law,” and attach a copy of SEC Form 1662); see also SEC Enforcement Manual § 2.4 (the Staff may reject a submission if the person making the submission “limits its admissibility under Federal Rule of Evidence 408 or otherwise limits the Commission’s ability to use the submission pursuant to Form 1662.”).
 64. See SEC Enforcement Manual §2.4, § 5.2.1; 17 C.F.R. § 202.5(b); see also generally Robert A. Fippinger, *The Securities Law of Public Finance*, PLIREF-SECFIN § 13:2.2.
 65. *In Re: Initial Public Offering Sec. Litig.*, 2004 WL 60290, at *4.
 66. *In Re: Initial Public Offering Sec. Litig.*, 2004 WL 60290, at *4.
 67. *In Re: Initial Public Offering Sec. Litig.*, 2004 WL 60290, at *3-*4. A Wells submission also may be discoverable through a FOIA request, provided that the SEC investigation has concluded. See 5 U.S.C.A. § 552(b)(7)(A); 17 C.F.R. § 200.83.
 68. *Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368, 1374, Fed. Sec. L. Rep. (CCH) P 97172, Fed. Sec. L. Rep. (CCH) P 97573 (D.C. Cir. 1980). See also *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995).
 69. See *U.S. v. Kordel*, 397 U.S. 1, 90 S. Ct. 763, 25 L. Ed. 2d 1, 13 Fed. R. Serv. 2d 868 (1970); *Keating*, 45 F.3d at 324; *SEC v. Dresser Indus.*, 628 F.2d at 1372.
 70. See, e.g., *Keating*, 45 F.3d at 324; *S.E.C. v. AmeriFirst Funding, Inc.*, 2008 WL 866065, at *2-*5 (N.D. Tex. 2008); *Hollinger Intern., Inc. v. Hollinger Inc.*, 2008 WL 161683, at *2 (N.D. Ill. 2008); *Parker v. Dawson*, 2007 WL 2462677, at *3 (E.D. N.Y. 2007); *In re CFS-Related Securities Fraud Litigation*, 256 F. Supp. 2d 1227 (N.D. Okla. 2003); *Trustees of Plumbers and Pipefitters Nat. Pension Fund v. Transworld Mechanical, Inc.*, 886 F. Supp. 1134, 1139, R.I.C.O. Bus. Disp. Guide (CCH) P 8846 (S.D. N.Y. 1995); *Ex parte Ebbers*, 871 So. 2d 776, 789 (Ala. 2003). See also Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201 (1990). But see *In re Financial Federated Title & Trust, Inc.*, 252 B.R. 834, 837, 36 Bankr. Ct. Dec. (CRR) 1017, Bankr. L. Rep. (CCH) P 78274 (Bankr. S.D. Fla. 2000) (holding that, under law in the Eleventh Circuit, defendant’s motion to stay could be denied unless defendant shows that “invocation of the privilege... will result in certain loss by automatic summary judgment”) (citations omitted).
 71. See *Keating*, 45 F.3d at 326 (“A defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege.”).
 72. See *SEC v. Dresser Indus.*, 628 F.2d at 1375-1376 (“Other than where there is specific evidence of agency bad faith or malicious government tactics, the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter.”). See also *Transworld Mech.*, 886 F. Supp. at 1140 (S.D.N.Y. 1995) (finding that the significant subject matter similarity of the two cases and the fact that the individual defendants had been indicted weighed in favor of a stay because of “defendants’ interests in avoiding the quandary of choosing between waiving their Fifth Amendment rights or effectively forfeiting the civil case”).
 73. See *In re Bank of Am. Corp. Sec., Derivative & Employment Ret. Income Sec. Act (ERISA) Litig.*, No. 09 MDL 2058 (DC), (SDNY), Memorandum Decision dated Nov. 16, 2009 (Mem. Dec.) at 1-2.
 74. The PSLRA provides that all discovery be stayed pending resolution of a motion to dismiss, “unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.” 15 U.S.C.A. § 78u-4(b)(3)(B).
 75. PSLRA, 15 U.S.C.A. § 78u-4(b)(3)(B).

76. S. Rep. 104-98, at 4, 14 (1995), as reprinted in 1995 U.S.C.C.A.N. 679, 693.
77. S. Rep. 104-98, at 6.
78. See Milton Pollack, Parallel Civil and Criminal Proceedings, 129 F.R.D. at 209. See also Mark Hamblett, *Securities Unit Fights Crime, Stays Civil Suits*, N.Y. L.J., March 13, 2003 (discussing efforts of prosecutors to protect investigations from discovery process of civil cases).
79. See Gary P. Naftalis, *Defending Parallel Civil and Criminal Proceedings*, SM090 ALI-ABA 1257, 1301-03 (2007).
80. See, e.g., *S.E.C. v. Saad*, 229 F.R.D. 90 (S.D. N.Y. 2005).
81. For a comprehensive analysis of this development, see Steven M. Witzel and David B. Hennes, *Balanced Approach for Parallel Proceedings Discovery*, N.Y.L.J., Aug. 17, 2009. The article also provides a catalogue of published and unpublished decisions denying stays in similar circumstances.
82. See *U.S. S.E.C. v. Cioffi*, 2008 WL 4693320 (E.D. N.Y. 2008).
83. *SEC v. Cioffi*, 2008 WL 4693320, at *1 (“Courts are justifiably skeptical of blanket claims of prejudice by the government where—as here—the government is responsible for the simultaneous proceedings in the first place.”)
84. *Saad*, 229 F.R.D. at 91 (finding it “stranger still that the U.S. Attorney’s Office, having closely coordinated with the SEC in bringing simultaneous civil and criminal actions against some hapless defendant, should then wish to be relieved of the consequences that will flow if the two actions proceed simultaneously”). See also, *S.E.C. v. Oakford Corp.*, 181 F.R.D. 269 (S.D. N.Y. 1998) (“To use the federal courts as a forum for filing serious civil accusations that one has no intention of pursuing until a parallel criminal case is completed is a misuse of the processes of these courts.”); *U.S. v. Gieger Transfer Service, Inc.*, 174 F.R.D. 382, 385 (S.D. Miss. 1997) (denying government’s motion to stay discovery in part because government had created the conflict by filing the criminal and civil actions simultaneously).
85. *Cioffi*, 2008 WL 4693320, at *2 (Block, J.); *S.E.C. v. Jones*, 2005 WL 2837462 (S.D. N.Y. 2005) (Sweet, J.); *SEC v. Stockman*, 07-CV-2419 (S.D.N.Y., Order dated Sept. 10, 2007) (Scheidlin, J.).
86. See, e.g., *U.S. v. Stauffer Chemical Co.*, 464 U.S. 165, 170-171, 104 S. Ct. 575, 78 L. Ed. 2d 388, 20 Env’t. Rep. Cas. (BNA) 1257, 14 Env’tl. L. Rep. 20064 (1984).
87. See, e.g., *U.S. v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984) (acquittal on firearms charges does not preclude *in rem* civil forfeiture action against those firearms).
88. See *Standefer v. U. S.*, 1980-2 C.B. 379, 447 U.S. 10, 22-23, 100 S. Ct. 1999, 64 L. Ed. 2d 689, 80-2 U.S. Tax Cas. (CCH) P 9481, 46 A.F.T.R.2d 80-5084 (1980).
89. See, e.g., *U.S. v. Beaty*, 245 F.3d 617, 2001 FED App. 0095P (6th Cir. 2001) (preclusive effect of criminal convictions in civil forfeiture actions); *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38 (2d Cir. 1986) (preclusive effect of criminal convictions in private civil action); *Wolfson v. Baker*, 623 F.2d 1074, Fed. Sec. L. Rep. (CCH) P 97607 (5th Cir. 1980) (criminal conviction given collateral estoppel effect in subsequent private securities action); *S.E.C. v. Opulentica, LLC*, 479 F. Supp. 2d 319, Fed. Sec. L. Rep. (CCH) P 94191 (S.D. N.Y. 2007) (preclusive effect of criminal convictions in subsequent SEC enforcement action); *S.E.C. v. Bilzerian*, 29 F.3d 689, Fed. Sec. L. Rep. (CCH) P 98325 (D.C. Cir. 1994) (granting summary judgment against defendant in SEC enforcement action based on defendant’s criminal conviction for the same underlying conduct); see also Fed. R. Evid. 803 (22) (providing as hearsay exception, “[e]vidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment.”).
90. See, e.g., *U.S. v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978) (“It is well-settled that a criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel... in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case.”); *Gray v. C.I.R.*, 708 F.2d 243, 83-1 U.S. Tax Cas. (CCH) P 9391, 52 A.F.T.R.2d 83-5153 (6th Cir. 1983) (guilty plea on counts of tax evasion had preclusive effect in civil tax fraud prosecution arising out of the same conduct).
91. See Fed. R. Crim. P. 11(b)(3).
92. See *Allen v. McCurry*, 449 U.S. 90, 96, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980) (Congress has specifically required “federal courts to give

- preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.”).
93. See, e.g., Stephanie Martz, Trends in Deferred Prosecution Agreements, 29 NOV CHAMP 45 (2005).
 94. Fed. R. Evid. 801(d)(2).
 95. *S.E.C. v. Monarch Funding Corp.*, 192 F.3d 295, Fed. Sec. L. Rep. (CCH) P 90646 (2d Cir. 1999).
 96. *Monarch Funding Corp.*, 192 F.3d at 305.
 97. *Monarch Funding Corp.*, 192 F.3d 295. For example, a defendant may be reluctant to testify during sentencing because his or her sentence may be enhanced for obstructing justice if the testimony is disbelieved.
 98. *Monarch Funding Corp.*, 192 F.3d 295.
 99. *Monarch Funding Corp.*, 192 F.3d 295.
 100. *Maciel v. C.I.R.*, 489 F.3d 1018, 2007-2 U.S. Tax Cas. (CCH) P 50688, 99 A.F.T.R.2d 2007-3040 (9th Cir. 2007) (holding that sentencing court’s determination that defendant did not have the intent to evade taxes was not binding on taxpayer’s subsequent civil challenge of penalties imposed by the I.R.S.).
 101. See *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788, 169 U.S.P.Q. 513, 1971 Trade Cas. (CCH) ¶ 73565 (1971).
 102. See *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552, Fed. Sec. L. Rep. (CCH) P 96713, 26 Fed. R. Serv. 2d 669 (1979).
 103. See *U.S. v. General Dynamics Corp.*, 828 F.2d 1356, 1361, n.5, 34 Cont. Cas. Fed. (CCH) P 75252, 34 Cont. Cas. Fed. (CCH) P 75364 (9th Cir. 1987); *U.S. v. Beery*, 678 F.2d 856, 868 n.10, 11 Fed. R. Evid. Serv. 264 (10th Cir. 1982); *U.S. v. Konovsky*, 202 F.2d 721 (7th Cir. 1953).
 104. See *U.S. v. Rogers*, 960 F.2d 1501, Fed. Sec. L. Rep. (CCH) P 97735 (10th Cir. 1992) (government was collaterally estopped from prosecuting the defendant based on issues that had been resolved adversely to the government in a prior SEC civil lawsuit against the defendant based on the same conduct where the judgment in the prior lawsuit reached the merits of the case and exonerated the defendant); see also *U.S. v. Mumford*, 630 F.2d 1023, Fed. Sec. L. Rep. (CCH) P 97648 (4th Cir. 1980) (stating that collateral estoppel may be applicable when the first cause of action was civil and the second is criminal, but finding that the issues involved in the prior SEC civil proceeding were not identical to those upon which the subsequent criminal prosecution was based).
 105. See, e.g., *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893-894, 22 Fed. R. Serv. 2d 779 (2d Cir. 1976); *Mishkin v. Peat, Marwick, Mitchell & Co.*, 1988 WL 391648, at *2 (S.D. N.Y. 1988); *In re Cenco Inc. Securities Litigation*, 529 F. Supp. 411, 416, Fed. Sec. L. Rep. (CCH) P 98461 (N.D. Ill. 1982) Even so, it is advisable to include language in a consent decree that states expressly that the order will have no preclusive effect in future proceedings. *But see Option Resource Group v. Chambers Development Co., Inc.*, 967 F. Supp. 846, 851 (W.D. Pa. 1996) (holding that provision in consent decree that SEC’s factual findings are not binding in subsequent litigation has no effect on their later admissibility).