Global Investigations Review

The Practitioner's Guide to Global Investigations

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

GIR
Global Investigations Review

The Practitioner's Guide to Global Investigations

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 978-1-910813-95-9

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

Acknowledgements

The publisher acknowledges and thanks the following firms for their learned assistance throughout the preparation of this book:

ALLEN & OVERY LLP

ANAGNOSTOPOULOS

ARCHER & ANGEL

BAKER & MCKENZIE LLP

BARCLAYS BANK PLC

BCL SOLICITORS LLP

BDO USA, LLP

BRUNSWICK GROUP LLP

CADWALADER, WICKERSHAM & TAFT LLP

CLIFFORD CHANCE

CLOTH FAIR CHAMBERS

CORKER BINNING

DEBEVOISE & PLIMPTON LLP

DECHERT LLP

DREW & NAPIER LLC

ELIG, ATTORNEYS-AT-LAW

FOUNTAIN COURT CHAMBERS

FOX WILLIAMS LLP

FRESHFIELDS BRUCKHAUS DERINGER

GIBSON, DUNN & CRUTCHER LLP

GOODWIN PROCTER LLP

HERBERT SMITH FREEHILLS LLP

HOGAN LOVELLS

KINGSLEY NAPLEY LLP

MATHESON

NAVACELLE

NORTON ROSE FULBRIGHT LLP

OUTER TEMPLE CHAMBERS

PINSENT MASONS LLP

PROSKAUER ROSE LLP

QUINN EMANUEL URQUHART & SULLIVAN, LLP

RICHARDS KIBBE & ORBE LLP

ROPES & GRAY LLP

SCHELLENBERG WITTMER LTD

SIMMONS & SIMMONS LLP

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

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 lifecycle 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. As well as containing the most up-to-date versions of the chapters in Part I of the guide, the website 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:
copublishing@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 12 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. We look forward to updating and expanding both parts of the book in future editions as the law and practice continues to evolve in this emerging field. *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 2016
London and New York

10

Co-operating with 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.

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 new 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*,[10] 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 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.'[11]

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

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

11 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.

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.'[12] 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.'[13] 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.[14]

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 can potentially eliminate all penalties.[15] 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.[16]

12 Miller, above at footnote 9.

13 Enforcement and Cooperation Program, U.S. Securities & Exch. Comm'n (14 June 2016), available at https://www.sec.gov/spotlight/enfcoopinitiative.shtml.

14 Id.

15 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.

16 U.S.S.G. § 8C2.5 application note 13.

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.[17] 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.

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.'[18]

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.[19] 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.

10.1.3 Status of the parties involved in the investigation

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

17 See, e.g., *Standard Oil Co. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962).

18 USAM § 9-28.500.

19 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).

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 provides incorrect information knowingly 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.'[20] Typically falling somewhere between a target and a witness, a subject is someone or some entity that enforcement 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.'[21]

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

20 USAM § 9-11.151.

21 Id.

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.

10.1.4 Key benefits and drawbacks to co-operation

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.[22]

10.1.4.1 Reduced or no charges and penalties

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.[23] And companies that do not co-operate have received significantly harsher treatment by enforcement authorities.[24]

Equally important, co-operation that results in reduced or no charges may also avoid the collateral consequences of an adjudged violation. Collateral

22 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.').

23 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.

24 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.

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 civil judgment for a number of offences, including bribery, or any offence 'indicating a lack of business integrity or business honesty. . . .'[25] Moreover, federal disbarment or suspension may automatically trigger a cascade of similar consequences at the state or local,[26] and international,[27] 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

25 21 C.F.R. § 1404.800 (2012).

26 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').

27 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).

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 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.

10.1.4.3 Financial cost

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,[28] 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.'[29] 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.

10.1.4.4 Disruption to business

Any government investigation is likely to be disruptive to a company's operations and can even affect its share price.[30] Working under the glare of an investigation

28 U.S.S.G. § 8C3.3.

29 Yates, above at footnote 6.

30 See, e.g., USAM § 9-28.700 ('a protracted government investigation . . . could disrupt the corporation's business operations or even depress its stock price.').

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 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.'[31] 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.

31 Id.

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 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.[32] 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.[33]

10.2.2 The FCPA pilot programme

In the same spirit, in April 2016, the DOJ announced a new, one-year pilot programme for Foreign Corrupt Practices Act (FCPA) enforcement.[34] 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.[35]

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.'[36] 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.[37] Third, the company must undertake timely and appropriate remediation, including through implementation of an ethics and compliance programme and discipline of employees responsible for the misconduct.[38] If a company meets all three requirements and disgorges all profits received

32 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.

33 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.

34 U.S. Dep't of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (5 April 2016), at 2.

35 Id.

36 Id. at 4 (quoting U.S.S.G. § 8C2.5(g)(1)).

37 Id. at 5.

38 Id. at 7–8.

from the alleged violation, it may receive up to a 50 per cent reduction off the applicable minimum fines under the Sentencing Guidelines,[39] and the DOJ will consider a declination of prosecution.[40] 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.[41]

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.[42] 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.

10.3 Special challenges with cross-border investigations

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.[43] 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.[44]

Indeed, governments are touting this collaboration. As the Joint Head of Bribery and Corruption at the United Kingdom's Serious Fraud Office noted recently: '[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

39 Id. at 8.

40 Id. at 9 ('[w]here those same conditions are met, the Fraud Section's FCPA Unit will consider a declination of prosecution.').

41 Id. at 8.

42 Id. at 8–9.

43 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).

44 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.')

too.'[45] 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.'[46]

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.

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. 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, and ensure a consistent, coherent defence that does not create additional exposure abroad or as to other sets of issues.

---

45 Ben Morgan, Joint Head of Bribery and Corruption, Serious Fraud Office, Remarks at the Annual Anti Bribery & Corruption Forum (19 October 2015).

46 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.')

10.4 Other options besides co-operation

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: 'The government may charge even the most cooperative corporation . . . if . . . the prosecutor determines that a charge is required in the interests of justice. Put differently, even the most sincere and thorough effort to cooperate cannot necessarily absolve a corporation that has . . . engaged in an egregious, orchestrated, and widespread fraud.'[47]

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.[48]

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 said it 'made a business decision' to end the government investigation by making

47 USAM § 9-28.720.

48 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).

a US$40 million forfeiture payment, and Google, Walgreens Company, and CVS Caremark Corporation have paid fines up to US$500 million.[49]

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.[50]

49 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.

50 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 the time this chapter was authored, post-trial proceedings had not yet occurred.

Appendix 1

About the Authors

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.

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.

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.

Kevin Yeh
Gibson, Dunn & Crutcher LLP

Kevin Yeh is an associate in Gibson Dunn & Crutcher's San Francisco office, where he practices in the litigation department, specialising in antitrust. He handles merger clearance, civil litigation, and cartel matters, and represents clients before both the US Department of Justice and the Federal Trade Commission.

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306
United States
Tel: +1 202 955 8500
Fax: +1 202 467 0539

555 Mission Street
Suite 3000
San Francisco, CA 94105-0921
United States
Tel: +1 415 393 8200
Fax: +1 415 393 8306

fwarin@gibsondunn.com
wchan@gibsondunn.com
psoto@gibsondunn.com
kyeh@gibsondunn.com

www.gibsondunn.com