Global Investigations Review

The Practitioner's Guide to Global Investigations

Volume I: Global Investigations in the United Kingdom and the United States

Fifth Edition

Editors
Judith Seddon, Eleanor Davison, Christopher J Morvillo,
Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

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24

Negotiating Global Settlements: The US Perspective

Nicolas Bourtin[1]

Introduction 24.1

Strong incentives exist for corporations – particularly those in highly regulated industries that are vulnerable to potentially debilitating collateral consequences – to avoid litigating a case brought by the government. Among other considerations, protracted and unpredictable litigation can create risks of (1) financial and reputational harm to the company, (2) weakening relationships with regulators, (3) significant legal expense, and (4) severe legal and regulatory consequences associated with an unfavourable litigation outcome. As a result, when threatened with enforcement action, corporations often seek to enter into settlement negotiations with investigating authorities. Nevertheless, a corporation entering into such negotiations must carefully weigh the various attendant burdens and collateral consequences of such agreements.

Strategic considerations 24.2

As a preliminary matter, it is important to consider the impact of all interactions with US authorities on the company's ability to reach a settlement on favourable terms. Even early in an investigation, a corporation can develop a co-operative working relationship with an enforcement agency through prompt and complete disclosure and assistance with requests and inquiries. While co-operation is not the right strategic approach in all cases – companies may choose to take a more adversarial approach, even early in an investigation – establishing a record of proactive and complete co-operation can have a substantial effect on the final terms

1 Nicolas Bourtin is a partner at Sullivan & Cromwell LLP. The author acknowledges the contributions of Sullivan & Cromwell associate Steve A Hsieh and former associates Kate Doniger, Stephanie Heglund and Ryan Galisewski to earlier editions of this chapter.

of any resolution, as US government authorities typically consider the nature and extent of a corporation's co-operation with the investigation in contemplating whether to settle a matter and on what terms. Indeed, both the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC, or the Commission) have explicitly included voluntary disclosure and co-operation in their enforcement policies. As outlined in the DOJ's Justice Manual, in determining whether and to what extent to award a company co-operation credit, the DOJ considers, among other things, 'the timeliness of the co-operation, the diligence, thoroughness and speed of the internal investigation, and the proactive nature of the co-operation'.[2] Similarly, the SEC Enforcement Manual provides that a company's co-operation is evaluated by considering self-policing, self-reporting of misconduct, remediation and co-operation with the investigation.[3] As a result, by conducting an internal investigation and self-reporting potential misconduct to the authorities, a corporation may increase its chances of receiving co-operation credit and, in turn, more favourable settlement terms.[4]

2 US Dep't of Justice, Justice Manual § 9-28.700, Principles of Federal Prosecution of Business Organizations, The Value of Cooperation (updated November 2018); see also Justice Manual § 9-47.120, FCPA Corporate Enforcement Policy (updated November 2019). On 20 November 2019, the DOJ announced further revisions to its Foreign Corrupt Practices Act Corporate Enforcement Policy that, while modest, reflect the DOJ's commitment to providing incentives for companies to self-disclose suspected FCPA violations. The policy revision makes clear that a company's notice to the DOJ of potential criminal conduct can earn it self-reporting credit even if the company does not at the time of the notification understand the full scope of the conduct or the involvement of all relevant employees. In such circumstances, the DOJ will not later penalise the company's self-reporting for failure to include 'all relevant facts'. On 28 February 2020, the DOJ and the Enforcement Division of the SEC released the second edition of A Resource Guide to the US Foreign Corrupt Practices Act, which incorporated a number of DOJ policies, including the November 2017 FCPA Corporate Enforcement Policy that set forth incentives for companies to self-disclose, fully co-operate and remediate, including the presumption of a declination in certain circumstances.

3 SEC, Office of Chief Counsel, Enforcement Manual, Framework for Evaluating Cooperation by Companies § 6.1.2 (28 November 2017); see also SEC Release No. 34-61340, Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions, Exchange Act Release No. 34-61340, 75 Fed. Reg. 3122-02 (13 January 2010), www.sec.gov/rules/policy/2010/34-61340.pdf (last accessed 28 October 2020).

4 See, e.g., Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act: Eurex Deutschland, Release No. 70,148 (8 August 2013), www.sec.gov/litigation/investreport/34-70148.pdf (last accessed 28 October 2020) (forgoing an SEC enforcement action against the company 'because of its substantial and timely cooperation and prompt remediation efforts,' as well as its self-reporting); Declination in Cognizant Technology Solutions Corporation (13 February 2019), https://www.justice.gov/criminal-fraud/file/1132666/download (declining FCPA prosecution because of, among other reasons, voluntary self-disclosure, a thorough and comprehensive internal investigation and 'full and proactive cooperation'); Declination in Quad/Graphics Inc. (19 September 2019), https://www.justice.gov/criminal-fraud/file/1205341/download (same); Declination in World Acceptance Corp. (5 August 2020), https://www.justice.gov/criminal-fraud/file/1301826/download; Report of Investigation Pursuant to Section 21(a), Exchange Act Release No. 44,969, 76 SEC Docket 220 (23 October 2001) (declining to take action against the parent company given the company's response to the apparent misconduct and setting forth criteria the SEC considers in determining whether, and how much, to credit self-reporting).

At the close of the government's investigation, when beginning to negotiate the terms of a potential settlement agreement, a corporation must be particularly attuned to both the timing and the breadth of such an agreement. Regarding timing, certain stages of litigation can be particularly costly for a corporation; securing settlements early may be advantageous for a corporation. For example, in some cases – particularly where the key facts are known early and there is public pressure on the government to act quickly – a speedy settlement may be struck before a lengthy and expensive investigation is conducted. Such circumstances are rare, however, and the government will normally be reluctant to reach a settlement before a full investigation has been completed.

Another pivotal point to consider is whether settlement can be achieved before indictment or the filing of a complaint, as such public actions carry the risk of significant legal, financial and reputational consequences. And in fact most negotiated corporate resolutions are reached before charges are filed, as companies are eager to avoid the uncertain public and shareholder reaction to a contested litigation. Recent economic studies show that a company's share price generally decreases more dramatically as a result of the announcement of a government investigation if there is no concurrent resolution.[5] The extent of share price declines can, among other effects, have great significance in follow-on civil litigation.

In terms of the breadth of a potential settlement agreement, a corporation must consider the scope of the conduct being investigated and the scope of the potential release from liability. At the conclusion of the government's investigation, to the extent that it opts to pursue charges related to certain alleged misconduct, it can be advantageous for those charges to be reflected in a single settlement agreement or in distinct agreements announced simultaneously, so as to mitigate the risk of legal, financial and reputational harm associated with multiple days of negative press, carry-over investigations and future litigation. In the event that the government determines not to pursue charges against the company or its

5 See Declaration of Stephen Choi, Ph.D., *In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 1:10-cv-03461-PAC, 2015 WL 5613150 (S.D.N.Y. 6 April 2015), ECF No. 145 (finding that the average impact of an investigation announcement was -3.8 per cent when there was no concurrent resolution, compared to 0.22 per cent when there was a concurrent resolution). In one particularly striking example, Goldman Sachs settled a case for US$550 million in 2010 to avoid the difficulty and notoriety of litigation; after news of the settlement hit the market, Goldman's shares increased 5 per cent, resulting in a market value increase greater than the cost of the settlement. Sewell Chan & Louise Story, 'Goldman Pays $550 Million to Settle Fraud Case', *The New York Times* (15 July 2010), www.nytimes.com/2010/07/16/business/16goldman.html. See also Christian Flore et al., Settlement Agreement Types of Federal Corporate Prosecution in the US and Their Impact on Shareholder Wealth, 76 Journal of Business Research 145, 157 (2017) (analysing corporate settlements – 100 plea agreements, 64 deferred prosecution agreements (DPAs) and 63 non-prosecution agreements (NPAs) between January 2001 and December 2014 – and their effect on shareholder wealth and concluding 'significant and positive shareholder wealth effects to the announcement of settlement, indicating that investors generally view settlements as positive information').

employees,[6] it can be advantageous to diplomatically encourage a declination – a formal notice that the government has declined to pursue the case further,[7] to provide the company valuable closure.

Owing to the government's focus on the prosecution of individuals, however, it is unlikely that the government will release from liability company employees who engaged in potential wrongdoing as part of a settlement with a company.[8] The DOJ formalised its increased focus on the prosecution of individuals with the publication of a 2015 policy memorandum signed by then-Deputy Attorney General Sally Quillian Yates regarding individual accountability for corporate wrongdoing.[9] The Yates Memorandum memorialised certain government sentiments demonstrating an inclination toward the prosecution of individuals in

6 The Justice Manual lists 10 factors that prosecutors should weigh in determining whether to charge a corporation, including: (1) the nature and seriousness of the offence; (2) the pervasiveness of wrongdoing within the corporation; (3) the corporation's history of similar misconduct; (4) the corporation's willingness to co-operate including as to potential wrongdoing by its agents; (5) the adequacy and effectiveness of the corporation's pre-existing compliance programme; (6) the corporation's timely and voluntary disclosure of wrongdoing; (7) the corporation's remedial actions; (8) collateral consequences; (9) the adequacy of other remedies; and (10) the adequacy of the prosecution of individuals responsible for the corporation's malfeasance. Justice Manual § 9-28.300, Principles of Federal Prosecution of Business Organizations, Factors to Be Considered (rev. November 2018). The SEC considers its own factors in determining whether to close an investigation, including: (1) the seriousness of the conduct and potential violations; (2) the staff resources available to pursue the investigation; (3) the sufficiency and strength of the evidence; (4) the extent of potential investor harm if an action is not commenced; and (5) the age of the conduct underlying the potential violations. SEC, Office of Chief Counsel, Enforcement Manual § 2.6.1, Policies and Procedures.

7 Precise practices may differ. For example, the DOJ may issue a declination letter reporting that it has closed its investigation or declined to prosecute. See Department of Justice, Fraud Section, Declinations, https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations (last updated 6 August 2020). The policy of the SEC is to send 'termination letters' to 'notify individuals and entities at the earliest opportunity when the staff has determined not to recommend an enforcement action against them to the Commission'. SEC, Office of Chief Counsel, Enforcement Manual § 2.6.2, Termination Notices. These SEC termination letters provide somewhat less assurance than a formal declination, because '[a]ll that such a communication means is that the staff has completed its investigation and that at that time no enforcement action has been recommended to the Commission.' Id.

8 See Sally Quillian Yates, Memorandum from the US Dep't of Justice on Individual Accountability for Corporate Wrongdoing (9 September 2015), https://www.justice.gov/dag/file/769036/download (the Yates Memorandum). One exception is found in settlements with the DOJ's Antitrust Division. Historically, antitrust settlements regularly contained non-prosecution provisions that protected a company's employees from criminal liability related to the antitrust activity at issue. Antitrust settlements may 'carve out' certain individuals from this protection based on their level of culpability. See Scott D. Hammond, Deputy Assistant Att'y Gen. for Criminal Enforcement, Antitrust Division, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Presented at the ABA Antitrust Section Spring Meeting (29 March 2006), available at https://www.justice.gov/atr/speech/measuring-value-second-cooperation-corporate-plea-negotiations ('Most [antitrust] corporate plea agreements provide a non-prosecution agreement for company employees who cooperate fully in the investigation.').

9 The Yates Memorandum.

corporate fraud cases,[10] and specified that 'absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation'.[11] Following the change of administration in 2017, the DOJ revised the Yates Memorandum's guidance to restore some discretion to civil prosecutors, who are now empowered to 'negotiate civil releases for individuals who do not warrant additional investigation in corporate civil settlement agreements'.[12] The revised guidance also states that a corporation will be eligible for co-operation credit if it operates in good faith to identify individuals who were 'substantially' involved in or responsible for the potential misconduct, a move away from the Yates Memorandum's more stringent requirement that 'the company must identify all individuals responsible for the misconduct at issue, regardless of their position, status, or seniority'. However, the revised guidance emphasises the DOJ's ongoing commitment to and focus on individual accountability.[13] In 2019, the DOJ

10 See, e.g., Marshall Miller, Principal Deputy Assistant Attorney General for the Criminal Division, Remarks at the Global Investigations Review Conference (17 September 2014), https://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller (explaining that 'when [corporations] come in to discuss the results of an internal investigation to the Criminal Division . . . expect that a primary focus will be on what evidence you uncovered as to culpable individuals, what steps you took to see if individual culpability crept up the corporate ladder, how tireless your efforts were to find the people responsible'); Sung-Hee Suh, Deputy Assistant Attorney General, Remarks at the PLI's 14th Annual Institute on Securities Regulation in Europe: Implications for U.S. Law on EU Practice (20 January 2015), https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-sung-hee-suh-speaks-pli-s-14th-annual-institute-securities (explaining that 'corporations do not act criminally, but for the actions of individuals . . . the Criminal Division intends to prosecute those individuals, whether they are sitting on a sales desk or in a corporate suite'); Leslie Caldwell, Assistant Attorney General for the Criminal Division, Remarks at New York University Law School's Program on Corporate Compliance and Enforcement (17 April 2015), https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law (explaining that '[t]rue cooperation . . . requires identifying the individuals actually responsible for the misconduct – be they executives or others – and the provision of all available facts relating to that misconduct').

11 The Yates Memorandum at 2.

12 Rod J Rosenstein, Deputy Attorney General, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (29 November 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0. When announcing these changes, Deputy Attorney General Rod Rosenstein emphasised that this policy shift was in 'response to concerns raised about the inefficiencies of requiring companies to identify every employee involved regardless of relative culpability' and was 'consistent with our commitment to hold individuals accountable in every appropriate case.' Id.

13 Id.

increased the number of indictments of individuals for FCPA-related violations to 34, up from 31 individuals in 2018 and 24 individuals in 2017.[14]

Similarly, in the securities enforcement context, the SEC has expressed a focus on charging individuals responsible for wrongdoing.[15] In particular, Mary Jo White, the former Chair of the SEC, has highlighted that one new approach to charging individuals is to use Section 20(b) of the Exchange Act[16] to target those who have 'engaged in unlawful activity but attempted to insulate themselves from liability by avoiding direct communication with the defrauded investors'.[17] The co-directors of the SEC Division of Enforcement have continued to focus on individual accountability.[18]

24.3 Legal considerations

24.3.1 Privilege considerations

At times during the investigative process, legal considerations may be in tension with strategic ones – a corporation should be cognisant of the potential for such tensions to navigate toward an agreeable settlement without unnecessarily waiving any valuable rights. In particular, a company may need to weigh the value of additional co-operation credit for disclosing relevant privileged documents to the government against the value of protecting privileged documents from future discovery in follow-on civil litigation.

On the one hand, the government may consider the disclosure of privileged documents in determining the corporation's level of co-operation. Under current

14 Dep't of Justice, Criminal Division, Fraud Section, Year in Review: 2019, at 4, https://www.justice.gov/criminal-fraud/file/1245236/download; Dep't of Justice, Criminal Division, Fraud Section, Year in Review: 2018, at 5, https://www.justice.gov/criminal-fraud/file/1123566/download; Dep't of Justice, Criminal Division, Fraud Section, Year in Review: 2017, at 4, https://www.justice.gov/criminal-fraud/file/1026996/download.

15 Joshua Gallu and David Michaels, SEC to Shift Enforcement Focus to Individuals, White Says, *Bloomberg News* (26 September 2013), www.bloomberg.com/news/articles/2013-09-26/sec-to-shift-enforcement-focus-to-individuals-white-says-1-; Mary Jo White, SEC Chair, Speech at the New York City Bar Association's Third Annual White Collar Crime Institute: Three Key Pressure Points in the Current Enforcement Environment (19 May 2014), https://www.sec.gov/news/speech/2014-spch051914mjw.html (noting that an 'internal, back-of-the[-]envelope, analysis the staff did recently indicates that since the beginning of the 2011 fiscal year, we charged individuals in 83% of our actions . . . , [a]nd we look for ways to innovate in order to further strengthen our ability to charge individuals').

16 Section 20(b) of the Securities Act of 1933 allows the Commission to bring enforcement actions against 'any person' who does 'any act or thing which it would be unlawful for such person to do under the provisions of this chapter or any rule or regulation thereunder through or by means of any other person'. See 15 U.S.C. § 78t(b) (2011).

17 Id.

18 Message from the Co-directors, SEC Division of Enforcement, 2018 Annual Report at 4, https://www.sec.gov/files/enforcement-annual-report-2018.pdf (listing as 'Principle 2: Focus on Individual Accountability' and announcing that '[h]olding individuals accountable for wrongdoing is a key pillar of any strong enforcement program'); Message from the Co-directors, SEC Division of Enforcement, 2019 Annual Report at 5, https://www.sec.gov/files/enforcement-annual-report-2019.pdf ('A central pillar of our [enforcement] program is holding accountable individual wrongdoers.').

DOJ policy, for example, 'cooperation credit is not predicated upon the waiver of attorney–client privilege or work-product protection', although co-operation still requires the timely disclosure of 'relevant facts',[19] which may require the disclosure of some privileged materials, such as memoranda of witness interviews prepared during an internal investigation.[20] On the other hand, disclosure to the government of documents prepared during the course of an investigation may waive any relevant protections during follow-on civil litigation.[21] In such instances, a company may consider entering into a limited waiver agreement with the government as a middle ground, but it must keep in mind that courts may be sceptical of a limited waiver agreement, even when paired with a confidentiality agreement.[22]

19 Justice Manual § 9-28.720, Principles of Federal Prosecution of Business Organizations, Cooperation: Disclosing the Relevant Facts (rev. November 2017); Memorandum from Mark Filip at 9–11, Deputy Att'y Gen., US Dep't of Justice, Principles of Federal Prosecution of Business Organizations (28 August 2008), at 9–11, https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

20 Justice Manual § 9-28.720; Memorandum from Mark Filip at 8, 9. This reflects a steady retreat in the DOJ's position. In 1999, then-Deputy Attorney General Eric Holder noted in a memorandum that the DOJ would consider the waiver of corporate attorney–client and work-product privileges as, although not an 'absolute requirement', at least 'one factor in evaluating the corporation's cooperation'. Memorandum from the Deputy Att'y Gen., US Dep't of Justice Bringing Criminal Charges Against Corporations §§ II.A.4, VI.A-B (16 June 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF. After some congressional interest in corporate attorney–client privilege, the DOJ issued another memorandum in 2006 stating that, although '[w]aiver of attorney–client and work product protections is not a prerequisite to a finding that a company has cooperated', prosecutors could request carefully limited waivers only in limited circumstances 'when there is a legitimate need for the privileged information to fulfil their law enforcement obligations'. Memorandum from Paul J McNulty at 8, 9, Deputy Att'y Gen., US Dep't of Justice, Principles of Federal Prosecution of Business Organizations (12 December 2006), https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.

21 The Second Circuit Court of Appeals held that voluntary submission of a legal memorandum to the SEC during its investigation waived protections of the work-product doctrine in a subsequent civil class action suit. *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 232 (2d Cir. 1993). But the court declined 'to adopt a per se rule that all voluntary disclosures to the government waive work product protection.' Id. at 236. Similarly, a court in the Southern District of New York held that briefs, written memos, white papers and presentations shown to the Commodity Futures Trading Commission (CFTC) were discoverable in a subsequent civil action. See *Alaska Electrical Pension Fund v. Bank of America Corp.*, 2017 WL 280816, at *2, 3 (S.D.N.Y. 20 January 2017). The court's decision, however, noted the lack of confidentiality agreements between the government and the defendants, and the court did not claim to apply a categorical rule about confidentiality agreements and waiver of work-product privilege. See id. at *2. ('[T]he Court need not decide categorically whether confidentiality agreements can ever protect work product that is shared voluntarily with a government agency because, at most, they are just one of several factors to be considered, and they are not enough to carry the day here.' (internal quotation marks and citations omitted)).

22 Most federal courts of appeal have declined to allow a selective disclosure to regulators during an investigation of documents protected by the attorney–client privilege or work-product doctrine without a resultant waiver of the privilege or protection with respect to third-party civil litigants. See *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1127–28 (9th Cir. 2012) (US Attorney investigation); *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179 (10th Cir. 2006) (SEC and DOJ investigations); *Gruss v. Zwirn*, 2013 WL 3481350, at *5–8 (S.D.N.Y. 10 July 2013) (reviewing 'the origin and current viability of

Recent amendments to the SEC Enforcement Manual indicate that advocacy materials presented to the SEC may be discoverable and admissible in evidence, notwithstanding the protections of Federal Rule of Evidence 408.[23]

As part of its investigative process, the government may also engage the company in discussions as to whether charges are warranted. Government authorities may convey this information to the company orally, through reverse proffers,[24] or in writing, through a document such as the SEC's Wells notice.[25] Upon receipt of such information, the company then generally may respond with its arguments as to why the government should not bring an enforcement action. While providing

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the "selective waiver" doctrine' and reversing the findings of a magistrate judge that a confidentiality agreement with the SEC prevented waiver); SEC, Office of Chief Counsel, Enforcement Manual § 4.3.1, Confidentiality Agreements (28 November 2017) ('While obtaining materials that are otherwise potentially subject to privilege or the protections of the attorney work-product doctrine can be of substantial assistance in conducting an investigation, the staff should exercise judgment when deciding whether to enter into a confidentiality agreement with a company under investigation. Considerations include [that] . . . [s]ome courts have held that companies that produce otherwise privileged materials to the SEC or the US Department of Justice, even pursuant to a confidentiality agreement, waived privilege in doing so.'). But see *In re Steinhardt Partners, L.P.*, 9 F.3d. 230, 236 (2d Cir. 1993) ('[W]e decline to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection . . . . Establishing a rigid rule would fail to anticipate . . . situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.'); see also *In re Natural Gas Commodity Litigation*, 2005 WL 1457666, at *8 (S.D.N.Y. 21 June 2005) (discussing how an explicit confidentiality agreement combined with a non-waiver agreement went a 'long way' toward establishing non-waiver).

23 See SEC, Office of Chief Counsel, Enforcement Manual § 3.2.3.2, White Papers and Other Materials (excluding Wells submissions) (28 November 2017).

24 See Andrew Ceresney, Director, SEC Division of Enforcement, Remarks at University of Texas School of Law's Government Enforcement Institute: The SEC's Cooperation Program: Reflections on Five Years of Experience (13 March 2015), https://www.sec.gov/news/speech/sec-cooperation-program.html. ('One thing we are doing more of is using reverse proffers at key points in our investigations. When appropriate, we will invite counsel in for a meeting in which we share key documents and expected testimony that will implicate the defendant. This is another practice that is well established among criminal prosecutors and FBI agents but historically has been used less frequently at the SEC. Sometimes we might do a reverse proffer at a more advanced stage of an investigation in order to attempt to bring the investigation swiftly to a close on settlement terms that we deem favourable and appropriate. But we also might do it much earlier in an investigation, in order to demonstrate to a witness why cooperation is worthwhile.'); J Michael Sheckels and Jennifer L Farer, 'Investigating and Prosecuting Transnational Telefraud Schemes: The India-Based Call Center Scam and Costa Rica Telemarketing Fraud Cases', 66 *DOJ J. Fed. L. & Prac.* 213, 230–31 (2018) ('[I]t became abundantly clear that prosecutors needed to be proactive in educating defense counsel to help them make sense of the massive amount of evidence in the case, understand the operation of the complex scheme, and recognize where their particular client fit into it. As a result, prosecutors engaged in a robust reverse proffer process aimed at positioning opposing counsel to advise their clients on the strength of the government's case, cooperation potential, and plea possibilities.').

25 A Wells notice is a letter that a securities or commodities regulator, such as the SEC, CFTC or the Financial Industry Regulatory Authority (FINRA), sends to a corporation or individual when it intends to bring a civil action against them. See, e.g., *Richman v. Goldman Sachs Grp., Inc.*, 868 F. Supp. 2d 261, 272 (S.D.N.Y. 2012) ('The SEC provides a target of an investigation with a Wells Notice "whenever the Enforcement Division staff decides, even preliminarily, to recommend charges".' (citation omitted).)

a response is usually advisable and carries the prospect of success, in certain circumstances, a corporation may determine that it is not in the company's best interest. Among other considerations, a Wells submission is not privileged or confidential, and therefore can be used later against the corporation in civil litigation or made publicly available.[26] In fact, the SEC Enforcement Manual provides that the SEC staff may reject any Wells submission that purports to be settlement-related material.[27] In the alternative, the corporation may opt to initiate a meeting with the authorities to discuss the proposed charges to prevent the creation of discoverable material and foster a dialogue between the company and the government.

During settlement negotiations, a corporation must also be careful in sharing drafts of settlement documents because materials shared with the government may become discoverable in civil litigation. Although documents related to settlement negotiations are generally protected under Federal Rule of Evidence 408,[28] the documents may nonetheless ultimately be deemed discoverable,[29] or even admissible as evidence.[30]

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26 See *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 234 (2d Cir. 1993) (declining to 'address the question of whether the memorandum [at issue] was in fact a Wells submission' because 'characterizing the memorandum as such [would not] alter[] [the court's] conclusion' that voluntary disclosure of the memorandum to the SEC waived work-product protections); *In re Initial Pub. Offering Sec. Litig.*, 2004 WL 60290, at *2 (S.D.N.Y. 12 January 2004) ('Wells submissions are not – or at least, not intrinsically – settlement materials.').

27 See SEC, Office of Chief Counsel, Enforcement Manual, The Wells Process § 2.4 (28 November 2017) ('The staff may reject a Wells submission if the person making the submission seeks to limit (including by reserving the right to limit) . . . its admissibility under Federal Rule of Evidence 408[.]').

28 See Fed. R. Evid. 408 advisory committee's note ('[S]tatements made during compromise negotiations of other disputed claims are not admissible in subsequent criminal litigation, when offered to prove liability for, invalidity of, or amount of those claims.').

29 For example, courts in the Southern District of New York consistently hold that 'Rule 408 does not apply to discovery'. E.g., *Morgan Art Found. Ltd. v. McKenzie*, 2020 WL 3578251, at *5 (S.D.N.Y. 1 July 2020); *Republic of Turkey v. Christie's, Inc.*, 326 F.R.D. 394, 399 (S.D.N.Y. 2018); *Small v. Nobel Biocare USA, LLC*, 808 F. Supp. 2d 584, 586 (S.D.N.Y. 2011); accord *Conopco, Inc. v. Wein*, 2007 WL 1040676, at *5 (S.D.N.Y. 4 April 2007); *ABF Capital Mgmt. v. Askin Capital*, 2000 WL 191698, at *1 (S.D.N.Y. 10 February 2000). Rather, courts apply the discovery standard of Federal Rule of Civil Procedure 26(b)(1) to determine the discoverability of settlement negotiations. E.g., *Morgan Art Found.*, 2020 WL 3578251, at *5; *Republic of Turkey*, 326 F.R.D. at 399; *Small*, 808 F. Supp. 2d at 586–87; *ABF Capital Mgmt.*, 2000 WL 191698, at *2. Some courts require a 'particularized showing' of the need for the discovery. See *Bottaro v. Hatton Assocs.,* 96 F.R.D. 158, 160 (E.D.N.Y. 1982); see also *Tribune Co. v. Purcigliotti*, 1996 WL 337277, at *2 (S.D.N.Y. 19 June 1996) ('slightly heightened showing of relevance'); *SEC v. Thrasher*, 1996 WL 94533, at *2 (S.D.N.Y. 27 February 1996) ('modest presumption against disclosure'). But see *In re Initial Pub. Offering Sec. Litig.*, 2004 WL 60290, at *2 (S.D.N.Y. 12 January 2004) (rejecting a need for a 'particularized showing' because 'Wells submissions are not – or at least, not intrinsically – settlement materials. And in any case, the discovery of settlement materials is not governed by a different standard than other documents under the Federal Rules of Civil Procedure').

30 E.g., *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 4410008, at *5 (S.D.N.Y. 18 August 2016) (deferring a ruling on the admissibility of evidence concerning 'a voluntary settlement program' but suggesting the use of 'protective measures' such as limiting instructions to the jury and bifurcation of the punitive damages phase of trial); *In re Gen. Motors LLC Ignition*

24.3.2 Limitations and tolling agreements

In the course of a government investigation, statutes of limitation will often come into play.[31] At the outset of an investigation, particularly if the investigation commences toward the end of a particular statutory period, the government may ask the company to sign a tolling agreement, an agreement to waive a right to claim that litigation should be dismissed owing to the expiry of a statute of limitations for a particular period.[32] It may be in the best interest of the company to sign it, as a form of co-operation and to avoid a precipitous filing of charges by the government. If a tolling agreement has not been signed at an earlier stage in the investigation, the government may ask a corporation to sign one during the settlement negotiation process, especially if a potential limitations period is about to close. In this context, tolling agreements serve to relieve the government of the pressure of taking formal action before the relevant limitations period runs, and allow for time for additional sharing of information in the hope of facilitating a settlement agreement.[33]

Switch Litig., 2015 WL 7769524, at *2 (S.D.N.Y. 30 November 2015) (admitting consent decree as evidence 'not . . . to prove that New GM violated the Safety Act . . . but for other purposes that are plainly relevant').

31 Unless otherwise provided by statute, an enforcement action by a federal regulator that seeks a civil fine or penalty is generally subject to the standard five-year limitations period for proceedings. 28 U.S.C. § 2462. 'Securities fraud offenses', however, are subject to six-year limitations periods. 18 U.S.C. § 3301.

32 See DOJ and SEC, A Resource Guide to the US Foreign Corrupt Practices Act at 35 (8 July 2020), https://www.justice.gov/criminal-fraud/file/1292051/download ('[C]ompanies or individuals cooperating with DOJ may enter into a tolling agreement that voluntarily extends the limitations period.').

33 See SEC, Office of Chief Counsel, Enforcement Manual § 3.1.2, Statutes of Limitations and Tolling Agreements (28 November 2017) ('If the assigned staff investigating potential violations of the federal securities laws believes that any of the relevant conduct arguably may be outside the five-year limitation period before the SEC would be able to file or institute an enforcement action, the staff may ask the potential defendant or respondent to sign a "tolling agreement." Such requests are occasionally made in the course of settlement negotiations to allow time for sharing of information in furtherance of reaching a settlement.').

A tolling agreement signed by the corporation will not toll the statute of limitations against individuals. Rather, to toll the time to bring charges against an individual, the government will have to secure a separate tolling agreement with that person. See the Yates Memorandum at 6 ('[W]here it is anticipated that a tolling agreement is . . . unavoidable and necessary, all efforts should be made either to resolve the matter against culpable individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations period by agreement or court order.'); Justice Manual § 4-3.100 (updated November 2018) (same).

Forms of resolution 24.4

Prosecutorial settlements: DPAs, NPAs and guilty pleas 24.4.1

In past years, most corporate criminal investigations initiated by US prosecutors were resolved by deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs).[34] DPAs and NPAs are generally thought of as a middle ground between declining prosecution and obtaining a conviction.[35] Although in

34 For examples of DPAs and NPAs, see *In re Goldman Sachs Group Inc.* (22 October 2020), https://www.justice.gov/opa/pr/goldman-sachs-charged-foreign-bribery-case-and-agrees-pay-over-29-billion (DPA, FCPA); *In re JPMorgan Chase & Co.*(29 September 2020), https://www.justice.gov/opa/pr/jpmorgan-chase-co-agrees-pay-920-million-connection-schemes-defraud-precious-metals-and-us (DPA, spoofing); *In re Bank Hapoalim B.M.* (30 April 2020), https://www.justice.gov/opa/press-release/file/1275081/download (DPA, money laundering); *In re Wells Fargo* (21 February 2020), https://www.justice.gov/opa/press-release/file/1251346/download (DPA, criminal and civil sales practices); *In re Telefonaktiebolaget LM Ericsson* (6 December 2019), https://www.justice.gov/opa/press-release/file/1272151/download (DPA, FCPA); *In re Standard Chartered Bank* (9 April 2019), https://www.justice.gov/opa/press-release/file/1152801/download (DPA, IEEPA); *In re Legg Mason, Inc*. (4 June 2018), https://www.justice.gov/criminal-fraud/file/1072461/download (NPA, FCPA); *In re Credit Suisse* (24 May 2018), https://www.justice.gov/criminal-fraud/file/1079596/download (NPA, FCPA); *In re Las Vegas Sands Corp*. (17 January 2017), https://www.justice.gov/opa/press-release/file/929836/download (NPA, FCPA); *In re Gen. Cable Corp*. (22 December 2016), https://www.justice.gov/criminal-fraud/file/921801/download (NPA, FCPA); *In re JPMorgan Securities (Asia Pacific)* (17 November 2016), https://www.justice.gov/criminal-fraud/file/911356/download (NPA, FCPA); *In re IAP Worldwide Servs. Inc.* (16 June 2015), https://www.justice.gov/opa/file/478281/download (NPA, FCPA); *In re Dallas Airmotive, Inc.* (10 December 2014), https://www.justice.gov/file/181831/download (DPA, FCPA); *In re HSBC Holdings plc* (10 December 2012), https://www.justice.gov/sites/default/files/opa/legacy/2012/12/11/dpa-executed.pdf (DPA, IEEPA & TWEA); *In re ING Bank N.V.* (8 June 2012), https://www.sec.gov/Archives/edgar/data/1039765/000119312513120728/d501093dex45.htm (DPA, IEEPA & TWEA); *In re Wells Fargo Bank, N.A.* (8 December 2011), https://www.justice.gov/sites/default/files/atr/legacy/2011/12/08/278076a.pdf (NPA, anticompetitive conduct); *In re Tenaris S.A.* (17 May 2011), https://www.sec.gov/news/press/2011/2011-112-dpa.pdf (DPA, FCPA); *In re Barclays Bank PLC* (16 August 2010), www.federalreserve.gov/newsevents/press/enforcement/enf20100818b1.pdf (DPA, IEEPA & TWEA); *In re ABN AMRO Bank N.V.* (9 May 2010), https://www.justice.gov/opa/pr/former-abn-amro-bank-nv-agrees-forfeit-500-million-connection-conspiracy-defraud-united (DPA, IEEPA & TWEA); *In re Wachovia Bank, N.A*. (16 March 2010), https://www.sec.gov/litigation/complaints/2011/comp22183.pdf (DPA, money laundering).

35 See Justice Manual § 9-28.1100, Principles of Federal Prosecution of Business Organizations, Collateral Consequences (updated July 2020) ('[W]here the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designated, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other.'); see also Mary Jo White, SEC Chair, Speech at the New York City Bar Association's Third Annual White Collar Crime Institute: Three Key Pressure Points in the Current Enforcement Environment (19 May 2014), https://www.sec.gov/news/speech/2014-spch051914mjw.html ('[S]ome have questioned whether it is appropriate for prosecutors to consider the consequences – direct and collateral – when they make a decision whether to indict a company. Of course they should; we want their decision to be thoughtful and in the public interest. And the DOJ's Principles of Federal Prosecutions of Business Organizations indeed require them to weigh the collateral consequences of a corporate indictment among a number of other factors.').

recent years there have been some high-profile corporate guilty pleas, there is no indication yet that these guilty pleas will overtake NPAs and DPAs as prosecutors' primary settlement mechanism.[36]

The DOJ commonly uses both forms of agreement to resolve investigations concerning, among other things, fraud, the Foreign Corrupt Practices Act,[37] the False Claims Act,[38] the Bank Secrecy Act[39] and antitrust laws.

In an NPA, no criminal charges are filed against the company. As a result, an NPA need not be made public unless prosecutors seek to publicise the results of the investigation or the company is itself required to disclose the agreement. A DPA differs in that the government brings criminal charges against the company, which it agrees to dismiss at the end of a specified period if the company complies with the DPA's terms. Because a DPA is filed with the court, it becomes a public document. Consequently, unlike an NPA, over which the government has full discretion to adopt terms and conditions, a DPA may be subject to some level of judicial review pursuant to the Speedy Trial Act. Because a DPA involves the filing of an information or indictment, the Speedy Trial Act requires trial to start within 70 days.[40] However, the Speedy Trial Act allows this 70-day period to be tolled with the 'approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct'.[41] Although this provision suggests that courts have a role in overseeing DPAs, judges have historically been relatively deferential to the government in approving them.[42]

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36 Although there is no standard form or precedent for these agreements, most prosecutorial settlement agreements include some or all of the following provisions: (1) a statement of facts describing illegal acts and/or an admission of wrongdoing; (2) an agreement that the company, its employees and its agents will not publicly contradict the statement of facts; (3) co-operation with the government for the duration of the agreement, including the provision of documents and efforts to secure employee testimony; (4) some form of remedial action, including terminating or disciplining culpable employees, implementing revised internal controls and procedures, and/or, in some cases, appointing an independent compliance monitor; (5) fines and penalties; (6) obligations to report future violations of law; and (7) an acknowledgement that the government has the sole discretion to determine whether the agreement has been breached. For both an NPA and a DPA, because the company has generally admitted to the conduct at issue, if a company is indicted upon breach of the agreement, conviction is almost certain.

37 15 U.S.C. §§ 78dd-1 et seq.

38 31 U.S.C. §§ 3729–3733.

39 31 U.S.C. §§ 5311–5330.

40 See 18 U.S.C. § 3161(c)(1); see also Justice Manual: Criminal Resource Manual § 628, Speedy Trial Act of 1974 (updated 22 January 2020).

41 18 U.S.C. § 3161(h)(2).

42 Cf. *In re Flynn*, 961 F.3d 1215, 1220 (D.C. Cir. 2020), *reh'g en banc granted, order vacated.* No. 20-5143, 2020 WL 4355389 (D.C. Cir. 30 July 2020) and *on reh'g en banc*. 973 F.3d 74 (D.C. Cir. 2020) ('Although Rule 48 requires "leave of court" before dismissing charges, "decisions to dismiss pending criminal charges – no less than decisions to initiate charges and to identify which charges to bring – lie squarely within the ken of prosecutorial discretion."' (quoting *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016); *In re Flynn*, 973 F.3d 74, 82 (D.C. Cir. 2020) (Nothing in this decision forecloses the possibility of future mandamus relief should the District Court's disposition . . . violate the separation of powers or some other clear and indisputable right).

Two decisions from the Courts of Appeals for the District of Columbia and Second Circuits confirm that the long-standing practice of limited judicial oversight over consensual enforcement settlements is the favoured approach. In each case, the district court refused to approve a settlement that the court deemed too lenient, and was reversed by the Court of Appeals on the grounds that the trial court's discretion in such circumstances is quite limited. In April 2016, in *United States v. Fokker Services BV*,[43] the DC Circuit Court of Appeals issued a writ of *mandamus* and vacated a decision by District Judge Richard Leon that rejected as too lenient a proposed DPA between the DOJ and Fokker Services. The Court of Appeals reasoned that 'the court's withholding of approval would amount to a substantial and unwarranted intrusion on the Executive Branch's fundamental prerogatives'.[44] Similarly, in June 2014, the Second Circuit issued a decision in *SEC v. Citigroup Global Markets*,[45] calling into question the appropriateness of judicial scrutiny of consensual settlements with the SEC. In a decision that reversed a notable opinion written by District Judge Jed Rakoff criticising an SEC settlement with Citigroup as insufficient, the Second Circuit made clear that courts must afford the SEC's policy judgements 'significant deference', including whether, when and how to resolve enforcement proceedings.[46] Under *Citigroup*, a district court's review of a settlement agreement is narrow and limited. Subsequent cases have added glosses to the *Citigroup* holding, with some district courts exerting discretion over certain aspects of settlement agreements,[47] including the selection of an independent monitor.[48] Notably, the Second Circuit, in *United States v. HSBC Bank*,[49] overturned a district court's decision to unseal a monitor's report and found that the district court erred in invoking its supervisory authority over a DPA.

Despite the reversals, the district courts' criticisms are broadly consistent with those expressed in recent years by a number of federal judges who have hesitated before ultimately approving DPAs and other similar government settlements. In those other instances, the courts' criticisms commonly have included assertions that those settlements lacked (1) a large enough penalty amount[50] (relatedly, there

43 818 F.3d 733, 747 (D.C. Cir. 2016), vacating 79 F. Supp. 3d 160 (D.D.C. 2015).

44 Id. at 744.

45 752 F.3d 285 (2d Cir. 2014).

46 Id. at 296–97.

47 See, e.g., *US Securities and Exchange Commission v. Aronson*, 665 F. App'x 78, 80 (2d Cir. 2016), (holding that the district court did not abuse its discretion in ordering briefing on an issue before a related criminal case was completed, even though the consent decree provided that the parties would propose a briefing schedule after the completion of the criminal case).

48 See *US Commodity Futures Trading Commission v. Deutsche Bank AG*, 2016 WL 6135664, at *1–3 (S.D.N.Y. 20 October 2016) (holding that it was proper for the court to select an independent monitor, when the parties' proposed monitors were inadequate).

49 863 F.3d 125 (2d Cir. 2017).

50 See *US v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 31 (D.D.C. 2015) ('An agreement that contained neither punitive measures (such as fines) nor requirements designed to deter future criminality (such as compliance programs and independent monitors) could not be said to be designed to secure a defendant's reformation and should be rejected. Even an agreement that contained some of these

is concern that companies will begin to view monetary penalties merely as 'a cost of doing business'[51]), (2) admissions of wrongdoing by the company,[52] (3) charges against the individuals who were responsible for the offence,[53] (4) sufficient factual detail for the judge to evaluate the agreement,[54] (5) sufficient remedial obligations for the company[55] and (6) sufficient reporting to the court about the company's compliance with the agreement.[56]

In the years after the 2008–2009 financial crisis, perhaps as a result of political and public pressure,[57] including such public criticism of DPAs from the federal courts, there was an uptick in guilty pleas to resolve criminal actions.[58] The major

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elements could be ineffective if the obligations were found to be so vague or minimal as to render them a sham.'); Order Approving Deferred Prosecution Agreement at 2, *United States v. Transp. Logistics Int'l, Inc.*, No. 8:18-cr-00011-TDC, ECF No. 10 (D. Md. 2 April 2018) (commenting that the DPA required 'a criminal penalty that is less than 10 percent of the amount contemplated by the Sentencing Guidelines' and thus risks providing 'insufficient deterrence to companies').

51 See, e.g., Brett Wolf, 'U.S. Warns Banks It May Revoke Some Money-Laundering Settlements', Reuters (15 March 2015), http://www.reuters.com/article/us-banks-moneylaundering-idUSKBN0MC1ZE20150316 (quoting Assistant Attorney General Caldwell as saying 'We don't want DPAs and NPAs to be perceived as a cost of doing business'); Peter J Henning, 'Guilty Pleas and Heavy Fines Seem to Be Cost of Business for Wall St.', *The New York Times* (20 May 2015), https://www.nytimes.com/2015/05/21/business/dealbook/guilty-pleas-and-heavy-fines-seem-to-be-cost-of-business-for-wall-st.html?_r=0 ('Banks appear willing to plead guilty as long as the collateral costs are not too heavy. Thus, the potency of a criminal conviction as a deterrent seems to have been dissipated, perhaps to the point that it is just another business expense.').

52 See, e.g., *S.E.C. v. CR Intrinsic Investors, LLC*, 939 F. Supp. 2d 431, 436–39 (S.D.N.Y. 2013) (discussing concerns about allowing 'neither admit nor deny' provisions in a consent judgment).

53 See *Saena Tech Corp.*, 140 F. Supp 3d at 35–36 (discussing potential concerns with a DPA that effectively immunised an individual).

54 Cf. *US Securities and Exchange Commission v. Mulvaney*, 2012 WL 12930425, at *1 (E.D. Wis. 20 November 2012) (granting consent decree only after ordering further briefing on its factual basis).

55 See *Saena Tech Corp.*, 140 F. Supp. 3d at 31 (discussing the necessity of sufficient deterrent effects); Transcript of Arraignment at 8, *United States v. US Bancorp*, No. 18-CR-150, ECF No. 9 (S.D.N.Y. 22 February 2018) (statement by the court that 'both the interests of deterrence and the interests of just punishment are better served in all or most cases by prosecution of the individuals responsible' and that '[i]f you really want to deter, the way to do it is to make the individuals pay the price for the crimes.').

56 Cf. *US v. HSBC Bank USA, N.A.*, 2013 WL 3306161, at *11 (E.D.N.Y. 1 July 2013) (ordering the parties to file quarterly reports and stating that it will 'notify the parties if, in its view, hearings or other appearances are necessary or appropriate').

57 See, e.g., Danielle Douglas, 'Holder Concerned Megabanks Too Big to Jail', *The Washington Post* (6 March 2013), https://www.washingtonpost.com/business/economy/holder-concerned-megabanks-too-big-to-jail/2013/03/06/6fa2b07a-869e-11e2-999e-5f8e0410cb9d_story.html; Jed S Rakoff, 'The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?', *The New York Review of Books* (9 January 2014), https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/.

58 In May 2015, Citicorp, JPMorgan Chase & Co., Barclays PLC, Royal Bank of Scotland and UBS all pleaded guilty to felony charges for conspiring to manipulate foreign exchange benchmark rates. DOJ, Press Release, Five Major Banks Agree to Parent-Level Guilty Pleas (20 May 2015), https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas; see also Hapoalim (Switzerland) Ltd., Plea Agreement, 20-cr-00262-MKV, ECF No. 5 (S.D.N.Y. 30 April 2020), https://www.justice.gov/opa/pr/israel-s-largest-bank-bank-hapoalim-admits-conspiring-us-taxpayers-

difference between a guilty plea and an NPA or DPA is that a guilty plea results in a conviction, which generally comes with harsher collateral regulatory consequences and more significant reputational harm. Such risks for a corporation are significant, especially in a heavily regulated industry – the ramifications can be wide-ranging and unclear.

See Section 24.5.3

Regulatory settlements: consent orders and civil NPAs and DPAs 24.4.2

Companies under investigation by federal and state regulators whose enforcement mechanisms are administrative or civil may resolve an investigation by voluntarily entering into a consent order where an institution typically consents to the issuance of a cease-and-desist order or the assessment of a civil monetary penalty, or both. A consent order, like a cease-and-desist order or a civil monetary penalty assessment, is a formal enforcement action; it is a public document and, although it may not always be filed, its terms are enforceable in court. Consent orders often vary in the level of detail they provide concerning the wrongdoing, although they are often less detailed than a criminal settlement. A consent cease-and-desist order may oblige the company to undertake remedial measures to correct misconduct and ensure future compliance. The term of the order is usually indefinite. A consent civil monetary penalty assessment merely obliges the institution to pay a penalty, and the order's terms are fully satisfied by the payment.

Previously, NPAs and DPAs were the exclusive domain of the DOJ, but the SEC,[59] CFTC[60] and state prosecutors[61] have also adopted their use to resolve cer-

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hide-assets-and-income#:~:text=Bank%20Hapoalim%20(Switzerland)%20Pleads%20Guilty,the%20United%20States%2C%20Richard%20E; GA Société Générale Acceptance, Plea Agreement, 18-cr-274 (E.D.N.Y. 5 June 2018), https://www.justice.gov/criminal-fraud/file/1072441/download; Rabobank, Plea Agreement, 18-cr-0614 (7 February 2018), https://www.justice.gov/opa/press-release/file/1032101/download; DB Group Servs. Plea Agreement, 3:15CR62 (D. Conn. 23 April 2015), https://www.justice.gov/file/628871/download; BNP Paribas S.A. Order to Cease and Desist (Fed. Reserve Sys. 30 June 2014), https://www.federalreserve.gov/newsevents/press/enforcement/enf20140630a1.pdf; Credit Suisse AG Plea Agreement, 1:14-cr-00188 (E.D. Va. 19 May 2014), https://www.justice.gov/iso/opa/resources/6862014519191516948022.pdf.

59 See SEC, Press Release, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (13 January 2010), http://www.sec.gov/news/press/2010/2010-6.htm (announcing Cooperation Initiative, including co-operation agreements, DPAs and NPAs); SEC, Office of Chief Counsel, Enforcement Manual § 6.2.2, Deferred Prosecution Agreements (28 November 2017); SEC, Office of Chief Counsel, Enforcement Manual § 6.2.3, Non-Prosecution Agreements (28 November 2017); Andrew Ceresney, Director, SEC Division of Enforcement, Remarks at University of Texas School of Law's Government Enforcement Institute: The SEC's Cooperation Program: Reflections on Five Years of Experience (13 March 2015), https://www.sec.gov/news/speech/sec-cooperation-program.html; Enforcement Cooperation Program, SEC (16 February 2016), https://www.sec.gov/spotlight/enfcoopinitiative.shtml.

60 See CFTC, Division of Enforcement, Enforcement Manual § 7.2, Cooperation Tools (20 May 2020), https://www.cftc.gov/media/1966/The%2520CFTC%2520Division%2520of%2520Enforcement%2520-%2520Enforcement%2520Manual/download.

61 See Memorandum from Daniel R Alonso, Chief Assistant District Attorney, District Attorney of the County of New York, Considerations in Charging Organizations § II.1 (27 May 2010), https://www.manhattanda.org/wp-content/themes/dany/files/Considerations%20in%20Charging

tain securities law violations. Some have adopted NPAs and DPAs that are similar to their federal criminal counterparts'. For example, the SEC, which is responsible for civil enforcement and administrative actions to enforce the securities laws,[62] has begun to use NPAs and DPAs to resolve cases 'where an entity or person has engaged in misconduct and where the co-operation is extraordinary, but the circumstances call for a measure of accountability'.[63] NPAs and DPAs, however, remain relatively uncommon for civil enforcement actions by the SEC.[64]

24.5 Key settlement terms

Whether negotiating a settlement agreement in the criminal or regulatory context, many common principles come into play. To facilitate a successful negotiation, a company must have a comprehensive understanding of (1) benchmark terms for historical settlements regarding similar misconduct, (2) those terms that are most significant to the company and (3) any distinguishing factors in the matter at issue that encourage terms less severe than the benchmarks.

%20Organizations.pdf ('In certain circumstances, it may be appropriate to enter into a deferred prosecution agreement ("DPA") or non-prosecution agreement ("NPA") with an organization.').

62 See SEC, How Investigations Work (modified 27 January 2017), https://www.sec.gov/News/Article/Detail/Article/1356125787012; Mary Jo White, SEC Chair, Speech, 'All-Encompassing Enforcement: The Robust Use of Civil and Criminal Markets to Police the Markets' (31 March 2014), https://www.sec.gov/News/Speech/Detail/Speech/1370541342996.

63 Andrew Ceresney, Director, SEC Division of Enforcement, Remarks at University of Texas School of Law's Government Enforcement Institute, The SEC's Cooperation Program: Reflections on Five Years of Experience (13 March 2015), https://www.sec.gov/news/speech/sec-cooperation-program.html.

64 Id. ('[T]hey have been a relatively limited part of our practice. I think this is appropriate and should continue to be the case.'); see also SEC, Office of Chief Counsel, Enforcement Manual § 6.2.3, Non-Prosecution Agreements (28 November 2017) ('A non-prosecution agreement is a written agreement . . . entered in limited and appropriate circumstances.'). From 2017 to 2019, the SEC did not enter into any NPAs or DPAs. See 2019 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements (8 January 2020), https://www.gibsondunn.com/2019-year-end-npa-dpa-update/#_ednref8 ('The SEC has not entered into any NPAs or DPAs in 2019.'); 2018 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs) (10 July 2018), https://www.gibsondunn.com/2018-mid-year-npa-dpa-update/ ('[A]s in 2017, the SEC has not entered into any NPAs or DPAs in 2018.').

Monetary penalties 24.5.1

Nearly all corporate settlements with US authorities include some form of monetary penalty. The form largely depends on the regulator and its practices.[65] Typically, monetary penalties in regulatory settlements consist of a civil monetary penalty. Disgorgement of profits or restitution to harmed parties may also be required.[66]

Generally, the factors that US authorities consider in determining monetary penalties mirror those used to determine whether to bring charges against the corporation in the first place, including the nature of the offence, the company's timely and voluntary disclosure of wrongdoing, and the company's remedial actions. The SEC considers two principal factors in determining monetary penalties: the presence or absence of a direct and material benefit to the corporation itself as a result of the violation and the degree to which the penalty will recompense or further harm the injured shareholders.[67] The SEC will also consider factors such as deterring the conduct, the extent of the injury, any complicity on the part of the corporation, the intent of the individuals committing the wrong, the difficulty in detecting that particular type of wrongdoing, any remedial steps taken by the corporation and the extent of its co-operation.[68]

65 The SEC's monetary fines generally fall into three categories: (1) monetary penalties, (2) disgorgement with prejudgment interest and (3) monetary relief for harmed investors. See, e.g., Securities Enforcement Empirical Database and Cornerstone Research, SEC Enforcement Activity Against Public Company and Subsidiaries, https://www.law.nyu.edu/centers/pollackcenterlawbusiness/seed/research (last visited 31 October 2020) (collecting reports on SEC actions initiated against public companies traded on major US exchanges and their subsidiaries from 2010 to 2019).

66 Forfeiture, the seizure of assets that comprised the proceeds of the wrongdoing, or were used to facilitate it, is rarely used in regulatory actions against business entities even when available, because the government is generally reluctant to seize property related to an ongoing business. See Justice Manual § 9-111.124, Business Seizures (updated January 2020) ('Due to the complexities of seizing an ongoing business and the potential for substantial losses from such a seizure, a United States Attorney's Office must consult with the [Money Laundering and Asset Recovery Section] prior to initiating a forfeiture action against, or seeking the seizure of, or moving to restrain an ongoing business.'). Notably, however, the DOJ announced in May 2020 that it had recovered more than US$49 million in forfeited assets in connection with 1Malaysia Development Berhad (1MDB). DOJ, Press Release, United States Reaches Settlement to Recover More Than $49 Million Involving Malaysian Sovereign Wealth Fund (6 May 2020), https://www.justice.gov/opa/pr/united-states-reaches-settlement-recover-more-49-million-involving-malaysian-sovereign-wealth. Restitution, the compensation of individuals harmed by illegal conduct, is also rarely a part of any settlement. In particularly complex cases involving many different classes of individuals that may have been harmed, calculation of restitution may be especially difficult, and a corporation may find the government amenable to not seeking restitution in its settlement, with the understanding that compensation of harmed individuals is more efficiently and accurately handled through related civil litigation. See 18 U.S.C. § 3663A(c)(3).

67 SEC Release No. 2006-4, Statement of the Securities and Exchange Commission Concerning Financial Penalties (4 January 2006), https://www.sec.gov/news/press/2006-4.htm.

68 Id.

While settlement values generally increased between 2010 and 2015, this trend ended in 2016, but there is some indication that settlement values may be increasing again, at least with respect to DOJ actions. For example, from 2010 to 2015, the total criminal fines and penalties assessed by the DOJ's Antitrust Division increased an entire order of magnitude, from US$555 million in 2010 to US$2 billion in 2015.[69] The total decreased to US$399 million in fiscal year 2016 and to US$67 million in 2017.[70] Since then the total has been trending upwards to US$172 million in fiscal year 2018 and US$365 million in fiscal year 2019.[71] In fiscal year 2018, the DOJ collected more than US$2.8 billion in settlements and judgments from civil cases involving fraud and false claims against the government – the lowest recovery total since 2009.[72] This increased slightly in fiscal year 2019 to over US$3 billion, bringing total recoveries since 1986 to more than US$62 billion.[73]

The SEC has continued its use of 'aggressive' monetary penalties in a trend that appears to be continuing.[74] Whereas a record-setting penalty in 2002 reached a mere US$10 million, the mean payment for certain cases between 2010 and 2013 was over US$50 million.[75] Three of the top 10 monetary settlements imposed in public company-related actions were imposed in 2016.[76] These include a US$415 million action against Merrill Lynch and a US$267 million action against JP Morgan wealth management subsidiaries. Up to October 2016, SEC enforcement settlements related to misconduct leading to or arising from

69 DOJ, Total Criminal Fines and Penalties (updated 28 September 2020), https://www.justice.gov/atr/total-criminal-fines.

70 Id.

71 Id.

72 DOJ, Press Release, Justice Department Recovers Over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018 (21 December 2018), https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018.

73 DOJ, Press Release, Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019 (9 January 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019.

74 SEC Enforcement Activity Against Public Companies and Their Subsidiaries, Cornerstone Research (2019), https://www.cornerstone.com/Publications/Reports/SEC-Enforcement-Activity-FY-2019-Update ('Monetary settlements . . .totaled $1.5 billion in FY 2019, consistent with both the average and median of the total monetary settlements from FY 2010 through FY 2018 of $1.5 billion.'). Other regulatory agencies have taken a similar approach. For example, in FY 2019, the CFTC collected more than US$1.3 billion in total monetary relief, a 39 per cent increase on FY 2018 and the fourth-highest total in CFTC history. CFTC, CFTC Division of Enforcement Issues Annual Report for FY 2019 (25 November 2019), https://cftc.gov/PressRoom/PressReleases/8085-19.

75 Sonia A Steinway, Comment, SEC 'Monetary Penalties Speak Very Loudly,' But What Do They Say? A Critical Analysis of the SEC's New Enforcement Approach, 124 *Yale L.J.* 209 (October 2014) (analysing SEC trends in monetary penalties).

76 SEC Enforcement Activity Against Public Companies and Their Subsidiaries: Fiscal Year 2016 Update, Cornerstone Research (2016), https://www.cornerstone.com/Publications/Reports/SEC-Enforcement-Activity-Against-Public-Company-Defendants-2016.

the financial crisis exceeded US$3.76 billion for the 204 entities and individuals charged.[77]

In June 2017, the US Supreme Court issued a seemingly consequential decision that could have diminished the SEC's leverage in settlement negotiations. In *Kokesh v. SEC*,[78] the Supreme Court held that a five-year statute of limitations applies to SEC enforcement actions seeking disgorgement.[79] Looking at the numbers alone, *Kokesh* does not seem to have greatly affected disgorgement in SEC enforcement actions. Disgorgement recoveries increased from US$2.8 billion in FY 2016 to US$3 billion in FY 2017, before dipping to US$2.5 billion in FY 2018.[80] In FY 2019, however, disgorgement recoveries increased to US$3.2 billion.[81] Nevertheless, the SEC has stated that '[t]he *Kokesh* decision has had a significant impact, as many securities frauds are complex, well-concealed, and are not discovered until investors have been victimized over many years', and estimates that 'the *Kokesh* ruling has caused the Commission to forgo approximately $1.1 billion dollars in disgorgement in filed cases'. *Kokesh* also raised the question of whether the Court would, in fact, recognise disgorgement as an available remedy in SEC enforcement proceedings.[82] In June 2020, the Court addressed this issue in *Liu v. SEC*,[83] upholding the use of disgorgement by the SEC so long

77 SEC, SEC Enforcement Actions: Addressing Misconduct That Led To or Arose From the Financial Crisis, key statistics (modified 15 July 2019), www.sec.gov/spotlight/enf-actions-fc.shtml (summarising all settlements resulting from the financial crisis up to 7 October 2016). Other regulatory agencies followed suit, with the CFTC enforcing a record US$3.144 billion in civil monetary penalties and US$59 million in restitution and disgorgement in 2015. Between 2010 and 2014, the New York Department of Financial Services (NYDFS) issued monetary penalties totalling nearly US$6 billion. Completed mainly through consent orders, NYDFS's most notable settlements include a US$600 million penalty against Deutsche Bank and a US$2.243 billion penalty against BNP Paribas, which eventually pleaded guilty to criminal charges and paid a total of US$8.9 billion to resolve the numerous investigations.

78 137 S. Ct. 1635 (2017).

79 Id. at 1645. Prior to this ruling, the SEC relied disproportionately on disgorgement penalties. In 2015, the SEC obtained US$3 billion in disgorgement payments and US$1.2 billion in other civil monetary penalties. See SEC, 'Select SEC & Market Data: Fiscal 2015' (2016), https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2015.pdf. In FY 2016, the SEC obtained US$2.8 billion in disgorgement payments and US$1.3 billion in other civil monetary penalties. See SEC, Division of Enforcement, Annual Report: A Look Back at Fiscal Year 2017 (15 November 2017), https://www.sec.gov/files/enforcement-annual-report-2017.pdf. In FY 2017, the disproportionality was more stark, with US$3 billion in disgorgement payments and US$832 million in other civil monetary penalties. Id.

80 See SEC, Division of Enforcement, 2018 Annual Report at 11 (2 November 2018), https://www.sec.gov/files/enforcement-annual-report-2018.pdf.

81 See SEC, Division of Enforcement, 2019 Annual Report at 16 (6 November 2019), https://www.sec.gov/files/enforcement-annual-report-2019.pdf.

82 Id. at 1642, n. 3 ('Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context. The sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462's limitations period.').

83 140 S. Ct. 1936 (2020).

as a disgorgement award 'does not exceed a wrongdoer's net profits'.[84] The impact of *Liu* remains to be seen.

The DOJ announced in 2019 a written policy formalising how the Criminal Division should consider a company's argument that it is financially unable to pay an otherwise appropriate penalty.[85] Under the policy, which aims to promote transparency around corporate penalties, the parties must first agree on the form of a corporate criminal resolution and the otherwise appropriate monetary penalty in the absence of the inability-to-pay considerations. The company must then complete an 11-point questionnaire, which requires the disclosure of, among other things, cash-flow projections, federal income tax returns for the past five years, operating budgets, acquisition or divestiture plans, encumbered assets and payments to the business's highest-earning executives.[86] DOJ lawyers are then directed to consider that information in light of statutory sentencing factors, the US Sentencing Guidelines, and the Justice Manual's principles regarding the consideration of collateral consequences in resolving a corporate criminal case.[87]

See Chapter 26 on fines, disgorgement, etc.

24.5.2 Continuing obligations

In addition to monetary penalties, settlement agreements will often include other continuing obligations. In particular, settlement agreements almost always contain language stating that the company will commit to undertake remedial efforts, such as the enhancement of its compliance programmes or an obligation to report potential violations of law in the future. To ensure ongoing compliance and satisfactory remedial efforts, government agencies may require the use of corporate monitors to keep corporations accountable.

A potentially substantial obligation in corporate settlements is the imposition of a monitor to oversee a company's compliance with a settlement agreement and report back to the government on the company's progress. The requirement of an independent monitor was common for DPAs and NPAs, but self-monitoring and reporting became more standard in settlement agreements. Recently, there appears to be a resurgence of the imposition of outside monitors. As at October 2020, the DOJ Fraud Section had three active monitors appointed in 2017, one active monitor in 2018, four active monitors in 2019 and one active monitor in 2020.[88] In

See Chapter 33 on monitorships

84 Id. at 1940.

85 Memorandum from Brian A Benczkowski, Assistant Att'y Gen., US Dep't of Justice, Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty (8 October 2019), https://www.justice.gov/opa/speech/file/1207576/download.

86 Id. at Attachment A.

87 Id. at 1.

88 In April 2020, the DOJ published for the first time a list identifying all active corporate monitors by companies as part of criminal resolutions. See Dep't of Justice, List of Independent Compliance Monitors for Active Fraud Section Monitorships, https://www.justice.gov/criminal-fraud/strategy-policy-and-training-unit/monitorships.

an attempt at greater transparency, the DOJ issued guidance in October 2018 for the selection of monitors in criminal matters.[89]

Monitorships, which may last for a number of years, are a financial and functional burden on a company. Monitorships can be draining in terms of the cost of retaining the monitor itself, the costs required to implement recommended reforms, the cost of staffing and maintaining an internal team to work closely with the monitor and the disruption to the company's business and management. Another important consideration when contemplating a monitorship as a term of settlement is that monitors are generally given broad access to the corporation's files, outside the protection of an attorney–client relationship. This lack of attorney–client relationship can pose a risk of further legal exposure for the company. Given that a monitor is tasked with reviewing the corporation's practices, and reporting the findings of the review to relevant authorities, it is possible that the monitor will identify and be obliged to disclose additional violations of law to relevant authorities. In addition, once a monitor's reports are submitted to the relevant authorities, those reports and any documents contained in them can be subject to Freedom of Information Act requests, which may create additional exposure in follow-on civil litigation.[90]

Given the substantial expense and disruption caused by a monitorship, it is in a corporation's interest to try and avoid the imposition of a monitor – especially in instances where corporate culpability is relatively low and the company has already undertaken substantial remedial efforts. The most effective way for a company to avoid the imposition of a monitor continues to be to voluntarily report its misconduct, to co-operate fully with the government's resulting investigation and to demonstrate to the government that the company has already undertaken a comprehensive remediation plan. Where a monitor is imposed, a corporation can mitigate the disruption by negotiating the monitor's duration of assignment, scope of responsibility, decision-making capacity and accessibility to corporate files.

89 Brian A. Benczkowski, Memorandum from the US Dep't of Justice on Selection of Monitors in Criminal Division Matters (11 October 2018), https://www.justice.gov/opa/speech/file/1100531/download. The memorandum instructs DOJ attorneys to consider, among other factors, '(a) whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems; (b) whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management; (c) whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and (d) whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future'. Id. at 2.

90 See *100Reporters LLC v. United States Dep't of Justice*, 316 F. Supp. 3d 124 (D.D.C. 2018) (holding that the DOJ's attempts to withhold parts of a monitor's report under FOIA Exemptions 4, 5, 6 and 7(C) were overly broad).

24.5.3 Collateral consequences

A criminal or regulatory settlement can also trigger a number of collateral consequences, which can vary depending on the types of violations the settlement covers and the industry of the affected entity. For example, a guilty plea for a bank could mean the loss of its financial holding company status and federal deposit insurance, the appointment of a receiver or conservator, and, for foreign banks, the potential termination of offices in the United States. A guilty plea for a broker-dealer could mean automatic loss of broker-dealer registration, a bar from acting as a registered investment adviser, and revocation of its status as a well-known seasoned issuer. A guilty plea for a corporation could also result in, among other things, disqualification from membership of certain self-regulatory organisations, a temporary or permanent bar from participation in federal procurement contracts (debarment), or loss of state licences. Compounding these difficulties, many of the collateral consequences that arise upon conviction travel within a corporation's legal structure, so that even regulated businesses that were not involved in the offence can be subject to licence revocations, loss of securities law safe harbours and other consequences.

Corporations may need to seek waivers or exemptions from multiple regulators including the SEC, the CFTC, the Federal Reserve, the Department of Labor and the Financial Industry Regulatory Authority to allow them to continue engaging in the affected business activities, a process that should be planned well in advance of settlement. Each regulator may have more than one relevant exemption.[91] The company will therefore need to assess the relevant regulations for each authority that oversees the company's activities. The permutations of collateral consequences are many and depend on the form of the settlement (e.g., DPA, NPA, guilty plea, conviction or consent order)[92] or even the nature of the offence.[93] In addition to

91 The SEC has many, including: (1) status as a well-known seasoned issuer (WKSI); (2) status under § 9(a) of the 1940 Act as an investment adviser, depositor or principal underwriter of registered investment companies; and (3) exemptions from certain capital-raising restrictions, under Regulations A and D. See also generally Richard A. Rosen and David S. Huntington, 'Waivers from the Automatic Disqualification Provisions of the Federal Securities Laws', *29:8 Insights: The Corp. & Sec. Law Advisor* at 2 (8 August 2015) (cataloguing various SEC waivers).

92 Naturally, criminal convictions have much more severe consequences than a DPA, NPA or administrative consent order. For instance, Section 9(a) of the Investment Company Act of 1940 automatically bars an entity from acting as investment adviser or providing certain other services to registered investment companies if that entity or an affiliated entity has been convicted within the past ten years of any felony or misdemeanour arising out of the conduct of the business of a bank. 15 U.S.C. § 80a-9(a)(1).

93 For example, under the Commodities Exchange Act, an entity may be disqualified from registration under the Act if the entity has been found to have committed some kind of fraud by a settlement agreement with any federal or state agency. 7 U.S.C. § 12a(2), (3); see also CFTC, No Action and Interpretation, Letter No. 12-70 (31 December 2012), www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/12-70.pdf. The SEC has a policy of not enforcing the disqualifications under Section 206(4) of the Investment Advisers Act for administrative (but not civil) orders. See SEC, No-Action Letter, Dougherty & Co., 2003 WL 22204509 (3 July 2003).

automatic disqualifications, there is a wide array of discretionary actions available to regulators for which waivers or exemptions could be sought.[94]

The method of receiving a waiver or exemption from these collateral consequences depends on the agency. For the SEC, a corporation requests an exemption from the SEC Staff, which can either make a recommendation to the Commission or act directly on the application with delegated authority from the Commission.[95] The SEC generally grants a waiver under a finding of 'good cause'.[96] In contrast, the Department of Labor, in granting exemptions for qualified professional asset manager status, engages in a formal rule-making process, including a public notice and comment period.[97] The Federal Reserve, which can take a range of discretionary actions, generally engages in a more informal regulatory-relations dialogue when considering the collateral consequences of a significant settlement.

Timing is critical for the waiver process, because a company will need to ensure that there is no gap in its licences and statuses. Complicating matters, regulators often take different views as to when statutory disqualifications based on convictions or settlements commence. The SEC views 'conviction' as entry into a guilty plea, so any relevant SEC waivers need to be lined up before then. In contrast, the Department of Labor says that conviction is at sentencing, which can take place well after the entry of the guilty plea. For this reason, sentencing after the entry of a guilty plea can be delayed for the purpose of obtaining the necessary exemption from the Department of Labor.[98]

In the wake of the 2008–2009 financial crisis, the granting of waivers in connection with corporate settlements has drawn criticism by some in the government and the media that enforcement agencies have been too lenient in releasing companies from the consequences of their settlements, particularly in the case of

94 For example, under Section 15(b)(4) of the Securities Exchange Act, the SEC has the discretion after a conviction to suspend or revoke the registration of a broker-dealer if it finds, after notice and comment, that it is in the public interest. See 15 U.S.C. § 78o(b)(4)(B).

95 In July 2019, SEC Chairman Jay Clayton announced that the Commission would allow companies to make offers of settlement contingent on the receipt of requested disqualification waivers. SEC Chairman Jay Clayton, Statement Regarding Offers of Settlement (3 July 2019), https://www.sec.gov/news/public-statement/clayton-statement-regarding-offers-settlement ('[A] settling entity can request that the Commission consider an offer of settlement that simultaneously addresses both the underlying enforcement action and any related collateral disqualifications.').

96 17 C.F.R. § 230.405, Ineligible Issuer § 2 ('An issuer shall not be an ineligible issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer.'); see also SEC, Div. of Corp. Fin., Revised Statement on Well-Known Seasoned Issuer Waivers (24 April 2014), www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp-031214.htm.

97 29 C.F.R. pt. 2570, subpt. B.

98 For example, in the set of plea agreements associated with manipulating foreign exchange benchmark rates, there was a term that the United States would support any motion or request to delay sentencing until the Department of Labor had issued a ruling on the request for exemption. Barclays Plea Agreement ¶ 12(e), Case No. 3:15-cr-00077, ECF No. 6 (D. Conn. 20 May 2015), https://www.justice.gov/file/440481/download; UBS Plea Agreement ¶ 28, Case No. 3:15-cr-00076, ECF No. 6 (D. Conn. 20 May 2015), https://www.justice.gov/file/440521/download.

companies that have been the subject of multiple enforcement actions.[99] These criticisms have continued, and there is every reason to believe that going forward the relevant agencies will require increasingly high showings by companies before agreeing to grant the necessary waivers.

24.5.4 Admissions and follow-on civil litigation

With increasing frequency, as a condition of settlement, government authorities are requiring corporations to make factual or legal admissions, or both. For example, prior to 2013, the SEC had a long-standing policy of settling cases without requiring admissions from defendants.[100] In June 2013, however, following public criticism, including in the wake of Judge Rakoff's denial of approval of the SEC's settlement with Citigroup, the Commission changed its policy 'by requiring admissions of misconduct in certain cases where heightened accountability and acceptance of responsibility by a defendant are appropriate and in the public interest'.[101] The SEC has defined these types of cases as including instances where (1) the violation of the securities laws involved particularly egregious conduct, (2) large numbers of investors were harmed, (3) the markets or investors were placed at significant risk, (4) the conduct obstructs the Commission's investigation, (5) an admission can send an important message to the markets or (6) the wrongdoer poses a particular future threat to investors or the markets.[102] Nevertheless, the SEC has also acknowledged that 'for reasons of efficiency and other benefits', including getting significant relief, eliminating litigation risk, returning money to victims expeditiously and conserving enforcement resources for other matters,

99 See, e.g., Letter from Office of Sen. Elizabeth Warren, Rigged Justice: 2016: How Weak Enforcement Lets Corporate Offenders Off Easy (January 2016), https://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf (describing major criminal and civil cases from 2015 in which report authors found government enforcement 'feeble' and insufficient to deter corporate crime); Kara M Stein, SEC Commissioner, Dissenting Statement in the Matter of the Royal Bank of Scotland Group, plc, Regarding Order Under Rule 405 of the Securities Act of 1933, Granting a Waiver from Being an Ineligible Issuer (28 April 2014), www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541670244 ('I fear that the Commission's action to waive our own automatic disqualification provisions arising from RBS's criminal misconduct may have enshrined a new policy – that some firms are just too big to bar.').

100 See SEC Release No. 33-337, Consent Decree in Judicial or Administrative Proceedings, 1972 WL 125351 (28 November 1972) (formally permitting respondent to avoid admitting or denying the allegations).

101 Andrew Ceresney, Director, SEC Division of Enforcement, Testimony on Oversight of the SEC's Division of Enforcement (19 March 2015), https://www.sec.gov/news/testimony/031915-test.html.

102 Id.; see also Mary Jo White, SEC Chair, Speech for the Council of Institutional Investors fall conference in Chicago, IL, 'Deploying the Full Enforcement Arsenal' (26 September 2013), https://www.sec.gov/News/Speech/Detail/Speech/1370539841202.

'most cases will continue to be resolved on a "neither admit nor deny" basis'.[103] Indeed, even under the new policy, admissions still appear to be infrequent.[104]

In addition to the reputational impact and collateral consequences that such admissions can impose on a corporation, admissions can expose a company to significant liability in follow-on civil litigation. Plaintiffs may be able to rely on factual or legal admissions in settlement agreements, including DPAs and NPAs, to support a complaint,[105] and may attempt to introduce them as evidence later.[106] A corporation will have a stronger argument that an administrative consent order does not represent an adjudication and cannot be relied on in a complaint although litigation on the issue has been met with mixed results.[107]

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103 Andrew Ceresney, Director, SEC Division of Enforcement, Testimony on Oversight of the SEC's Division of Enforcement (19 March 2015), https://www.sec.gov/news/testimony/031915-test.html.

104 See David Rosenfeld, Admissions in SEC Enforcement Cases: The Revolution That Wasn't, 103 Iowa L. Rev. 113, 129–31 (2017) (finding from an analysis of SEC enforcement actions '[s]ince the new [SEC admissions] policy was put in place and through February 15, 2017' that 'the SEC has obtained admissions in roughly 2.7% of the new standalone matters it has brought in the three full years that the policy has been in place' (footnotes omitted)).

105 E.g., *In re Veon Ltd. Sec. Litig.*, 2018 WL 4168958, at *1 (S.D.N.Y. 30 August 2018) ('Plaintiffs' complaint also relies heavily on a criminal complaint and Deferred Prosecution Agreement'); *Menaldi v. Och-Ziff Capital Mgmt. Grp. LLC*, 277 F. Supp. 3d 500, 509 (S.D.N.Y. 2017) ('The key difference between the factual allegations in the Old Complaint and those in the New Complaint is the level of detail regarding Och–Ziff's dubious dealings in Africa. Of great help are the DPA and the SEC Settlement, both of which are incorporated into the New Complaint.'); *7 W. 57th St. Realty Co., LLC v. Citigroup, Inc.*, 2015 WL 1514539, at *1 n.1 (S.D.N.Y. 31 March 2015), aff'd, 771 F. App'x 498 (2d Cir. 2019) ('[T]he Court has also considered documents that are incorporated into the Amended Complaint by reference, including non-prosecution and deferred prosecution agreements that certain Defendants entered into with the United States Department of Justice'); *Carpenters Pension Tr. Fund of St. Louis, St. Clair Shores Police & Fire Ret. Sys. v. Barclays PLC*, 56 F. Supp. 3d 549, 552 n.3 (S.D.N.Y. 2014) ('The Complaint incorporates by reference several investigative reports, including . . . the Statement of Facts accompanying the Non–Prosecution Agreement between Barclays and the United States Department of Justice'); *In re Fannie Mae 2008 Sec. Litig.*, 891 F. Supp. 2d 458, 471 (S.D.N.Y. 2012), aff'd, 525 F. App'x 16 (2d Cir. 2013) (noting that the amended complaint 'closely track[ed]' 'statements made in a Non-Prosecution Agreement . . . entered into with the SEC'); *Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447, 462 (S.D.N.Y. 2009) (finding that, although '[t]he Amended Complaint relie[d] completely on [the] Deferred Prosecution Agreements and the U.S. Senate's Subcommittee Report to tell the story of an alleged conspiracy', the amended complaint failed to satisfy the heightened pleading standards for fraud).

106 E.g., *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 4410008, at *5 (S.D.N.Y. 18 August 2016) (deferring a ruling on the admissibility of evidence concerning 'a voluntary settlement program' but suggesting the use of 'protective measures' such as limiting instructions to the jury and bifurcation of the punitive damages phase of trial); *In re Gen. Motors LLC Ignition Switch Litig.*, 2015 WL 7769524, at *2 (S.D.N.Y. 30 November 2015) (admitting consent decree as evidence 'not . . . to prove that New GM violated the Safety Act . . . but for other purposes that are plainly relevant').

107 For example, the Second Circuit has held that 'a consent judgment between a federal agency and a private corporation which is not the result of an actual adjudication of any of the issues . . . can not be used as evidence in subsequent litigation between that corporation and another party'. *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976); see also *Waterford Tp. Police & Fire Ret. Sys. v. Smithtown Bancorp, Inc.*, 2014 WL 3569338 (E.D.N.Y. 18 July 2014) (striking from

A corporation entering into a settlement agreement ideally should, to the extent possible, try to neither admit nor deny the charges, in which case the findings of the order are less likely to be able to be used against it.[108] In the event that a corporation is unable to do so, a company should strategically negotiate for narrowly tailored factual statements and flexible language to enable it to defend itself in follow-on civil litigation. In particular, admitting to a generalised violation of law may be less likely to have future adverse consequences than admission of a specific legal violation that shares elements of claims that could be brought in follow-on civil litigation. For example, a corporation could admit to various controls-based violations in a settlement with the SEC rather than admitting to securities fraud. Or, a corporation could admit to a violation that does not contain a *scienter* element or does not concede that anyone was harmed as a result – necessary elements for many private causes of action.

Furthermore, a corporation should be aware that settlement agreements that dictate that the corporation cannot contradict the findings of facts can restrict the corporation's positions in follow-on civil litigation.[109] Because any statement

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complaint references to consent agreements with the Federal Deposit Insurance Corporation and the New York Banking Department); *In re Rough Rice Commodity Litig.*, 2012 WL 473091, at *5 (N.D. Ill. 9 February 2012) ('Under *Lipsky* and its progeny, the findings of the CFTC in its Order are not a sufficient basis for a manipulation claim.'); *In re Platinum & Palladium Commodities Litig.*, 828 F. Supp. 2d 588 (S.D.N.Y. 13 September 2011) (striking from complaint references to CFTC's findings of fact contained in an administrative consent order). But see *In re Herbal Supplements Mktg. & Sales Practices Litig.*, 2017 WL 2215025, at *6 (N.D. Ill. 19 May 2017) (reading *Lipsky* narrowly and as 'nonbinding authority' with limited application to materials from the New York State Office of the Attorney General); *Tobia v. United Grp. of Cos., Inc.*, 2016 WL 5417824, at *3 (N.D.N.Y. 22 September 2016) (holding that while the SEC complaint and consent order are inadmissible to prove liability under *Lipsky*, the allegations and findings enumerated in the SEC complaint are not made inadmissible merely by virtue of their inclusion therein); *In re OSG Sec. Litig.*, 12 F. Supp. 3d 619, 621 (S.D.N.Y. 2014) ('*Lipsky* did not hold that a complaint may never reference allegations from a separate proceeding under any circumstances.') (collecting cases); *In re Bear Stearns Mortg. Pass-Through Certificates Litig.*, 851 F. Supp. 2d 746, 768 n.24 (S.D.N.Y. 2012) ('[S]ome courts in this district have stretched the holding in *Lipsky* to mean that any portion of a pleading that relies on unadjudicated allegations in another complaint is immaterial under Rule 12(f). Neither Circuit precedent nor logic supports such an absolute rule.') (citation omitted).

108 See, e.g., *J.P. Morgan Securities Inc. v. Vigilant Ins. Co.*, 126 A.D.3d 76 (N.Y. App. Div. 1st Dep't 2015) (holding the insurer could not rely on the 'Dishonest Acts Exclusion' of policies to avoid indemnification of US$160 million disgorgement and US$90 million civil penalties required by an SEC cease-and-desist order); *Polk v. KV Pharm. Co.*, 2011 WL 6257466, at *6 (E.D. Mo. 15 December 2011) ('Plaintiff points only to the Consent Decree entered into between Defendant and the FDA as the sole factual support for the claims asserted in his complaint. The Consent Decree contains no findings of fact and the Consent Decree clearly indicates that Defendant neither admits nor denies any of its claims. As stated previously, it is only evidence of a settlement negotiated between the FDA and Defendant based upon the FDA's allegations.').

109 See, e.g., *In re Bank Hapoalim B.M.*, DPA, tax evasion (30 April 2020), https://www.justice.gov/opa/press-release/file/1275081/download ('BHBM admits and stipulates that the facts set forth in the Statement of Facts . . . are true and accurate. In sum, BHBM admits that it is responsible under US law for the federal criminal violations charged in the Information and set forth in the Statement of Facts as a result of the acts of its officers, directors, employees and agents.'); *In re*

that could be viewed by the government as contradictory to the facts of the agreement may then be seen as a breach – thereby reviving a prosecutorial or regulatory action[110] – it is important that such agreements, at a minimum, contain exceptions that allow a company to take good-faith positions in follow-on civil litigation or that allow a company to cure a potential breach.[111]

Resolving parallel investigations 24.6

Other domestic authorities 24.6.1

Most large-scale investigations of corporations involve a number of government agencies from federal and state governments, both prosecutorial and regulatory. The degree of coordination among these agencies varies case by case, and coordinating with multiple agencies can be challenging. However, there can be benefits to coordinated settlements, including closure for the company, enhanced legal certainty and the avoidance of unnecessary duplication,[112] or undue burdens of

Banamex USA, NPA, AML/BSA claims (18 May 2017), https://www.justice.gov/opa/press-release/file/967871/download ('The Parties stipulate that the following facts are true and correct'); *In re IAP Worldwide Services Inc*., NPA, FCPA claims (June 2015), https://www.justice.gov/opa/file/478281/download ('The Company admits, accepts, and acknowledges that it is responsible under United States law for the acts of its officers, directors, employees, and agents as set forth in the Statement of Facts . . . and that the facts described . . . are true and accurate.'); cf. SEC Release No. 9453, Order Instituting Cease-and-Desist Proceedings, *In the Matter of TD Bank, N.A.* (23 September 2013), https://www.sec.gov/litigation/admin/2013/33-9453.pdf (clarifying that '[t]he findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding').

110 See *United States v. Goldfarb*, 2012 WL 3860756 (N.D. Cal. 5 September 2012) (finding that defendants were in material breach of their DPA and thus denying defendants' motion to dismiss criminal charges).

111 See, e.g., *In re Wells Fargo*, DPA ¶ 5 (20 February 2020), https://www.justice.gov/usao-cdca/press-release/file/1251336/download ('If the USAOs determine that Wells Fargo has made a public statement contradicting its acceptance of responsibility . . . , the USAOs shall so notify Wells Fargo. Thereafter, Wells Fargo may avoid a breach of this Agreement by publicly repudiating the statement within five days after such notification. Wells Fargo shall be permitted to raise defenses and to assert affirmative claims in other proceedings relating to the matters set forth in the Statement of Facts provided that such defenses and claims do not contradict, in whole or in part, any statement contained in the attached Statement of Facts.'); *In the Matter of Citibank, N.A.*, CFTC Docket No. 16-16 at 26 (25 May 2016), www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcitibankisdaorder052516.pdf. ('Respondent agrees that neither it nor any of its successors and assigns, agents, or employees under its authority of control shall take any action or make any public statement denying directly or indirectly, any findings or conclusions in this Order or creating, or tending to create, the impression that this Order is without a factual basis; provided, however, that nothing in this provision shall affect Respondent's (i) testimonial obligations, or (ii) right to take positions in other proceedings to which the Commission is not a party.').

112 In May 2018, the DOJ announced a new policy encouraging coordination by the DOJ with other US and international law enforcement agencies conducting investigations of the same conduct to avoid 'disproportionate enforcement of laws by multiple authorities'. DOJ, Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Committee (Remarks as prepared for delivery) (9 May 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

disclosure.[113] In addition, because the settlement announcements can occur on a single day, a company may be better able to control the release of information concerning the settlements and thereby limit the effect of any harmful disclosures on the market.[114] There is a distinct trend towards more multi-agency settlements, as agencies increase collaboration, even across borders.[115] In 2018, the

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On 12 June 2018, the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, and Federal Deposit Insurance Corporation released a 'Policy Statement on Interagency Notification of Formal Enforcement Actions.' 83 Fed. Reg. 113 at 27371–72 (12 June 2018), https://www.occ.gov/news-issuances/federal-register/2018/83fr27371.pdf. The statement requires the agencies to notify each other of enforcement actions against financial institutions, especially when the action they are pursuing involves the interests of another agency. Id. at 27372. If two or more of the agencies consider bringing complementary actions, they 'should coordinate the preparation, processing, presentation, potential penalties, service, and follow-up' of the enforcement action. Id.

113 SEC, Press Release, 'CFTC Sign Agreement to Enhance Coordination, Facilitate Review of New Derivative Products' (11 March 2008), https://www.sec.gov/news/press/2008/2008-40.htm; US Commodity Futures Trading Commission, CFTC and SEC Announce Approval of New MOU (28 June 2018), https://www.cftc.gov/PressRoom/PressReleases/7745-18.

114 For example, on 29 January 2018, the CFTC and DOJ announced on the same day eight coordinated 'anti-spoofing' enforcement actions. See US CFTC, Press Release, CFTC Files Eight Anti-Spoofing Enforcement Actions against Three Banks (Deutsche Bank, HSBC & UBS) & Six Individuals (29 January 2018), https://www.cftc.gov/PressRoom/PressReleases/pr7681-18; DOJ, Press Release, Eight Individuals Charged with Deceptive Trading Practices Executed on US Commodities Markets (29 January 2018), https://www.justice.gov/opa/pr/eight-individuals-charged-decept ive-trading-practices-executed-us-commodities-markets; see also SEC, Press Release, JPMorgan Chase Agrees to Pay $200 Million and Admits Wrongdoing to Settle SEC Charges (19 September 2013), https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539819965 ('As part of a coordinated global settlement, three other agencies also announced settlements with JPMorgan today: the UK Financial Conduct Authority, the Federal Reserve, and the Office of the Comptroller of the Currency.'); SEC, Press Release, Standard Bank to Pay $4.2 Million to Settle SEC Charges (20 November 2015), https://www.sec.gov/news/pressrelease/2015-268.html. Media criticism may also be diffused through coordinated settlements among companies. See DOJ, Press Release, Five Major Banks Agree to Parent-Level Guilty Pleas' (20 May 2015), https://www.justice.gov/opa/pr/ five-major-banks-agree-parent-level-guilty-pleas (global settlement of claims against five banks – Citicorp, JPMorgan Chase & Co., Barclays PLC, The Royal Bank of Scotland plc, and UBS AG – involving the DOJ, the Federal Reserve, CFTC, and the New York State Department of Financial Services in the United States, and the Financial Conduct Authority in the United Kingdom).

115 In recent years, the DOJ has coordinated with the SEC and CFTC in spoofing enforcement. This coordination extends to interagency 'task forces', such as the establishment in July 2018 under the Trump administration of a task force on market integrity and consumer fraud that, among other things, combats corporate fraud that victimises the general public and the government. Other examples of multi-agency settlements include *In re Volkswagen 'Clean Diesel' Marketing, Sales Practices, and Products Liability Litigation*, 3:15-mc-02672-CRB (N.D. Cal. 17 May 2017) (consent decree with the DOJ, on behalf of the EPA and stipulated order for permanent injunction and monetary judgment for the FTC); *SEC v. Teva Pharmaceutical Industries, Ltd.*, 1:16-cv-25298 (S.D. Fla. 22 December 2016), https://www.sec.gov/litigation/litreleases/2016/lr23708.htm (DPA with the DOJ and interest and disgorgement payments to the SEC in connection with civil and criminal violations of the Foreign Corrupt Practices Act); SEC Release No. 78989, Order Instituting Administrative and Cease-and-Desist Proceedings (29 September 2016) (Och-Ziff DPA with the DOJ and interest and disgorgement payments to the SEC to resolve criminal charges arising out of

DOJ announced a policy intended to encourage coordination between it and other enforcement agencies and to discourage the disproportionate enforcement of laws by multiple authorities. Among other things, the policy sets forth factors that DOJ attorneys may evaluate in determining whether multiple penalties serve the interests of justice in a particular case, including the egregiousness of the wrongdoing and the adequacy and timeliness of a company's disclosures and co-operation.[116] It remains to be seen to what degree this policy will result in meaningful changes to the DOJ's approach to settling investigations involving multiple agencies.

Foreign authorities 24.6.2

Owing at least in part to the internationalisation of enforcement, the global nature of modern-day securities frauds, increased regulatory activity on the state level and the increased complexity of the markets,[117] regulatory investigations today tend to involve a variety of authorities.[118] Thus, a corporation must carefully evaluate

bribes paid to public officials in the Democratic Republic of Congo and Libya), https://www.sec.gov/litigation/admin/2016/34-78989.pdf; Commerzbank AG Plea Agreement (D.D.C. 12 March 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/12/commerzbank_deferred_prosecution_agreement_1.pdf (DPAs with the DOJ and DANY and consent orders with OCC and FinCEN); JPMorgan Chase Bank, N.A. Deferred Prosecution Agreement (S.D.N.Y. 6 January 2014), https://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/JPMC%20DPA%20Packet%20%28Fully%20Executed%20w%20Exhibits%29.pdf (DPA with the DOJ and consent orders with the Federal Reserve, OFAC and NYDFS); SEC Release No. 9453, Order Instituting Cease-and-Desist Proceedings, In the Matter of TD Bank, N.A. (23 September 2013), https://www.sec.gov/litigation/admin/2013/33-9453.pdf (consent orders with the OCC and FinCEN and cease-and-desist order with SEC).

116 DOJ, Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Committee (Remarks as prepared for delivery) (9 May 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

117 Mary Jo White, SEC Chair, Speech at the New York Bar Association's Third Annual White Collar Crime Institute, 'Three Key Pressure Points in the Current Enforcement Environment' (19 May 2014), https://www.sec.gov/news/speech/2014-spch051914mjw.html.

118 In 2020, the record high US$3.9 billion settlement under a DPA with France-based aerospace company Airbus SE to resolve foreign bribery charges resulted from significant assistance by law enforcement from France and the UK, and the US$1.06 billion settlement under a DPA with Sweden-based Telefonaktiebolaget LM Ericsson and the guilty plea of its Egypt subsidiary for violating the FCPA involved significant assistance from law enforcement authorities in Sweden. Many of the highest-profile settlements have been the result of cooperative efforts between US and foreign regulators. Indeed, the 10 largest FCPA settlements with the US were the result of co-operative investigations between US and foreign authorities: Odebrecht S.A. (US$3.56 billion), Airbus SE (US$2.09 billion), Petróleo Brasileiro S.A. (US$1.79 billion), Telefonaktiebolaget LM Ericsson (US$1.06 billion), Telia Company AB (US$965.6 million), Mobile TeleSystems PJSC (US$850.0 million), Siemens Aktiengesellschaft (US$800.0 million), VimpelCom Ltd (US$795.3 million), Alstom S.A. (US$772.3 million) and Société Générale S.A. (US$858.6 million). The US$2.9 billion settlement under a DPA with Goldman Sachs for violating the FCPA in the 1MDB scandal involved authorities from the United Kingdom, Singapore, Switzerland, Luxembourg, France and Malaysia. See Dep't of Justice, Press Release, Goldman

whether a settlement with certain authorities should be postponed until a global resolution can be reached. Coordinated global settlements often afford the company the opportunity to predict and prevent excessive, cumulative or unnecessary monetary penalties, continuing obligations and collateral consequences.[119]

Sachs Charged in Foreign Bribery Case and Agrees to Pay Over $2.9 Billion (22 October 2020), https://www.justice.gov/opa/pr/goldman-sachs-charged-foreign-bribery-case-and-agrees-pay-over-29-billion.

119 For example, on 31 January 2020, as part of the largest global foreign bribery resolution, Airbus SE, a global provider of aircraft based in France, paid more than US$3.9 billion to resolve foreign bribery charges. DOJ, Press Release, Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (31 January 2020), https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case. The agreement included the payment of US$527 million and €50 million in forfeiture to the DOJ, with US$1,797,490,796 credited to France's Parquet National Financier's separate record high recovery of €2.1 billion. See Airbus DPA ¶ 8, 20-cr-00021, ECF No. 8 (D.D.C. 31 January 2020). Airbus also paid €991 million under a DPA with the United Kingdom's Serious Fraud Office. See UK Serious Fraud Office, SFO Enters into €991m Deferred Prosecution Agreement with Airbus as Part of a €3.6bn Global Resolution (31 January 2020), https://www.sfo.gov.uk/2020/01/31/sfo-enters-into-e991m-deferred-prosecution-agreement-with-airbus-as-part-of-a-e3-6bn-global-resolution/. In December 2016, Odebrecht entered a plea agreement with the DOJ, providing that 'the United States will credit the amount that Odebrecht pays to Brazil and Switzerland over the full term of their respective agreements.' DOJ, Press Release, 'Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History' (21 December 2016), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve. And, as part of a global settlement with Embraer to resolve alleged FCPA violations, the SEC announced that 'Embraer may receive up to a $20 million credit depending on the amount of disgorgement it will pay to Brazilian authorities in a parallel civil proceeding in Brazil.' SEC, Press Release, 'Embraer Paying $205 Million to Settle FCPA Charges' (24 October 2016), https://www.sec.gov/news/pressrelease/2016-224.html.

Appendix 1

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Nicolas Bourtin is a litigation partner at Sullivan & Cromwell LLP, co-head of the firm's FCPA and anti-corruption group, and managing partner of the firm's criminal defence and investigations group. His practice focuses on white-collar criminal defence and internal investigations, regulatory enforcement matters, and securities and complex civil litigation.

Mr Bourtin has represented individuals, corporations and financial institutions in numerous high-profile matters involving accounting fraud, antitrust, FIRREA, the FCPA, insider trading, money laundering, mortgage orientation and servicing, OFAC sanctions, securities fraud, tax fraud and trading. He has extensive experience in representing financial institutions in parallel regulatory and criminal investigations and representing non-US companies and individuals in connection with US investigations.

Mr Bourtin has conducted numerous jury trials and has argued frequently before the US Court of Appeals for the Second Circuit. He is frequently recognised as a leading practitioner in the area of white-collar criminal defence. Mr Bourtin also serves, *pro bono*, on the Criminal Justice Act panel for the Eastern District of New York, representing indigent defendants in federal criminal proceedings.

Mr Bourtin served for four years as an Assistant US Attorney in the Eastern District of New York, where he was involved in investigations, prosecutions and trials involving fraud, corruption, money laundering and other white-collar offences.

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