The International Investigations Review

Third Edition

Editor
Nicolas Bourtin

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In the United States, it continues to be a rare day when newspaper headlines do not
announce criminal or regulatory investigations or prosecutions of major financial
institutions and other corporations. LIBOR. Foreign corruption. Financial fraud. Tax

US and non-US corporations alike, for the past several years, have faced increasing
scrutiny from US authorities, and their conduct, when deemed to run afoul of the law,
has been punished severely by record-breaking fines and the prosecution of corporate
employees. Already complex interlocking legal and regulatory regimes have become even
more labyrinthine with the passage of new laws in the wake of the economic crisis, and
the compliance burdens imposed on corporations have grown ever more onerous.

This trend has by no means been limited to the US; while the US government
continues to lead the movement to globalise the prosecution of corporations, a number
of non-US authorities appear determined to adopt the US model. Parallel corporate
investigations in multiple countries increasingly compound the problems for companies,
as conflicting statutes, regulations and rules of procedure and evidence make the path
to compliance a treacherous one. What is more, government authorities forge their own
prosecutorial alliances and share evidence, further complicating a company’s defence.
These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to
advise their clients on the implications of criminal and regulatory investigations outside
their own jurisdictions. This can be a daunting task, as the practice of criminal law
– particularly corporate criminal law – is notorious for following unwritten rules and
practices that cannot be gleaned from a simple review of a country’s criminal code. And
while nothing can substitute for the considered advice of an expert local practitioner,
a comprehensive review of the corporate investigation practices around the world will
find a wide and grateful readership.

The authors of this volume are acknowledged experts in the field of corporate
investigations and leaders of the bars of their respective countries. We have attempted
to distil their wisdom, experience and insight around the most common questions
and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is it a realistic option for a corporation to defend itself at trial against a government agency? And how does a corporation manage the delicate interactions with the employees whose conduct is at issue? The International Investigations Review answers these questions and many more and will serve as an indispensable guide when your clients face criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given country’s legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that in its third edition, this volume covers 24 countries.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gift of time and thought. The subject matter is broad and the issues raised deep, and a concise synthesis of a country’s legal framework and practice was in each case challenging.

Nicolas Bourtin
Sullivan & Cromwell LLP
New York
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I INTRODUCTION

Last year saw a continuation of the sustained trend of aggressive US criminal and regulatory enforcement activity against corporations and their directors, officers and employees. Domestically, regulators continued doggedly to pursue banks, accounting firms, rating agencies and others implicated in the financial crisis. Prosecutors also scored several victories against high-profile defendants accused of insider trading and reached a settlement in the BP Deepwater Horizon case that resulted in the imposition of the largest criminal fine in US history – $4 billion – just one of several 10- and 9-figure settlements reached in 2012. Notably, much of the domestic enforcement activity occurred at the state level: for example, 49 state attorneys general – in conjunction with federal authorities – entered into a $25 billion settlement with five mortgage servicers for financial fraud-related claims in 2012.

The international enforcement front was no less active. US, UK and Swiss regulators continued their ongoing investigations into the manipulation of the LIBOR rate, reaching settlements with two major international financial institutions – Barclays and UBS – which paid combined penalties of almost $2 billion to regulators to resolve the charges against them. And although enforcement of the Foreign Corrupt Practices Act (‘FCPA’) saw a slight decline in 2012 in terms of the total value of penalties imposed, it remains one of the most active areas of international regulatory enforcement. In 2012, the US Department of Justice (‘the DoJ’) and the Securities and Exchange Commission (‘the SEC’) brought several high-profile FCPA actions against corporations and high-ranking employees within those companies, resulting in the imposition of more than a quarter of a billion dollars in fines, including high-profile actions against Pfizer and Marubeni that resulted in large settlements. More than 80 additional companies are

1 Nicolas Bourtin is a partner and Nathaniel Green is an associate at Sullivan & Cromwell LLP.
known to be under investigation for potential FCPA violations. Significantly, US regulators continued to target non-US companies and individuals suspected of anti-corruption violations, often with the cooperation of foreign governments and regulators, including the UK’s Serious Fraud Office.

The statutes authorising these prosecutions represent just a sliver of the interlocking regulatory and legal regimes in the United States, where companies must comply with numerous regulations and statutes or face criminal or civil sanctions. There is no shortage of regulatory agencies empowered to take action in the event of a compliance lapse. The most prominent of these include the DoJ, the SEC, the Internal Revenue Service, the Environmental Protection Agency (‘the EPA’), the US Commodity Futures Trading Commission (‘the CFTC’), the US Departments of Commerce, Labor and the Treasury, the Federal Energy Regulatory Commission and the Occupational Safety and Health Administration. Many of these agencies are empowered to commence formal investigations and enforcement proceedings on their own initiative and impose monetary sanctions or other penalties, and these powers have expanded in recent years. The enforcement arm of the SEC, for instance, was granted permanent authority in August 2010 to issue subpoenas for documents and witnesses and to compel testimony in connection with investigations into financial wrongdoing.

Still, the DoJ, which is charged with prosecuting corporate crimes such as fraud, money laundering, bribery and tax fraud, is perhaps uniquely formidable among the agencies due to its power to indict and prosecute criminally, the threat of which has remained an important method of ensuring corporate compliance over the past decade; this phenomenon is demonstrated not only by the passage of the 2002 Sarbanes-Oxley Act and the expansion of corporate criminal statutes, but also by the contemporaneous revision of the United States Sentencing Commission’s (‘USSC’) Organizational Guidelines to impose harsher penalties for corporate malfeasance.

For large-scale corporate investigations and prosecutions, however, the DoJ frequently coordinates with other federal agencies, as well as state and local authorities. For example, in recent years, the DoJ has worked closely with the IRS’s Criminal Investigative Division to investigate and charge Swiss banks with facilitating tax fraud by US taxpayers, including obtaining an indictment in 2012 against a bank for allegedly hiding more than $1.2 billion in secret accounts. The DoJ also has pursued enforcement actions against a number of international financial institutions in recent years for the failure of anti-money laundering controls and for ‘stripping’, or removing, identifying information from payment messages on behalf of parties subject to US trade sanctions administered by the Office of Foreign Assets Control (‘OFAC’) of the US Treasury Department. In 2012, Standard Chartered paid $340 million to the New York State Department of Financial Services and $227 million to the DoJ, the New York County District Attorney’s Office and other federal regulators to resolve charges stemming from payments and trade business with sanctioned parties. HSBC paid a record $1.9 billion late last year for failures in its anti-money laundering programme and its own business

2 ABN AMRO, HSBC, ING Bank NV, Barclays, Credit Suisse, Lloyds TSB Bank, and Standard Chartered.
with sanctioned parties. The DoJ investigations in this space have been conducted in conjunction with the New York County District Attorney’s Office, OFAC and the US bank regulatory agencies. Cooperation between federal agencies and state and local authorities has become more common, with various ‘task forces’ created to coordinate the agencies’ efforts; this includes the Financial Fraud Enforcement Task Force, which was set up by the Obama administration and brings together representatives from various agencies and state and local authorities to take action against financial fraud, with a recent special focus on corporate entities engaged in mortgage fraud.

A corporation facing a criminal investigation by the DoJ or other agencies typically feels great pressure to avoid an indictment, which carries the risk of severe reputational, legal and regulatory consequences (even apart from the potential criminal penalties such as fines, forfeiture, disgorgement of unlawful profits and restitution). For many companies, particularly highly regulated ones, a mere indictment – even before conviction – can have severe reputational effects and disastrous consequences for a company’s stock price and its ability to seek funding in the capital markets. Moreover, corporations in certain industries, such as companies that serve as government contractors for the Department of Defense or participate in the federal government’s Medicaid and Medicare programmes, can face crippling suspension upon the filing of charges and mandatory exclusion from the programmes if ultimately convicted. Notably, the US House of Representatives recently passed a bill that would have made ‘debarment’ mandatory for an FCPA violation (though the bill ultimately was not passed by the US Senate). The collateral consequences of a corporate criminal investigation and prosecution may not be reversible even if the company is ultimately vindicated on appeal. For example, Arthur Andersen – an 89-year-old firm with 85,000 employees, implicated in the Enron accounting fraud – suffered severe damage to its reputation after being indicted by the DoJ, and lost its licence to audit public companies after being convicted of felony obstruction of justice. Although that conviction was ultimately overturned by the Supreme Court, the firm had already suffered irreparable harm and had by that time ceased to function as a viable business.

It is therefore not surprising that most companies facing regulatory investigations cooperate as fully as possible with the investigation with the hope of avoiding formal charges and companies frequently self-report potential wrongdoing in which the company or company employees may be implicated.

II CONDUCT

i Self-reporting

Most federal enforcement agencies\(^3\) have published official policies emphasising the importance of voluntary disclosure and full cooperation in an investigation, and pledging to take such disclosure and cooperation (or lack thereof) into account in determining whether to bring an enforcement action and what kind of penalties to seek.

\(^3\) Including the DoJ, SEC, EPA, the enforcement arms of the Treasury Department, Departments of Defense and Health and Human Services and the CFTC.
The USSC Organizational Guidelines also explicitly provide for reduced sentences for companies that provide ‘timely and thorough cooperation’, where ‘timely’ is defined as ‘begin[ning] essentially at the same time as the organization is officially notified of a criminal investigation’.

In some cases, the benefits of self-reporting and cooperation are unambiguous. The Department of Defense, for instance, will not pursue suspension or debarment sanctions against companies that self-report and cooperate, and the Antitrust Division of the Department of Justice offers full amnesty to the first company involved in an antitrust cartel that (1) comes forward to voluntarily disclose its participation, (2) makes restitution to victims of the cartel and (3) cooperates in the investigation and prosecution of other culpable companies. The cooperating company’s directors, officers and employees will also receive amnesty if they are willing to cooperate in the investigation.

In most other settings, however, voluntary disclosure and cooperation are just two of many factors that regulators and prosecutors promise to ‘take into account’ in their charging calculus, without specific guidance as to how much weight each will be accorded in relation to other factors affecting the charging decision. For example, both the DoJ and SEC have explicitly included voluntary disclosure and cooperation in their respective official enforcement policies as factors to be weighed and high-ranking representatives from these agencies have made various other public pronouncements of the importance of voluntary disclosure and are quick to cite examples of companies that were purportedly spared severe sanctions after disclosing and cooperating fully. In spite of these assurances, however, it is difficult to isolate any quantifiable benefit that can be attributed to voluntary reporting as opposed to other factors because of the lack of visibility in the regulators’ decision-making process and the multitude of factors that affect both the decision to charge and the severity of the ultimate penalty imposed; given the regulators’ clear interest in having companies come forward on their own initiative to disclose wrongdoing, thereby avoiding the burden of independently detecting illicit activity, companies may have good reason for some degree of scepticism of the professed benefits of self-disclosure.

Therefore, it is not completely clear that voluntary reporting should be the default action of every company that discovers potentially unlawful conduct within its organisation; at the very least, the company should assess the probability of independent discovery of the potential misconduct by government authorities. It is important to note, however, the likelihood that some government agency will independently become aware of any impropriety has increased significantly in recent years as a result of the general upturn in regulatory enforcement activity, the expansion of international cooperation and the proliferation of new laws and regulations favourable to whistle-blowers.

A corporation must of course first determine whether it has a mandatory legal obligation to disclose potential wrongdoing that it discovers. For example, financial institutions may be obligated to report suspicious activity. Sarbanes-Oxley also imposes numerous compulsory reporting requirements on companies should they discover certain types of fraud and other misconduct. Because many of the regulators have information-sharing agreements or otherwise coordinate their actions, if a company decides to self-report, it is also prudent to make the disclosures to all potentially related agencies. This is to ensure that the company receives credit for self-reporting from each regulator that could potentially bring an enforcement action. For example, if a company believes
that one of its subsidiaries may have made an improper payment to a foreign official and has decided to voluntarily disclose this information to the SEC, it should strongly consider also informing the DoJ, given how frequently the two regulators bring parallel enforcement actions under the FCPA and the likelihood that the SEC will pass on any information received, or make a formal referral, to the DoJ.

In determining whether to self-report, and to what extent to cooperate with a regulatory investigation, corporations and their employees also must bear in mind that should they be deemed to be impeding or obstructing the investigation, in addition to charges relating to the conduct under investigation, they may potentially face charges of obstruction of justice or conspiracy to commit obstruction of justice. These charges typically are much easier to prove than charges stemming from the underlying conduct being investigated and can carry as, or more, severe penalties. Under Sarbanes-Oxley, for example, an individual can face up to 20 years in prison for altering or falsifying documents with the intention of obstructing a federal investigation and a company can face substantial fines for this conduct. In recent years, the DoJ has not hesitated to seek such penalties against companies and employees that are perceived to be uncooperative or evasive and the SEC and other agencies have been known to refer reports of obstructive conduct during civil enforcement actions to the DoJ for criminal prosecution.

ii Internal investigations

In conjunction with disclosing potentially improper conduct to the government, a corporation will typically undertake an internal investigation, either on its own initiative or with the encouragement of the relevant government agency, to determine whether unlawful activity has in fact occurred and, if so, which employees are responsible. There are several important reasons to conduct such an investigation. First, a full understanding of the facts can be crucial to mounting a defence in any adversarial proceedings that might arise with government authorities or in any private civil suits that might be filed. Second, by conducting an internal investigation and disclosing important information gleaned from a review of documents and employee witness interviews to federal agencies, a corporation may be more likely to receive credit for cooperation and thereby decrease its risk of indictment and the imposition of severe penalties. Finally, simply as a matter of good corporate governance, it is important for the corporation to be confident that it has accurately determined which employees were responsible for the unlawful activity and to ensure that it has implemented adequate controls to prevent any recurrence of the wrongdoing.

Even if a company has not yet made the decision to report potentially unlawful conduct to a regulator, it still might have cause to conduct an internal investigation after, for example, (1) receiving a tip about fraudulent activity on a dedicated company hotline, (2) receiving information from an internal or external auditor about a potential compliance issue or (3) being named in a civil suit by a former employee containing allegations of improper conduct on the part of the company. Further, because Sarbanes-Oxley requires companies to implement systems for the reporting of complaints by employees relating to accounting or auditing matters and conduct investigations in response to a wide range of concerns, companies are more likely than ever before to encounter situations where the prudent course of action is to initiate an internal investigation.
It is generally advisable to have counsel supervise such investigations because of the likelihood that legal questions and issues will arise, although whether it is necessary to retain an outside law firm will depend on the company’s assessment of various considerations. In-house counsel may have the advantage of a more intimate understanding of the company’s operations and culture, while external counsel may have more experience conducting internal investigations and dealing with government agencies. In-house counsel’s familiarity with the company can also be a weakness if it is perceived by the government to undermine their objectivity, in which case the company may have more credibility in interacting with the government if it retains reputable external counsel. This is especially likely to be the case, of course, if any members of the company’s legal department are implicated in the conduct under investigation.

With respect to the conduct of such investigations, typically there are two primary components: review and analysis of relevant documents, and interviews of company employees with knowledge of the relevant facts. Generally, documents are gathered and reviewed prior to conducting interviews, which allows the interviewer to focus his or her questioning on key issues or questions discovered during the course of the document review, or to seek clarification on potentially inculpatory or troubling statements contained in those documents. At the outset of each interview, the standard practice is to notify the employee that the attorney conducting the interview is counsel to the company and not the interviewee’s personal attorney, and that while the conversation is protected by the attorney-client privilege, that privilege belongs to the company, which it may waive at its sole discretion. The interviewee should also be informed that any information imparted during the interview may be shared with government authorities. Unless it has not previously made any disclosures to the government and uncovers nothing to merit such disclosure during the course of the internal investigation, a company typically will present its findings to the government after the completion of the document review and interviewing process, or – for a particularly complex investigation – at the conclusion of some segment of that process. Those presentations can be made orally or in written form, in response to which the government may identify additional areas of concern that require follow-up work. The government and counsel may then engage in dialogue regarding whether and what kind of criminal or civil charges are warranted and how much credit to give to the company for its cooperation. In making its case for leniency, it may be effective for a company to argue not only that the facts uncovered do not amount to actionable misconduct, but also, from a policy perspective, that the relevant agency’s objectives would not be advanced by pursuing an enforcement action against the company. A company should also consider reviewing the agency’s published charging guidelines (such as the DoJ’s guidelines for the prosecution of business organisations) to support an argument that an indictment is not warranted or that the situation calls for reduced charges; for example, (1) by emphasising that senior management was not implicated in the wrongdoing and, therefore, the misconduct was not pervasive; (2) that the company has no history of criminal conduct; or (3) that the collateral consequences of prosecution would be unjustifiably severe.

Whether conducted by in-house or outside counsel, a significant amount of attorney-client privileged information and attorney work product material will be generated through the course of an internal investigation. Until recently, it was the expectation of the DoJ that a corporation would waive the attorney-client privilege and
provide the DoJ with all requested materials and information if the company wished to receive cooperation credit. There was significant criticism of this policy from the corporate sector, the defence bar and various members of Congress. In response, the DoJ has revised its policy and now categorically directs prosecutors not to seek a waiver of privilege and prohibits prosecutors from taking waiver into account when making a cooperation determination. The current policy does, however, allow prosecutors to consider the extent to which the company has disclosed all ‘relevant facts’. Therefore, despite the government’s assurances that waiver is not necessary to obtain cooperation credit, a company may find that it is not possible to make a full disclosure of the ‘relevant facts’ without turning over privileged materials. Other agencies, such as the SEC, have published similar policies.

iii Whistle-blowers
The probability of a US company facing a whistle-blower complaint increased significantly with the implementation of the whistle-blower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which came into effect in 2011 and authorise the payment of rewards of between 10 and 30 per cent of judgments over $1 million by the SEC to whistle-blowers who alert the SEC to certain types of wrongdoing and that ultimately results in a successful enforcement action. The SEC received in excess of 3,000 tips in the programme’s first year of operation and has paid several substantial bounties to whistle-blowers who have given information leading to successful prosecutions, including a payment of more than $100 million to a whistle-blower in connection with the UBS undeclared overseas account investigation. The new whistle-blower rules also expand the already broad-reaching protections for whistle-blowers created by Sarbanes-Oxley and the False Claims Act, including extending Sarbanes-Oxley whistle-blower coverage to employees of non-public subsidiaries of publicly traded companies.

Given this new regulatory regime, a company must now proceed with even greater caution when confronted with allegations of misconduct from a whistle-blower. Any credible tips describing potential illegal acts should be investigated promptly and thoroughly, with the assistance of outside counsel if necessary. If the company determines that the allegations have merit, it should take swift remedial action and consider self-reporting its findings to interested regulators. By no means should a company take any action that might be perceived as retaliation against the whistle-blower, as such behaviour could potentially expose the company to substantial civil or criminal liability.

III ENFORCEMENT

i Corporate liability
Because of the way in which the doctrines of corporate criminal and civil liability have evolved in the United States, prosecuting and regulatory agencies have considerable leverage over business organisations. Generally speaking, companies are liable for the actions of employees if the employees’ conduct is within the scope of their employment and they act at least in part with the motive of benefiting the company. Those two qualifiers – ‘within the scope of employment’ and ‘to benefit the company’ – have been interpreted to place little meaningful limit on a company’s potential exposure. For
example, corporations have been held liable where the wrongdoing at issue benefited only the employee and was perpetrated in violation of the company’s explicit instructions. Moreover, it is irrelevant where the culpable employee falls on the corporate ladder; legally speaking, the conduct of a mailroom clerk is imputed to the company to the same extent as the company’s CEO. Further, under the collective liability or collective scienter doctrine, a company may be liable – particularly in the civil context – if its employees, when considered in the aggregate, possessed sufficient knowledge and intent to violate the law, even if no single employee alone had the requisite mental state or corrupt intent. While some courts have limited the application of this doctrine in recent years, it still can be an attractive option for a regulator bringing, for example, a complex securities fraud case against a huge, decentralised company.

ii Penalties
Regulators have a vast arsenal of potential sanctions to impose on corporations convicted of a statutory violation. Various regulatory statutes authorise, among other potential penalties and sanctions, criminal or civil fines (or both), restitution, disgorgement, criminal forfeiture, probation and community service. Further, as mentioned above, the collateral consequences of a conviction can be just as damaging, potentially resulting in suspension or debarment from eligibility for government contracts, reputational harm and decline in company stock price.

In recent years, most corporate criminal investigations have ended not with an indictment, but rather with the two sides entering into a deferred prosecution agreement or non-prosecution agreement (‘DPAs’ or ‘NPAs’, respectively). The typical DPA provides that the agency will file formal charges, which will be stayed for a period of time (usually between one and three years), after which the charges will be dismissed if the company has complied with certain obligations. These obligations typically require the company to (1) cooperate fully with the agency’s investigation and in any other investigation that may be ongoing, (2) accept responsibility for the wrongdoing at issue, (3) undertake remedial action, including terminating or disciplining culpable employees and implementing revised internal controls and procedures, and appointing an independent compliance monitor in some cases. The company also normally agrees to a monetary penalty, including a criminal or civil fine, forfeiture, restitution or disgorgement of unlawful profits. NPAs require similar types of performance on the part of the company but do not involve the formal filing of charges with a court. In both types of agreement, because the company has admitted to the conduct at issue (which is typically set forth in an agreed ‘statement of facts’ attached to the agreement), if a company is indicted upon breach of the agreement, conviction is almost certain. In previous years, DPAs and NPAs were the exclusive domain of the DoJ, but the SEC has also recently adopted the use of such agreements.

iii Compliance programmes
Not only do DPAs typically require the implementation of an effective compliance programme or the improvement of an existing one, the existence of an effective compliance programme is also a factor that the DoJ and other regulators take into account in making their ultimate charging decisions and may lead to a reduced sentence under the USSC
Organizational Guidelines. These Guidelines provide guidance on the characteristics of a compliance programme that will be looked upon favourably by the government. These include the following, among others:

a management that is knowledgeable about and able to oversee the programme competently;
b adequate staffing of the programme;
c training for all employees in compliance standards and procedures;
d procedures for monitoring and periodic auditing of the effectiveness of the programme;
e a system for the anonymous reporting of compliance breaches;
f the consistent enforcement of the programme; and

g procedures for taking ‘reasonable steps’ to prevent further wrongful conduct if any is detected.

In 2010, the USSC revised its commentary to note that as part of the ‘reasonable steps’ a company is expected to take to prevent the recurrence of wrongful conduct, a company should pay restitution to any victims that can be identified. The USSC further stated that the hiring of an ‘outside professional adviser’ to oversee the implementation of the compliance programme also could be considered such a ‘reasonable step’. This has led to speculation that the hiring of an outside consultant by the company may vitiate the need to impose an independent compliance monitor on a company as part of a regulatory settlement, which until very recently was a common requirement of a DPA or NPA, but which was also a practice that had come under criticism for being unduly disruptive to the company and excessively remunerative to the monitors themselves. The FCPA settlements that were announced in 2012 indicate a trend toward self-monitoring and reporting rather than the imposition of an independent monitor as a standard feature of a settlement agreement.

Notably, in their recently issued FCPA Resource Guide, the DoJ and SEC reaffirmed the importance of the presence or absence of a robust compliance programme as a key factor in the regulators’ charging decision and in their determination of an appropriate settlement for a violation. The regulators cited a recent anti-corruption enforcement action against a Morgan Stanley employee – in which the SEC declined to charge the company itself in view of Morgan Stanley’s implementation of an extensive compliance system – as evidence of the SEC’s commitment to rewarding companies that put into place strong compliance programmes.

iv Prosecution of individuals
The question often arises during the course of a regulatory investigation of whether it is appropriate for a corporation to enter into a joint defence agreement with employees that are also under investigation. The DoJ’s official position is that the government may not consider such an arrangement in determining whether a corporation has cooperated with the investigation. However, as with the issue of waiver of privilege, the DoJ has qualified this position by noting that to the extent that such an agreement limits the company’s ability to disclose ‘relevant facts’, it may adversely affect the ability of the company to obtain credit for cooperation. Moreover, because various agency policies, as
well as the USSC Organizational Guidelines, encourage corporations to cooperate fully in the prosecution of wrongdoing employees, in many situations the risk of a conflict of interest between the company and its employees may preclude the possibility of entering into a joint defence agreement. Such conflicts of interest are more likely than ever to arise as, in recent years, the government has pursued individuals suspected of corporate malfeasance increasingly aggressively, and the DoJ has publicly announced that it favours prosecution of individuals over entities where feasible.

A distinct but related issue is the advancement or payment by a company under investigation of the attorneys’ fees of employees implicated in the wrongdoing at issue. While, as with waiver of privilege, the DoJ’s stance until recent years was that advancing such fees would weigh against a corporation in the DoJ’s cooperation determination, the government has now reversed that position, in part because of the United States Court of Appeals for the Second Circuit’s ruling in United States v. Stein.4 In that case, the court upheld a trial court ruling that the DoJ had violated the Fifth and Sixth Amendment rights of certain KPMG employees when it communicated to KPMG that it would not look favourably upon the advancement of fees to employees incriminated in the accounting scandal for which KPMG was under investigation, despite KPMG’s historical practice of paying for its employees’ fees in such situations. At the same time as this decision, the DoJ announced that it would no longer consider advancement of fees as a factor influencing its cooperation determination, though it noted that the failure to terminate or adequately discipline employees would still be a consideration influencing its ultimate indictment decision. Other agencies, such as the SEC, have not taken a clear stance with respect to this issue.

IV INTERNATIONAL

i Extraterritorial jurisdiction

Now more than ever, federal agencies are taking an expansive view of their statutory jurisdiction and aggressively pursuing foreign companies for violations of domestic law. While evident in a variety of contexts, nowhere is this trend more apparent than in the domain of the FCPA. Notably, a majority of FCPA enforcement actions over the past two years – including most of the higher-value settlements – targeted foreign companies and individuals. While the FCPA applied only to issuers of stock on a US exchange when originally enacted, the statute now proscribes corrupt payments by any person, natural or otherwise, where relevant acts occur ‘in the territory of the United States’. The DoJ and SEC have interpreted this provision as requiring only the slightest territorial nexus to trigger jurisdiction: a single phone call to or from the United States in furtherance of the corrupt payment, a transaction cleared through a US bank, or – in an action settled in 2011 – an email sent through a ‘server located in the US’ may suffice. Moreover, even where that minimum territorial connection is not met, the government has not hesitated to stretch traditional legal doctrines to assert jurisdiction, for example, by charging a foreign subsidiary with ‘aiding and abetting’ a violation by its US parent or for

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4 541 F.3d 130 (2nd Cir. 2008).
making an improper payment as the ‘agent’ of a US company. Other countries have also begun to look beyond their shores to target illegal conduct by corporations. For example, while previously criticised for its inaction in the foreign corruption arena, the United Kingdom recently enacted enhanced anti-bribery laws that went into effect in 2011. The new law has an expansive jurisdictional scope that may exceed even that of the FCPA, theoretically allowing the UK government to assert jurisdiction over any company that does business in the United Kingdom, even if the conduct at issue occurred elsewhere. In 2012, UK authorities reaffirmed their commitment to aggressively pursuing criminal charges against suspected violators of UK anti-bribery laws, revising previously-issued guidance on the those laws that called for leniency or the imposition of civil fines only in certain situations.

ii International cooperation

Because a successful international prosecution depends on effective cross-border cooperation and access to witnesses and evidence located abroad, the government frequently enlists the assistance of foreign governments and agencies in such investigations. The DoJ, for instance, has many formal and informal relationships with foreign agencies to facilitate cross-border enforcement. Neither have other agencies shied away from international investigation; the SEC, for example, maintains an Office of International Affairs, through which it coordinates with foreign governments and provides training to foreign agencies in financial fraud enforcement. In fact, many of the highest-profile settlements have been the result of such cooperative efforts. For example, the DoJ’s $1.5 billion settlement with UBS in connection with the LIBOR investigation was obtained in conjunction with UK and Swiss authorities; many other settlements in recent years were publicly stated to have been the result of international coordination.

iii Local law considerations

Not all countries, however, have been as amenable to the expanding extraterritoriality of US law enforcement and enhanced cooperation among foreign authorities. For example, various countries, including Mexico, Canada and certain members of the EU, have enacted ‘blocking statutes’ that prohibit taking action, or refraining from taking action, in order to comply with such restrictions. This puts companies operating in the international arena in a difficult position, as compliance with one law may necessarily mean running afoul of another. A multinational company under investigation by multiple regulators in other countries also faces innumerable complexities in dealing with varying and potentially inconsistent laws relating to the discovery of evidence and examination of witnesses. For example, data privacy laws in one country may prohibit the company from complying with a subpoena from a regulator in another, and the rights to counsel and against self-incrimination may be limited or absent under other regimes.

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5 Including the 10-figure Siemens FCPA settlement in 2008 and the recent FCPA settlements with the members of a US–French–Italian–Japanese joint venture to develop natural gas facilities in Bonny Island, Nigeria.
V CONCLUSIONS AND OUTLOOK

For at least the past decade, corporate and civil liability in the United States has moved inexorably towards more regulation and enforcement, harsher penalties and expanding jurisdiction. This trend continued in 2012, with the imposition of several 10-figure penalties and high-profile prosecutions under a number of regulatory frameworks. The trend seems unlikely to slow anytime soon, with significant ongoing investigations into financial institutions, active enforcement of anti-money laundering rules and tax fraud laws, major investigations pending under the FCPA and other wide-reaching statutes, such as the False Claims Act. The high reporting rate and apparent success of the first year of the SEC’s whistle-blower bounty programme suggests that whistle-blower investigations may become increasingly prevalent in the future, compounding the risk that a corporation will find itself the target of an enforcement action. The trend is unlikely to be limited to the financial fraud context, however: antitrust law, consumer protection, and environmental regulation, just to name a few, all remain areas of high enforcement activity and will likely remain so into the foreseeable future. What remains a constant, however, is the necessity of maintaining a robust compliance structure to promptly detect potential wrongdoing. While total prevention is unlikely given the innumerable ways in which a company can run afoul of the law and the sheer complexity of the various regulatory regimes, prompt detection thorough investigation and meaningful remedial action will limit the company’s exposure and maximise its chance of avoiding criminal or civil charges, or – failing that – negotiating a favourable settlement with government authorities.
Appendix 1

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Nicolas Bourtin is a litigation partner at Sullivan & Cromwell LLP. His practice focuses on white-collar criminal defence and internal investigations, class action defence, and securities and complex civil litigation. Mr Bourtin has conducted numerous jury trials and has argued frequently before the US Court of Appeals for the Second Circuit. He regularly represents companies and individuals under investigation by the US Department of Justice, the Securities and Exchange Commission, FINRA and other self-regulatory organisations, and state and local prosecutors’ offices. He has extensive experience representing clients located outside the United States in defending against cross-border enforcement investigations. From 2001 until 2005, Mr Bourtin served as an assistant US attorney in the Criminal Division of the US Attorney’s Office for the Eastern District of New York. Mr Bourtin serves, on a *pro bono* basis, on the Criminal Justice Act panel for the Eastern District of New York. Mr Bourtin received his undergraduate degree *magna cum laude* from the University of Notre Dame and is a graduate of Columbia Law School, where he was a Harlan Fiske Stone scholar.

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