Chapter IX:
Collateral Considerations

Summary

Key Points:

— When the first investigation starts, plan for the second: During the initial investigation, plan tactics and processes in anticipation of related subsequent regulatory inquiries and civil litigation for years to come. Consider all the downstream consequences of any concessions, both small (waiving privilege as to some documents) and big (admitting to wrongdoing in a settlement), to any regulator.

— Value consistency: When handling simultaneous investigations and regulatory requests, coordinate messaging to ensure efficiency and consistency in the messaging to the public, employees, civil litigants, and regulators.

— Respond to government and public attention: Sometimes a crisis or scandal invites legislative and government attention beyond the investigation due to public scrutiny. Be engaged and proactive with any subsequent legislative action or administrative rule-making to prevent over-correction.

First Steps After the Investigation Begins:

— Appoint a committee of team members to oversee and coordinate all related investigations and inquiries, even across jurisdictions.

— Assess exposure to civil and regulatory actions to prioritize and allocate resources effectively.

— Determine whether preemptive disclosure to other regulators or investors is warranted and at what stage.

Introduction

No one jurisdiction or government body has a monopoly on investigating and handling cross-jurisdictional crises. As a result, when a multi-jurisdictional crisis arises, companies often face related investigations by multiple regulators within and across jurisdictions. Settlements with one regulator can not only affect settlements with others, but may also entail nearly-automatic regulatory consequences, such as affecting a company's ability to continue to operate certain regulated business lines. Additionally, as the conduct that leads to these investigations comes to light, private plaintiffs will often bring follow-on civil litigation. Finally, depending on the publicity surrounding the event, the company may need to respond to legislative action or administrative rule-making.

This chapter describes how to plan ahead for these eventualities by identifying decisions with important downstream consequences that are not always apparent at the outset. Without careful planning, a company may risk accidental waiver of certain privileges, bind itself to certain statements made in an early settlement, or enter into agreements that can have serious consequences for its ability to conduct business. By keeping these consequences in mind, the cost and difficulty of defending multiple fronts and planning for the future can be better managed from the outset.

Planning for Multiple Investigations from the Outset

Be Organized During the Investigation and Productions

An investigation by a single regulator can take years to resolve.[1] The complexities and timelines only increase when multiple regulators across continents begin investigations at different times and progress at different paces. Civil litigation will also move at a different—and often slower—pace from the regulatory investigations.

However, once the regulatory settlements begin, private plaintiffs will receive a roadmap of the relevant facts and theories for their complaint, often expediting the fact-gathering process. Practically, this means the production of identical

[1] *See, e.g.*, Sec. Exch. Comm'n, *FY 2017 Congressional Budget Justification & FY 2017 Annual Performance Plan & FY 2015 Annual Performance Report* 37 (Feb. 6, 2017), https://www.sec.gov/about/reports/secfy17congbudgjust.pdf (stating that in FY 2015 the average time between opening an investigation and commencing an enforcement action was twenty-four months).

documents and disclosures about similar issues will be repeated with different parties over many years. Rather than reinventing the wheel in each instance, a company should generally aim to:

— Minimize the cost of investigating identical or similar questions.

— Ensure that regulators and litigants are given consistent answers to similar questions over the years.

PRACTICE TIP: HOW TO STAY ORGANIZED IN AN INVESTIGATION

— **Appoint and identify stakeholders** who will be responsible for following developments in all related civil and regulatory cases, even across jurisdictions. In a large multi-national institution, there will likely be different groups or divisions responsible for managing different types of litigation risk based on jurisdictional and subject-matter consideration. Thus, as a simple example, an office in London may oversee European litigation generally, whereas the New York office oversees the American litigation. Appointing a committee will help ensure that the members update one another on major developments and are aware of strategic concerns outside of their own jurisdictions regarding the matter.

— **Track which data was collected by whom.** Because of differing theories and burdens of proof, the multiple regulatory entities and civil litigants will likely have different questions about technical details that are difficult—both in the amount of time it takes and in the level of disruption—to reproduce years later if it was not collected initially. For example, a civil litigant may ask how certain financial data was collected and what it contains years after it was collected for a regulator. Similarly, certain hard-to-produce data may never have been collected at all. It will be impossible to anticipate everything that will be important to every party at every point in time. However, to be in the best position to answer these questions at minimal cost and disruption, track the origin of each data set and why certain decisions with regards to document collection and production were made.

— **When tracking the origin of collected documents, take note of the data privacy issues for each jurisdiction.** Just because the data was produced to one regulator in one country, that does not mean it can be produced without issue to a different regulator in a different country. At a minimum, in many instances a protective order or separate agreement may need to be negotiated regarding that

data.[2] In addition, exercise thought with respect to the movement of documents from one jurisdiction to another. The careless movement of documents from one jurisdiction to another (even to a law firm in the second jurisdiction) may result in the loss of data privacy protection that otherwise might shield these documents from production to a regulator.

- **Keep detailed privilege and production logs.** As discussed below, regulators or civil litigants in an investigation or litigation that lags behind the initial investigation will likely begin discovery by asking companies to produce every document previously produced to regulators. This is known as "cloned discovery." Different courts have different approaches with respect to such requests; some courts permit them while others do not. When permitted, these productions will often be accompanied by privilege logs, but specific grounds for withholding documents may differ jurisdiction-to-jurisdiction and may need to be updated for each matter. Further, as regulators make idiosyncratic requests relevant to their jurisdiction or theory that are not disclosed, the "cloned discovery" may not be entirely synced among parties. Thus, to avoid accidentally withholding or disclosing documents, make sure there is one detailed "master" production log accounting for the different regulator-specific documents and privilege decisions.
- **Update prior answers when subsequent investigations disclose additional information.** During investigations into similar conduct, it is important to coordinate responses and maintain a consistent message among all regulators, including updating prior answers and productions to regulators when that information is newly made available to other regulators. Even when one regulator has not specifically asked for an item, it may make sense to produce it to that regulator when a company is producing it to respond to another regulator if it is likely to be or become relevant to its inquiry. When generating a document for a regulator containing factual information, it is also frequently useful to note that it is based on the best available information at the time and to correct such documents based on new information.
- **Reassess cooperation and preemptive disclosure choices.** As discussed further below, as the investigation brings more information to light, periodically reevaluate whether preemptive disclosure to other regulators may be beneficial.

[2] Data privacy is discussed in further detail in Chapter V: Data Privacy & Blocking Statutes.

Consider Downstream Consequences of Production and Settlement

Even if facing seemingly separate investigations from regulators in different jurisdictions, a company should assume decisions made in one will still impact investigations in another. Two major areas where these downstream consequences are significant are during document productions and when settling with a regulator. Generally, a company should not expect to produce documents "only" to a certain regulator or to cut a less-than-favorable deal in order to resolve a particular (often "minor" investigation). Similarly, without careful consideration, decisions made in order to resolve a matter with one regulator will dictate the terms with other regulators down the line.

Handling Cloned Discovery and Privilege Considerations

Document productions to one regulator do not happen in a vacuum specific to that regulator. In fact, many regulatory discovery requests will be very broad to start, but at a minimum most will request "cloned discovery," requiring the company to produce all documents previously produced in the context of the investigation to other regulators. Civil litigants will take the same approach and attempt to seek discovery of all materials produced to regulators. Some courts grant these requests on the view that "[t]he burden on the defendants is slight when a defendant has already found, reviewed and organized the documents."[3] Others do not, based on the competing view that civil litigants should not be able to piggyback on the work of government regulators.[4] Regardless, companies should anticipate and plan for the possibility of cloned discovery from an early stage, and work with counsel to develop arguments for limiting cloned discovery when it is later requested by regulators or civil litigants (for example, based on data privacy, privilege, jurisdiction, or burden).

[3] *In re Bank of Am. Corp. Sec., Derivative, & Emp. Ret. Income Sec. Act (ERISA) Litig.*, No. 09 MDL 2058 (DC), 2009 WL 4796169, at *2 (S.D.N.Y. Nov. 16, 2009) (lifting the automatic stay of discovery of the PSLRA due to prior investigations) (internal quotation marks omitted).

[4] *See, e.g.,* Order Denying Volkswagen-Branded Franchise Dealers' Motion To Compel, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Products Liab. Litig.*, No. 3:15-md-02672 (N.D. Cal. Apr. 24, 2018), ECF No. 4996.

PRACTICE TIP:
LIMITING CLONED DISCOVERY

Although some courts grant cloned discovery and such discovery may be useful in some circumstances, companies should still consider planning for and fighting off discovery requests seeking "all" productions to and communications with regulators during the investigation. In one instance, the court denied plaintiff's initial request as overbroad, and subsequently granted plaintiff's limited request for a "targeted subset of regulatory materials, including white papers, presentations, written memoranda, or briefs shown or provided."[5] Further, planning for potential requests for cloned discovery by relying on oral presentations to regulators, where possible, may be an effective means of limiting the impact of clone discovery requests.

Another consideration when producing documents is whether the company is waiving a privilege. Producing a document to one regulator may waive the privilege to that document—or worse, to an entire subject matter—in the future.[6] Whether it will result in a waiver depends, in part, on whether the company had a privilege in the first place and whether it asserted that privilege or voluntarily produced. Because waiving privilege may grant cooperation credit during settlement negotiations,[7] it may, in some cases, be a worthwhile strategy. Ultimately though, the decision to produce privilege communications should only be made after careful consideration of the pros and cons of disclosure relevant to *the entire set of investigations* rather than the considerations relevant only to a specific regulator. In particular, companies and their counsel should consider different privilege standards across jurisdictions, along with the importance of disclosing privileged communications to obtain cooperation credit with regulators, the ability to maintain flexibility for future investigations or litigation by *not* disclosing privileged communications, as well as whether there are alternative ways to satisfy a regulator without actually disclosing privileged communications. For example, counsel may be able to present regulators with non-privileged facts learned during the course of an investigation that can get regulators most, if not all, of what they need without waiving privilege.

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[5] *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14 Civ. 7126 (JMF), 2017 WL 280816, at *1 (S.D.N.Y. Jan. 20, 2017).

[6] *E.g., In re Grand Jury Proceedings*, 219 F.3d 175, 182–83 (2d Cir. 2000) ("[A] party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party."). *See also* Chapter V: Data Privacy & Blocking Statutes, discussing privilege considerations in further detail.

[7] *E.g.*, USAM 9-28.700; Federal Sentencing Commission, Guidelines Manual § 8C2.5 ¶ 13 (2016), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf. Cooperation is discussed in further detail in Chapter VII: Cooperation.

PRACTICE TIP: UNIQUE COLLATERAL PRIVILEGE CONSIDERATIONS—HANDLING A CONGRESSIONAL INVESTIGATION

When facing a congressional investigation, there are unique difficulties in maintaining and preserving legal privilege for related regulatory investigations and subsequent private actions. Chiefly, congressional committees do not always respect the invocation of attorney-client privilege and work product doctrines, and there are limited options to challenge such determinations, given the lack of court review.[8] And documents produced in these investigations are often referenced or contained within congressional investigative reports following the investigations. Litigants then request or attempt to use these documents, on the theory that privilege has been waived through disclosure to Congress.[9]

However, producing documents to Congress may not automatically waive privilege. Courts have held that producing documents under a subpoena demand is often considered an involuntary disclosure that will not waive the privilege as to other litigants.[10] Yet, to avoid waiving the privilege, a company may need to show it at least attempted to assert privilege or resist producing them to Congress initially before complying.[11] This standard raises difficulties of litigants that may want to avoid a formal subpoena from Congress, and voluntarily produce documents.[12] In such circumstances, voluntary responses to Congress raises similar waiver and confidentiality considerations, and should be framed and negotiated in such a way as to limit the risks of waiver to the greatest extent possible.

[8] *See generally* Todd Garvey & Alissa M. Dolan, Cong. Research Serv., *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure* 61 (2014), https://www.everycrsreport.com/files/20140410_RL34097_e1c05978a98ae4be23d3a3d973c553198c9dda72.pdf ("In the end, of course, it is the congressional committee alone that determines whether to accept a claim of attorney-client privilege.").

[9] *See, e.g., Spears v. First Am. eAppraiseIT*, 75 F. Supp. 3d 208, 212 (D.D.C. 2014).

[10] *Id*. at 212–13 ("[E]ven if the disclosure of documents were considered voluntary, because the documents were provided under seal by the OTS to the Senate PSI, this Court cannot reason that the disclosure was inconsistent with the maintenance of secrecy.").

[11] *Anaya v. CBS Broad., Inc.*, No. 06 Civ. 476 (JB) (KBM), 2007 WL 2219394, at *10 (D.N.M. Apr. 30, 2007) ("It is fair for a court to require the witness show that some serious effort was made to convince the Chair/and or the committee itself to recognize the privilege claims being asserted.") (citation omitted).

[12] *C.f., United States v. Philip Morris Inc.*, 212 F.R.D. 421, 426 (D.D.C. 2002) (producing documents day after receiving subpoena considered voluntary and a waiver).

Settlement Timing

Choosing when to begin settlement discussions with regulators may have cascading effects. For example, one of the factors considered by federal prosecutors when shaping settlement demands is the existence of related settlements for the same conduct.[13] Thus, where possible, a company should consider the sequence to maximize credit among regulators who may consider prior and related settlements.[14] However, settling with one regulator will likely invite scrutiny from other regulators or civil plaintiffs. Thus, also consider coordinating settlements to effect a global settlement among multiple regulators or with multiple defendants simultaneously if there is a joint-defense group. This may even be possible on a cross-jurisdictional basis.[15]

PRACTICE TIP:
MAXIMIZING COOPERATION CREDIT

Even when a global settlement may not be possible it is still important to coordinate active and potential investigations before settlements. In order to maximize cooperation credit where relevant, before the first settlements or investigations are made public, consider whether preemptively reaching out to regulators who might otherwise respond to an announcement and begin an investigation is the proper course of action. Especially when the investigation involves multiple defendants, consider reaching out to regulators who grant additional credit for being "first in line" even before news of the investigations begins to leak.

But be careful. It is a balancing act between engaging in preemptive disclosure to gain cooperation credit and engaging regulators who might not otherwise have taken action but for the disclosure.[16]

[13] *See* Dep't of Just., *U.S. Attorneys' Manual* § 9-28.300 (Nov. 1997) ("USAM"). In fact, the Department of Justice ("DOJ") recently announced an anti "piling on" policy designed to avoid penalizing companies repeatedly for the same conduct in certain circumstances. *See* Deputy Att'y Gen. Rod J. Rosenstein, Dep't of Just., Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act (May 9, 2018).

[14] *See*, for example, the Statoil settlement discussed in Chapter VII: Cooperation.

[15] *See, e.g.*, Press Release, Sec. Exch. Comm'n, *Petrochemical Manufacturer Braskem S.A. to Pay $957 Million to Settle FCPA Charges* (Dec. 21, 2016), https://www.sec.gov/news/pressrelease/2016-271.html (noting a nearly billion dollar global settlement with the "SEC, U.S. Department of Justice, and authorities in Brazil and Switzerland"); Press Release, Sec. Exch. Comm'n, *SEC Sanctions Statoil for Bribes to Iranian Government Official* (Oct. 13, 2006), https://www.sec.gov/news/press/2006/2006-174.htm (announcing a simultaneous settlement with the SEC and deferred prosecution agreement with the DOJ and U.S. Attorney's Office for the Southern District of New York).

[16] Considerations regarding cooperation are discussed in further detail in Chapter VII: Cooperation.

Negotiating Settlement Language—Limiting Prejudicial Language

When settling with a regulator, it is vital that any statement of facts accompanying the settlement, and especially any admission of wrongdoing, is as limited and narrow as possible. Even when settling on a "neither-admit-nor-deny" basis—which prevents future litigants from admitting evidence of that settlement as proof of liability[17]—limiting the tone and scope of the factual allegations is important. Future regulators and civil litigants will look at these prior documents as a starting point when considering their theories. Some courts will permit plaintiffs to rely even on unadmitted allegations in supporting a claim for relief.[18]

Most beneficially, settlements that admit no wrongdoing and contain no harmful facts can be used affirmatively in negotiations with other parties. Of course, getting a settlement without an admission may be easier said than done, depending on governmental or public pressure on obtaining admissions of wrongdoing.[19] However, make sure, to the extent that there is negative language regarding corporate conduct, to limit, where possible, the extent to which the company is restricted in what positions it can take in subsequent civil litigation.[20] One issue to keep in mind relates to the legal standards that civil litigants and regulators in other jurisdictions will need to satisfy to bring a claim. Frequently, it may be possible to use language that satisfies one regulator without admitting to allegations that constitute a violation in a second jurisdiction.

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[17] *See, e.g., United States v. Cook*, 557 F.2d 1149, 1152, 1155 (5th Cir. 1977) (holding that the DOJ was not permitted to admit into evidence a prior neither-admit-nor-deny settlement with the SEC).

[18] *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) (permitting plaintiffs to rely on SEC's complaint and non-prosecution agreement in pleadings) (citing *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887 (2d Cir. 1976)).

[19] *See* Mary Jo White, Chairwoman, Sec. Exch. Comm'n, Address at the Council of Institutional Investors Conference: Deploying the Full Enforcement Arsenal (Sept. 26, 2013), https://www.sec.gov/News/Speech/Detail/Speech/1370539841202 (outlining new admissions policy when settling claims with the SEC); Letter from Sen. Elizabeth Warren to Sec. Exch. Comm'n Chair Mary Jo White 8 (June 2, 2015), www.warren.senate.gov/files/documents/2015-6-2_Warren_letter_to_SEC.pdf (claiming that SEC waivers allows banks "to continue to enjoy special privileges under the securities laws despite the deep breaches of trust and evident mismanagement displayed").

[20] Thus for example, regulatory policy in the Commodity Futures Trading Commision ("CFTC") typically results in a provision in any settlement order stating "nothing in this provision shall affect" the "right to take legal positions in other proceedings to which the Commission is not a party." *See, e.g.*, *In re Barclays PLC*, CFTC No. 12-25, 2012 WL 2500330, at *36 (June 27, 2012).

Negotiating Settlement Language—Developing Advantageous Language

Beyond limiting negative language, try to include as much positive language as possible in the settlement that can be used offensively by the company in related future proceedings.

PRACTICE TIP:
INCORPORATING BENEFICIAL LANGUAGE INTO A SETTLEMENT

Consider an example settlement regarding conduct of a rogue employee. Include language, as applicable, highlighting:

- The company's robust compliance programs.
- The company's cooperation and self-reporting.
- Lack of knowledge by senior management at the company.
- Losses to the company caused by the rogue employee.
- The company's efforts to make possible victims whole.

Although this language may not prevent future litigation, it will help set the narrative and frame the conduct at issue in a way that is most beneficial to the company.

Negotiating Fines and Settlements

Like the settlement language, a major part of any settlement is the monetary sanction, which may be seen as a signal to future litigants about what to expect. The first settlement amount may be seen as a "floor" that future regulators compete with during settlement negotiations. Depending on the regulator's jurisdiction, consider trying to classify as much of the monetary penalty as possible as restitutionary or disgorgement awards instead of fines or penalties. Courts may rely on general equitable principles to prevent double recoveries to the same parties for the same conduct. Thus, restitutionary or equitable awards may foreclose or limit certain

types of follow-on civil litigation that address the same conduct.[21] In addition, regardless how the financial sanction is characterized, if monies flow to victims, that might limit the company's financial exposure in parallel private litigation. Conversely, payments toward civil settlements may reduce certain types of awards from regulators or limit their suits entirely if they bring similar claims on behalf of consumers.[22] It is also useful to be mindful of the tax and insurance consequences of a financial sanction. While oftentimes a penalty might not be tax-deductible or insurable, that rule is not uniform and there are exceptions. Slight changes in language may make a big difference in a company's ability to take a tax deduction or recover from an insurer.[23]

[21] *See, e.g., Imber-Gluck v. Google Inc.*, No. 5:14 Civ. 01070 (RMW), 2015 WL 1522076, at *2 (N.D. Cal. Apr. 3, 2015) (citing *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205 (9th Cir. 1975)) (denying class certification because the class was better served through the FTC settlement, which refunded customers for its wrongdoing); *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 734 F.Supp. 1071, 1076-77 (S.D.N.Y. 1990) (civil settlement reduced by any profits already disgorged to SEC in prior action).

[22] *See, e.g., SEC v. Palmisano*, 135 F.3d 860, 863-64 (2d Cir. 1998) (disgorgement award offset by payments made in criminal case); *People ex rel. Spitzer v. Applied Card Sys., Inc. (In re People ex rel. Spitzer)*, 11 N.Y.3d 105, 124-25 (2008) (New York Attorney General was barred by res judicata from seeking additional restitution due to prior California class action). *But see SEC v. Shah*, No. 92 Civ. 1952 (RPP), 1993 WL 288285, at *4-5 (Jul. 28, 1993) (no offset to regulatory fine for civil settlement because recoveries were under different theories of improper gain).

[23] *See* Diana L. Wollman and Jonathan Gifford, *IRS Issues Guidance on Deductibility of Settlement Payments Under New Law*, Cleary Enforcement Watch (Apr. 6, 2018), https://www.clearyenforcementwatch.com/2018/04/irs-issues-guidance-deductibility-settlement-payments-new-law/; Diana L. Wollman *et al., Settlement Payments Under the New Tax Reform Law*, Cleary Enforcement Watch (Feb. 21, 2018), https://www.clearyenforcementwatch.com/2018/02/1962/.

PRACTICE TIP: NEGOTIATING FINES

1. **Find the right tone:** If the negotiation is with an industry regulator that the company will have continued relations with, it may make sense to develop a less adversarial tone during the negotiation to preserve the relationship. At the same time, it may be wise to be more aggressive when negotiating the first settlements, given their potential impacts on future resolutions.
2. **Using Prior Settlements:** If the company's prior settlements with other regulators for the same conduct have favorable language and are still applicable (i.e., no other relevant conduct has since come to light), use them affirmatively during negotiations. If the prior settlements are negative, avoid them or distinguish them based on the different regulator's powers or jurisdictional hooks. For example, an antitrust regulator and a banking regulator might both look into a conspiracy scheme, but from vastly different angles and with different goals in mind. The banking regulator may focus more on systems and controls and may not differentiate significantly between unilateral and multilateral conduct, whereas the competition regulator may focus more on meetings and language suggesting agreements among competitors.
3. **Using Related Settlements:** If this settlement is part of a multi-defendant investigation, differentiate the company from other parties using other publicly available settlements and fact-finding as a way to lessen the fine in comparison. Even in situations where there are no co-defendants, it may be useful to compare the situation at hand with recent prior settlements with that regulator, or for similar conduct, to ensure consistency.
4. **Using Prior Settlements Against Other Companies:** Settlements the regulator has entered in other matters can be an important benchmark. Study settlements early in an investigation and be mindful of the facts that the regulator has deemed important in developing the factual records, making arguments, and providing cooperation.

Anticipating, Avoiding, and Coordinating Collateral Consequences

In certain industries (and especially in the securities industry), admissions of wrongdoing in a settlement, the filing of an indictment, the entering of a judgement, or the entering of an order from a Self-Regulatory Organization might trigger collateral consequences that require the company to apply for waivers or exemptions in order to avoid disqualifications or continue conducting certain business activities.[24] Details that seem insignificant may lead to far-reaching regulatory consequences. However, minor adjustments to the language of the settlement can often avoid triggering these consequences. In a regulatory climate where the process of obtaining waivers has become more protracted and less certain,[25] it is important to try to avoid being subject to this process in the first instance. Therefore, a company should begin thinking about these potential consequences from the outset of an investigation and should consult experienced counsel early on to make sure these collateral regulatory consequences are considered and anticipated.

PRACTICE TIP:
CONSIDERING THE RELATIONSHIPS BETWEEN REGULATORS

Regulators may not be averse to incorporating changes in settlement documents that will avoid triggering collateral consequences imposed by other agencies. The settling regulator may not be concerned with those consequences, or may even want to avoid becoming subject to other regulators' timelines.[26] Since the regulator may be open to negotiating these points, companies should not be hesitant to introduce such revisions to the settlement language.

[24] As one important example, large financial institutions subject to an enforcement action must request an exemption with the SEC to continue to be considered a "well-known seasoned issuer," which grants them certain conveniences when registering securities for offer and sale. *See* 17 C.F.R. § 230.405 (2018); Mary Jo White, Chairwoman, Sec. Exch. Comm'n, Remarks at the Corporate Counsel Institute: Understanding Disqualifications, Exemptions and Waivers Under the Federal Securities Laws (Mar. 12, 2015), https://www.sec.gov/news/speech/031215-spch-cmjw.html (discussing exemptions and waivers under federal securities laws). As another example, FINRA will revoke the membership of any entity subject to enforcement actions under the "statutory disqualification" requirement in 15 U.S.C. § 78c(a)(39), although it has a process for entities to seek a waiver and maintain membership. *See, e.g., Mathis v. SEC*, 671 F.3d 210, 216 n.5 (2d Cir. 2012). In addition, government agencies may also refuse to contract with companies that have a conviction or civil judgment for certain misconduct. *See generally* 48 C.F.R. § 9.4 (2018).

[25] *See, e.g.*, Emily Flitter, *Settlements for 3 Wall Street Banks Hold a Silver Lining*, N.Y. Times, Feb. 1. 2018, https://www.nytimes.com/2018/02/01/business/banks-settlements-waiver-cftc-sec.html.

[26] *See id.* (quoting a Commodity Futures Trading Commission ("CFTC") spokeswoman as commenting that "forcing banks to wait for waivers had kept the C.F.T.C. from finalizing settlement agreements. 'The S.E.C.'s waiver process has taken up to nine months,' she said. 'In these cases, this has delayed C.F.T.C. enforcement actions, which otherwise would have been resolved, for almost a year.'").

To this end, at an early stage in negotiating a resolution with a regulator or litigant, ideally before seeing the first draft of the language of a settlement, it is important to conduct a review in consultation with counsel experienced in this area, using existing knowledge of the company's business as well as past company settlements in order to identify the potential consequences of entering into the settlement. After this review, the company can propose changes to the settlement language, or the addition of a statement of disqualification, that will avoid triggering these consequences, thus obviating the need to seek exemptions or request waivers.

If it is not possible to avoid triggering regulatory consequences when entering into a settlement, the company should work with counsel to review the relevant waivers and exemptions and resolve them before settling in order to avoid disrupting corporate units or triggering any separate legal reporting requirements. In particular, it is important to manage the timing of the finalization, approval and announcement of the settlement, if possible, to give the company time to engage in advocacy with the relevant regulators and negotiate any waivers and exemptions to be received before the settlement is entered. Raising the need for more time to seek waivers and exemptions in the "eleventh hour" can result in the settling regulator requesting additional sanctions or declining to delay the settlement, which in turn risks potential negative market and reputational impacts associated with the consequences being publicized.

Navigating Simultaneous Requests from Multiple Authorities

During a large, multi-jurisdictional investigation, there will be multiple regulators receiving productions at the same time. At any given time, some of these regulators may be more engaged than others. However, regardless of which regulators are driving the productions, make sure that, where appropriate, responses to multiple authorities are coordinated and considered strategically to ensure goodwill and maximize cooperation credit. Thus, for example, where possible, relevant productions should be made to all investigating regulators simultaneously and should be appropriately framed in dialogue or correspondence. This coordination may even help reduce costs for the company during each production. If the productions going to regulators become out of sync or if discussions with regulators about the productions vary in substance or context, it may reflect poorly on the cooperation of the company. Regulators may speak to one another regarding an investigation

and compare notes.[27] Thus, if one regulator views itself as consistently being treated differently, it may extend less goodwill in the future.

Conversely, just because regulators *may* talk does not mean that companies should assume that they *do*. For example, materials produced in the context of a criminal grand jury investigation cannot be shared with the civil department or civil regulatory agencies,[28] so companies should not assume productions made in part of a related proceeding will automatically be shared with all parties. Nor should a company assume that one regulator will be comfortable that its communications with the company will be shared with a second regulator. While it might be important to keep multiple regulators all on the same footing, it is equally important to be sensitive to the concerns of each regulator that the course and direction of its investigation be kept confidential.

Types of Follow-On Civil Litigation

Consider the possibility of follow-on civil litigation once the conduct is uncovered and an investigation begins. Depending on the underlying conduct, whether it has caused harm, and the identity of those affected, suits may arise from consumers, shareholders, or even competitors. Further, the monetary demands from these cases may far exceed the fines a company faces from regulators.[29] Indeed, in some cases, private litigants may even be able to obtain double or treble damages.

There are multiple types of follow-on litigation, depending on the nature of the underlying conduct. Consumers, shareholders (securities violations and shareholder derivatives suits), competitors (antitrust and competition suits), and others who may have been affected by the wrongdoing can rely on the investigative findings as a roadmap for their complaint. As noted above, these follow-on cases are likely to be filed after the investigation is brought to light, either when announcing a settlement or during interim statements made about an investigation.

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[27] Indeed, agencies are often directed to consider how to coordinate parallel proceedings intra- and inter-agency. *See* 12 U.S.C. § 5515 (2018) (requiring the Consumer Financial Protection Bureau to coordinate investigations and enforcement actions with other agencies); Dep't of Just., *U.S. Attorneys' Org. and Functions Manual* § 27 (Jan. 2012); Sec. Exch. Comm'n, *Enforcement Manual* § 5.2.1 (2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

[28] Fed. R. Crim. P. 6(e)(2)(B); 31 U.S.C. § 3733(b)(1)(A) (2018).

[29] *See, e.g.*, Compl., *Moore v. Groeb Farms, Inc.*, 1:13-CV-02905 (N.D. Ill. filed Apr. 17, 2013) (filing for bankruptcy after follow-on civil litigation exacted treble damages from the company).

PRACTICE TIP:
FOCUS ON THE RISK OF FOLLOW-ON SECURITIES LAW SUITS

On top of the civil litigation risk relating to the misconduct itself, public companies also face another risk of litigation under the securities laws. Because public companies have certain disclosure obligations in their filings and statements, any material misstatement or omission contained in those statements can be an independent basis for suit. Thus, a company could face regulatory scrutiny and civil litigation about its conduct, coupled with an additional independent suit about its statements concerning that conduct before or during the investigations. Too much disclosure could be inaccurate and could also create unnecessary regulatory momentum and become a self-fulfilling prophecy. On the other hand, too little disclosure or inaccurate disclosure could expose the company to litigation risk (and criticism from investors) when a resolution is ultimately announced. To avoid this, be sure to comply with the regulatory disclosure requirements and ensure that the lawyers work closely with the public relations team handling the messaging during the crisis.[30]

Responding to Legislative Action

If the company crisis is big enough or sufficiently in the public eye, it is possible that there will be legislative action or administrative rulemaking aimed at addressing similar conduct in the future. In especially major cases, Congress may engage in its own investigation, subpoenaing witnesses and documents.[31]

How to handle a congressional investigation is a topic of its own, fit for its own book. But, as they relate to regulatory investigations and prosecutions, congressional investigations can present their own host of issues. A witness's testimony—whether at a public hearing or in a private session with staffers—will help set the factual record that the regulator will also consider. An insufficiently prepared witness can also be lulled into making statements that are insufficiently complete or untrue, undermining that witness's credibility in the regulatory matter and potentially subjecting the witness to prosecution for the untruth. Publicity can add fuel to the fire of a regulatory investigation, putting pressure on the regulator to aggressively

[30] Public relations and message management are discussed in further detail in Chapter VIII: Public Relations & Message Management.

[31] Michael L. Koempel, Cong. Research Serv., *A Survey of House and Senate Committee Rules on Subpoenas* (2017), https://fas.org/sgp/crs/misc/R44247.pdf.

charge a violation. In addition, a company should assume that documents produced in a congressional investigation will also have to be produced to regulators or will be made public by the congressional committee itself, potentially even putting the privilege at risk.[32]

CASE STUDY: CONGRESSIONAL RESPONSE TO THE WELLS FARGO SALES SCANDAL

In September of 2016, Wells Fargo was fined $185 million to settle accusations that its employees created two million fake accounts, which catalyzed customer charges and hurt credit scores, to satisfy sales pressure coming from the top-down.[33] Later, Senator Sherrod Brown, the Senate Banking Committee's top Democrat, and Representative Brad Sherman introduced a bill that would allow victims of the Wells Fargo scandal (and similar scandals) the opportunity to sue, rather than have their disputes arbitrated as required by contract.[34] For its part, Wells Fargo disputed the applicability of the clauses and ultimately settled with civil plaintiffs rather than forcing the arbitration clause issue.[35]

When Congress is considering taking legislative action in response to a crisis, it is important to stay engaged in this process to best provide relevant input on what action is necessary and how to effectuate it. If there is a danger of over-correction, emphasize the limited scope of what caused the problem in order to ensure that any legislative or administrative action has as narrow a focus as possible. To maintain credibility in the public sphere while debating this possibility, it will be important to be viewed as cooperating and immediately fixing any known issues. If the public views this as an isolated incident that is being fixed, Congress may be less likely to respond with negative legislative action. Even in instances where legislative or administrative action is warranted, having a voice in what those changes need to be may be useful in any remaining pending investigations or civil litigation.

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[32] For a fuller discussion of the privilege in Congressional investigations, *see* Chapter V: Data Privacy & Blocking Statutes.

[33] Press Release, Consumer Fin. Protection Bureau, *Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts* (Sept. 8, 2016), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/.

[34] Justice for Victims of Fraud Act, S. 552, 115th Cong. (2017).

[35] Press Release, Wells Fargo, *Wells Fargo Announces Agreement in Principle to Settle Class Action Lawsuit Regarding Retail Sales Practices* (Mar. 28, 2017), https://www.wellsfargo.com/about/press/2017/class-action_0328/.

Finally, remember that public comments about any impending rules will be considered by any regulators still investigating the conduct and by investors considering securities suits.[36]

Beginning in the earliest phases of a multi-jurisdictional crisis, a company must engage in a rigorous analysis directed at identifying the potential downstream consequences of attendant investigations and actions. This process can be used to articulate priorities and goals, to which the company should then refer throughout the process of crisis management, from responding to initial requests to negotiating final settlements. Planning in this way can reduce the costs associated with the crisis and limit disruption of the company's business activities, thereby minimizing the ultimate impact of the crisis on the company.

[36] Public statements are discussed in further detail in Chapter VIII: Public Relations & Message Management.