Chapter VII:
Cooperation

Summary

Cooperation:

— Requires voluntary and affirmative assistance beyond merely responding to compulsory requests for information.

— Involves providing information relevant to the investigating authority's inquiry.

— Generally does not require a party to waive privilege.

— May require assisting authorities in building cases against individuals.

— Will generally be considered in tandem with other factors (such as, for example, severity of the conduct) when determining what, if any, credit is warranted for cooperation.

Cooperation Credit:

— Depending on the facts, may take the form of a:

- Deferred prosecution agreement ("DPA");
- Non-prosecution agreement ("NPA");
- Cooperation agreement;
- Reduction in fines or other penalties, or the imposition of remedial measures;
- Reduction in jail time (for culpable individuals); or
- Declination of enforcement action.

Introduction

Cooperation in the context of a government investigation or enforcement action means voluntarily providing affirmative assistance to the investigating authority in the authority's investigation of a crime or violation that goes beyond what is legally required.[1] Regulatory and law enforcement authorities offer incentives to companies that cooperate in their investigations and enforcement actions, including lower penalties or fines, or declination of prosecution altogether. Consequently, while it comes with risks and costs, cooperation can also be a valuable tool for corporations looking to reduce their liability exposure. However, the costs and risks of cooperation can at times be significant and must be considered before a decision is made whether to cooperate. Investigating authorities are known frequently to quote the adage that you cannot cooperate halfway. For similar reasons, once a company has started to cooperate, it is frequently ill-advised to stop cooperating. Moreover, because the notion of cooperation can be subjective and investigating authorities retain substantial discretion with respect to the type and extent of cooperation credit to extend, it is difficult to have a concrete sense of the actual benefits of cooperation prior to the conclusion of an investigation—and even then the tangible benefits may be uncertain. This chapter explores some relevant considerations in determining whether and how to cooperate in an investigation, as well as available guidance from different authorities as examples of the factors considered and cooperation credit extended (or denied) in different contexts.

What Is Cooperation?

The exact manner in which cooperation is defined in the context of an investigation has both objective and subjective components and may be case and agency specific. Different authorities vary in the factors considered and credit awarded, which may further also depend on the particular circumstances of a given case. There are, however, general factors that are typically considered by authorities, which can be instructive in formulating a cooperation strategy.

[1] *See, e.g., Frequently Asked Questions: Corporate Cooperation and the Individual Accountability Policy*, Dep't of Just., (Nov. 30, 2016), https://www.justice.gov/file/913911/download.

PRACTICE TIP:
FACTORS TYPICALLY CONSIDERED IN DETERMINING THE EXTENT OF COOPERATION

- The timeliness of the cooperation, including whether the company self-reported any actual or potential misconduct.
- How quickly misconduct was detected, escalated, and addressed.
- The quality of the company's compliance and reporting program, and whether any deficiencies were resolved.
- The quality of the internal investigation, including whether the company provided information about culpable individuals as well as information that the investigating authority may not have been able to obtain on its own.
- The quality of practical assistance offered to the investigating authority, including whether documents were produced and witnesses were made available in a timely manner.
- Other remediation efforts undertaken after the wrongdoing was discovered.
- Resources devoted by the company to cooperation and correspondingly resources conserved as a result of the cooperation, and the degree to which the information provided otherwise furthered the investigation.

Practically Speaking, What Does Cooperation Look Like?

Many government and regulatory authorities award cooperation credit for a company's affirmative assistance with an investigation. A company should anticipate that different authorities vary in their willingness to articulate the precise metrics they apply in assessing cooperation, including how they calculate any cooperation credit and the amount of credit that they will award.

Cooperation in the United States

In the United States, government authorities—including, for example, the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC" or "Commission")—typically consider a host of factors in determining cooperation credit. These factors range from assisting with relatively prosaic but costly tasks, such as translations, to providing the government with evidence,

often located abroad, that it may not have been able to obtain without company cooperation. In general, authorities are willing to provide the most credit—including declining to bring a case at all—to entities that had low levels of culpability, but nonetheless provided extensive assistance, including in providing timely factual information that can be used to build cases against culpable individuals.

The DOJ

The DOJ, for example, has—at least for certain types of misconduct—been willing to articulate how it quantifies cooperation credit with significant granularity.

DOJ'S FOREIGN CORRUPT PRACTICES ACT (FCPA) CORPORATE ENFORCEMENT POLICY

In November 2017, the DOJ implemented the Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy.[2] This policy built on an earlier pilot program, adopted by the Fraud Section of the DOJ in April 2016, which articulated a written framework of penalty reductions to motivate companies "to voluntarily self-disclose FCPA-related misconduct."[3] Under the Corporate Enforcement Policy, a company may qualify for cooperation credit if it pays all "disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue,"[4] and meets the requirements set forth below:

Voluntary self-disclosure[5]

— Disclose wrongdoing "prior to an imminent threat of disclosure or government investigation."

— Disclose "within a reasonably prompt time of becoming aware of the offense."

— Disclose "all relevant facts known to the company, including all relevant facts about individuals involved in the violation."

[2] *See* Dep't of Just., *U.S. Attorneys' Manual* 9-47.120 (Nov. 1997) ("USAM").

[3] *See The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance*, Criminal Div., Dep't of Just. (Apr. 5, 2016), https://www.justice.gov/archives/opa/blog-entry/file/838386/download. The pilot program was originally set to expire in April of 2017, but was instead allowed to continue in full force until the DOJ completed an evaluation of the program. Jonathan Sack, *DOJ Announces It Will Extend FCPA "Pilot Program*," Forbes (Mar. 13, 2017), https://www.forbes.com/sites/insider/2017/03/13/doj-announces-it-will-extend-fcpa-pilot-program/#440722a51d3e.

[4] USAM § 9-47.120(1).

[5] *Id*. § 9-47.120(3)(a).

Full cooperation[6]

— Disclose, on a timely basis, all facts relevant to the wrongdoing at issue, including facts concerning the involvement of officers, employees, or agents.

— Engage in proactive, rather than reactive, cooperation, including disclosing relevant facts even when not asked to do so and identifying opportunities for the government to obtain relevant evidence not in the company's possession and unknown to the government.

— Preserve, collect, and disclose relevant documents and information relating to their provenance, including foreign and third-party documents and, where requested, document translations.

— Where requested, "de-conflict" an internal investigation with the government investigation.

— Make company personnel, including individuals located outside of the United States, available for DOJ interview upon request.

— Disclose all overseas documents, except where foreign law prohibits disclosure (with the responding party bearing "the burden of establishing the prohibition").

Remediation[7]

— Thoroughly analyze the root causes underlying the identified conduct and implement remedial steps to address the causes identified.

— Implement an effective compliance and ethics program based on specified criteria.

— Appropriately discipline culpable employees.

— Demonstrate appropriate retention of business records, including prohibiting improper destruction or deletion.

— Implement measures to reduce the risk of repetition of the misconduct identified.

[6] *Id*. § 9-47.120(3)(b).

[7] *See id*. § 9-47.120(3)(c).

The Corporate Enforcement Policy offers a rare degree of transparency as to the cooperation credit available to companies meeting the above requirements. Specifically, where a company has paid all required disgorgement or restitution, and has voluntarily self-disclosed, fully cooperated, and timely remediated:

— It is presumptively entitled to a declination so long as there are no "aggravating circumstances involving the seriousness of the offense or the nature of the offender."

— Where a criminal resolution is warranted, the DOJ will accord, or recommend to a sentencing court, a 50% reduction off of the low end of the U.S. Sentencing Guidelines (U.S.S.G.) fine range, except in the case of a recidivist.

— The DOJ generally will not appoint a monitor, so long as the company has implemented an effective compliance program at the time of the resolution.[8]

Additionally, if a company does not voluntarily disclose the wrongdoing, but later cooperates and fully remediates, "limited credit" may be available, whereby the company will receive, or DOJ will recommend to a sentencing court, "up to a 25% reduction off of the low end of the U.S.S.G. fine range."[9]

In a sign that the DOJ views the Corporate Enforcement Policy to be a successful model for promoting self-disclosure and cooperation, it has announced that the Corporate Enforcement Policy will serve as nonbinding guidance for non-corruption criminal cases investigated by the DOJ in the future.[10]

[8] *Id*. § 9-47.120(1).

[9] *Id*. § 9-47.120(2).

[10] *See generally*, Jonathan Kolodner et al., *DOJ Announces Expansion of Approach Encouraging Self Reporting and Cooperation*, Cleary Enforcement Watch (Mar. 5, 2018), https://www.clearyenforcementwatch.com/2018/03/doj-announces-expansion-approach-encouraging-self-reporting-cooperation/.

DOJ ANTITRUST DIVISION LENIENCY PROGRAM

Since 1993, the DOJ's Antitrust Division (the "Division") has offered a formal leniency program designed to facilitate cooperation in antitrust investigations.[11] Two types of leniency are available:[12]

— **Type A Leniency:** Automatically available where the Division was not aware of the anti-competitive activity from any other source prior to the company's reporting, *and* the company:

- Promptly and effectively terminates its participation in the misconduct upon discovery.
- Reports the wrongdoing with candor and completeness.
- Provides full, continuing, and complete cooperation to the Division throughout the investigation.
- Confesses to wrongdoing as a corporate act.
- Pays restitution where possible.
- Was not the ringleader of the conspiracy and did not coerce any participation in the conspiracy.

— **Type B Leniency:** Available where the Division has already received information about the illegal antitrust activity at the time of the application, regardless of whether an investigation has commenced, *and*:

- The company meets the other requirements for Type A Leniency.
- The Division has not yet obtained evidence against the company that is likely to result in a sustainable conviction.
- The granting of leniency would not be unfair to others given the factors relating to the company's participation.

[11] *See Corporate Leniency Policy*, Dep't of Just. (Aug. 10, 1993), https://www.justice.gov/atr/file/810281/download.

[12] *See Frequently Asked Questions about the Antitrust Division's Leniency Program and Model Leniency Letters*, Dep't of Just. (Jan. 17, 2017), https://www.justice.gov/atr/page/file/926521/download.

- The company is the first "to come forward and qualify for leniency with respect to the illegal activity being reported."[13]

Successful corporate leniency applicants may obtain substantial benefits,[14] including:

— Avoidance of all criminal penalties, which can amount to tens or hundreds of millions of dollars in a typical antitrust case.[15]

— For antitrust crimes, protection from criminal prosecution and possible incarceration for the company's officers and directors.[16]

Moreover, even if a company is unsuccessful in its leniency application, under the Division's "Leniency Plus" policy, an unsuccessful leniency applicant for a particular conspiracy may qualify for leniency in other markets in which it competes.[17]

As a practical matter, regardless of whether a governmental authority enumerates the specific actions it expects cooperating companies to undertake or only sets forth broader cooperation principles, investigating agencies typically expect cooperation to involve many, if not all, of the enumerated actions set forth in the DOJ's FCPA Corporate Enforcement Policy above, and it can, therefore, serve as a helpful reference in cooperating with other authorities as well. Further, while the DOJ has provided some quantification with respect to the cooperation credit available under its FCPA policy and Antitrust Leniency Program, each case differs and the

[13] *Id*. at 5. The Division will only award leniency to the first qualifying corporation for a particular antitrust conspiracy. Due to this "first-in-the-door" policy, companies have an incentive to make a leniency application as soon as they become aware of misconduct, before any co-conspirators or employees do so. *Id*. at 5–6. Accordingly, the Division has adopted a policy that allows a company to secure its place at the front of the line by putting down a "marker." To obtain a marker, a company's counsel must typically: "(1) [R]eport that he or she has uncovered some information or evidence indicating that his or her client has engaged in a criminal antitrust violation; (2) disclose the general nature of the conduct discovered; (3) identify the industry, product, or service involved in terms that are specific enough to allow the Division to determine whether leniency is still available and to protect the marker for the applicant; and (4) identify the client." *Id*. at 2-3. The corporate applicant thereafter has a finite period of time (generally 30 days) to perfect the leniency application. *Id*. at 4.

[14] *See id*. at 4-5.

[15] Scott D. Hammond, Dir. of Criminal Enforcement, Dep't of Just., *Fifteenth Annual Institute on White Collar Crime, When Calculating The Costs And Benefits Of Applying For Corporate Amnesty, How Do You Put A Price Tag On An Individual's Freedom?* (Mar. 8, 2001), https://www.justice.gov/atr/speech/when-calculating-costs-and-benefits-applying-corporate-amnesty-how-do-you-put-price-tag.

[16] If a company qualifies for Type A Leniency, "all current directors, officers, and employees of the corporation who admit their involvement in the criminal antitrust activity as part of the corporate confession . . . and continue to assist the Division throughout the investigation" will receive leniency. *Frequently Asked Questions about the Antitrust Division's Leniency Program and Model Leniency Letters* 20, Dep't of Just. (Jan. 26, 2017), https://www.justice.gov/atr/page/file/926521/download (last visited Aug. 3, 2018). If a corporation qualifies for Type B Leniency, the Division has greater discretion with respect to the charging decision. *Id*. However, "individuals who come forward with the corporation will still be considered for immunity from criminal prosecution" as if they had approached the Division on an individual basis. *Id*. at 20–21.

[17] *See id*. at 9–11. Note, however, that under the corresponding "Penalty Plus" policy, if a company applies for leniency due to one criminal violation, but fails to report an additional violation that the Division discovers, the leniency application is voided, and the Division will likely seek a more severe punishment for the additional crime. *See id*. at 11–12.

precise amount of cooperation credit assigned is ultimately within the discretion of the government attorneys investigating the case. Thus, companies should keep in mind that while cooperation may garner real benefits, other factors—such as the size and scope of any misconduct or the amount of publicity it garners—may also shape the contours of any resolution.

Other Investigative Agencies

In contrast to the detailed frameworks set forth in the DOJ's FCPA Corporate Enforcement Policy and Antitrust Leniency Program, other agencies—for example, the SEC and the Commodity Futures Trading Commission ("CFTC")—eschew detailed descriptions of concrete steps necessary to garner cooperation credit, much less undertake to quantify such credit. Instead, these agencies set out a series of principles that the agency looks to in determining whether an entity cooperated with an investigation.

THE SEC'S COOPERATION PROGRAM

The SEC has articulated four factors identified in the "Seaboard Report," which sets forth a framework for evaluating cooperation by companies.[18] These factors are:

— **Self-policing** prior to the discovery of the misconduct, including having effective compliance procedures in place and an appropriate tone at the top.

— **Self-reporting** misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins, and consequences of the misconduct, and promptly and completely disclosing the misconduct to regulatory agencies, to self-regulatory organizations, and to the public.

— **Remediation** including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those negatively affected by the misconduct.

— **Cooperation** with law enforcement authorities, including providing SEC staff with all information relevant to the underlying violations and the company's remedial efforts.

In weighing the Seaboard factors, the SEC retains broad discretion to evaluate each case individually. Additionally, the SEC may also take into account other factors, including:

— The nature of the misconduct, including how it arose, and the company's culture and compliance procedures.

— Where in the organization the misconduct arose and what that indicates about the way the entity does business.

— The duration of the misconduct.

— The extent of the harm, how it was detected, and what steps the company took following detection.[19]

[18] *See* Sec. Exch. Comm'n, Enforcement Manual § 6.1.2 (2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

[19] *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions Decisions*, Exch. Act Release No. 44969 (Oct. 23, 2001), https://www.sec.gov/litigation/investreport/34-44969.htm.

THE CFTC'S ADVISORIES ON COOPERATION AND SELF REPORTING

In September 2017, the CFTC Enforcement Division issued an "Updated Advisory on Self Reporting and Full Cooperation,"[20] which updates two prior advisories issued in January of that year,[21] in an effort to provide "greater transparency about what the [CFTC] requires from companies and individuals seeking mitigation credit for voluntarily self-reporting misconduct, fully cooperating with an investigation, and remediating[.]"[22]

In the January advisory addressing cooperation by companies, the CFTC indicated that it required more than just "ordinary cooperation or mere compliance" with law.[23] Rather, the CFTC considers the following factors in evaluating cooperation:

— *The value of cooperation to the CFTC's investigation or enforcement action*, including the timeliness of the disclosure.

— *The value of the company's cooperation in connection with the CFTC's broader enforcement interests*, including conservation of enforcement resources.

— *The relative culpability of the cooperating company*, including the circumstances of the misconduct, the company's history, and remediation.[24]

Under the January guidance, cooperation credit was discretionary, and could "range from the Division recommending no enforcement action" to "reduced charges or sanctions."[25]

The guidelines issued in September 2017 clarify the credit a company can expect for cooperation. Namely, where a company: (i) voluntarily self-discloses misconduct, (ii) fully cooperates, and (iii) appropriately remediates, the CFTC Enforcement Division

[20] *See Enforcement Advisory: Updated Advisory on Self-Reporting and Full Cooperation*, Commodity Futures Trading Comm'n (Sep. 25, 2017), https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf.

[21] *See Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies*, Commodity Futures Trading Comm'n (Jan. 19, 2017), http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf; *Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals* [hereinafter Recommendations for Individuals], Commodity Futures Trading Comm'n (Jan. 19, 2017), http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryindividuals011917.pdf.

[22] *Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies*, Commodity Futures Trading Comm'n (Sept. 25, 2017), http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf.

[23] *Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies* at 1, Commodity Futures Trading Comm'n (Jan. 19, 2017) https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf.

[24] *Id*. at 1, 4–5.

[25] *Id*. at 1–2.

"will recommend that the Commission consider a substantial reduction" in penalty and may, in extraordinary circumstances, recommend a declination of prosecution.[26]

— The voluntary disclosure requirement is satisfied where the company:

  - Discloses the misconduct before there is "imminent threat" of exposure.
  - Discloses within a "reasonably prompt" time after learning of the misconduct.
  - Includes all relevant facts known to the company at the time of the disclosure, including facts about relevant individuals involved.

While the CFTC makes clear that the most substantial reductions are reserved for companies that self-report, reductions in penalties are also available even if a company does not voluntarily disclose wrongdoing, but later fully cooperates and remediates.[27]

PRACTICE TIP:
COMPANIES SEEKING THE MAXIMUM BENEFITS FROM COOPERATION SHOULD, AT A MINIMUM, ANTICIPATE

— Affirmatively self-disclosing information from an internal investigation prior to the government knowing of or investigating the conduct.

— Quickly preserving, collecting, and disclosing all relevant documents, including all relevant documents located outside of the United States to the extent permitted by law (and asserting any legal barriers to doing so).[28]

— Providing translations of foreign-language documents.

— Identifying opportunities for the government to obtain relevant evidence unknown to government or beyond the reach of its investigative authority.

— Making officers or employees available to the government for interview, including those in foreign jurisdictions.

— Agreeing to continue cooperating in an investigation.

[26] *Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies* at 2, Commodity Futures Trading (Sept. 25, 2017) http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf.

[27] *Id*. at 2–3.

[28] Cross-border data issues, such as data privacy and blocking statutes, are discussed in further detail in Chapter V: Data Privacy & Blocking Statutes.

Cooperation Outside of the United States

In jurisdictions outside of the U.S., law enforcement and regulatory authorities may offer credit for cooperation, and similar competing considerations may impact a company's decision regarding whether to cooperate.

United Kingdom

In the United Kingdom, the Serious Fraud Office ("SFO"), which investigates and prosecutes "serious or complex fraud, bribery and corruption,"[29] and the Financial Conduct Authority ("FCA"), which regulates financial services firms,[30] each adopt certain measures and practices (including those which provide the possibility for reduced penalties) intended to incentivize corporations to cooperate with their investigations. In particular, a material incentive to cooperate with the SFO was provided to companies through the introduction of a DPA regime in February 2014.

By way of illustration, the SFO has published its "Guidance on Corporate Prosecutions" which clarifies that a "genuinely proactive approach adopted by [a company's] management team" will be a factor which militates against a criminal prosecution.[31] While the SFO does not expressly define what constitutes a "genuinely proactive approach" to cooperation, its Guidance on Corporate Prosecutions, Deferred Prosecution Agreement Code of Practice, and case law relating to the (relatively few) awards of DPAs to date[32] indicate relevant factors that the SFO might take into account in assessing the level of a company's cooperation.

[29] *See About Us*, Serious Fraud Office, https://www.sfo.gov.uk/about-us/ (last visited Aug. 3, 2018).

[30] *See About the FCA*, Fin. Conduct Auth., https://www.fca.org.uk/about/the-fca (last visited Aug. 3, 2018).

[31] *See Guidance on Corporate Prosecutions* ¶ 32, Serious Fraud Office, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/ (hereinafter Guidance on Corporate Prosecutions); *Deferred Prosecution Agreements Code of Practice* ¶ 2.8.2(i) (hereinafter Deferred Prosecution Agreements Code of Practice), Serious Fraud Office, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/.

[32] In contrast to the United States, the decision by the SFO to enter into DPA negotiations, and the terms of a proposed DPA, are both subject to the approval of the English courts. *See* Crime & Courts Act 2013, Sched. 17 ¶¶ 7–8, http://www.legislation.gov.uk/ukpga/2013/22/schedule/17/enacted.

SFO INVESTIGATIONS: FEATURES OF GOOD COOPERATION

In the context of SFO investigations, elements of good cooperation may include:

— **Voluntary Self-Reporting of Misconduct:** Self-reporting of misconduct is indicated as a factor that weighs against prosecution[33] and may weigh in favor of a DPA.[34] In assessing the effectiveness of a company's self-reporting, prosecutors may consider the following:

- How early the company self-reported after becoming aware of wrongdoing.
- The extent to which the company involved the prosecutor in the early stages of an investigation (for example, to discuss work plans, timetables, "or to provide the opportunity for the prosecutor to . . . commence an early criminal investigation").
- Whether the company identified all relevant information, including culpable individuals.[35]

— **Identifying Witnesses and Facilitating Interviews:** Proactive cooperation will typically involve identifying relevant witnesses and making them available for interview.[36] Moreover, a company will usually be expected to disclose witness accounts to the SFO, as well as the documents shown to witnesses.[37]

— **Disclosing Internal Investigation Documents:** In addition to providing the SFO with documents shown to witnesses, a cooperating company should expect to share documents relating to any internal investigation of the misconduct that it may have conducted,[38] which may include investigation interview summaries or memoranda.[39]

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[33] *See Guidance on Corporate Prosecutions* ¶ 32. By contrast, the "[f]ailure to report wrongdoing within reasonable time " and the "[f]ailure to report properly and fully the true extent of the wrongdoing" are both factors that weigh in favor of the SFO commencing prosecution. *Id.* at 7–8.

[34] *See* Deferred Prosecution Agreements Code of Practice ¶ 2.9.1. *See also Serious Fraud Office v. Standard Bank PLC* [2015] EWHC (QB) at 30(Eng.); *Serious Fraud Office v. XYZ Ltd.* [2016] EWHC (QB) at 57 (Eng.).

[35] Deferred Prosecution Agreements Code of Practice ¶¶ 2.9.1–2.9.2.

[36] *See, e.g.*, *Serious Fraud Office v. Standard Bank PLC* [2015] EWHC (QB) at 30 (Eng.) The U.K. authorities have recently adopted an increasingly proactive approach to challenging claims of legal privilege made by corporations over investigation materials, including notes of interviews with witnesses. In this regard, recent decisions of the English courts have significantly limited the circumstances in which privilege claims may be made over notes of interviews with witnesses. *See supra* Chapter IV: Preserving Legal Privilege.

[37] Deferred Prosecution Agreements Code of Practice ¶ 2.8.2(i). In certain instances, a company may demonstrate proactive compliance by deferring its internal interviews until the SFO has had the opportunity to complete its own interviews. *Serious Fraud Office v. Rolls Royce* [2017] EWHC (QB) ¶ 20(ii) (Eng.).

[38] Deferred Prosecution Agreements Code of Practice ¶ 2.8.2(i).

[39] *Serious Fraud Office v. Standard Bank PLC* [2015] EWHC (QB) at 30 (Eng.); *Serious Fraud Office v. XYZ Ltd.* [2016] EWHC (QB) at 30 (Eng.); *Serious Fraud Office v. Rolls Royce* [2017] EWHC (QB) ¶ 20(ii) (Eng.). While the SFO has previously allowed companies to provide either summaries of interviews or interview memoranda (on the basis of a limited privilege waiver), the English courts have recently taken a strict approach to claims of privilege over internal interview memoranda. *See supra* Chapter IV: Preserving Legal Privilege. As a result, it is not clear that the SFO will necessarily allow companies to provide internal interview memoranda on the basis of a limited privilege waiver in the future, which may have important implications for privilege waivers in the United States.

— **Providing Timely and Complete Responses to SFO Information Requests:** A cooperating company should voluntarily provide material responsive to SFOs requests.[40] In addition to providing the SFO with all relevant hard copy documents, further cooperation credit has been extended to companies that have provided the SFO with direct access to their electronic document review platform.[41]

— **Waiving the right to filter responsive material for privilege:** In at least one instance to date, a company's decision to waive the right to filter and review its documents for privilege, and instead allow its materials to be reviewed for privilege by independent counsel, was viewed as a factor that weighed in favor of allowing the company to enter into a DPA.[42]

In addition to the foregoing, the SFO may consider other factors, including, for example: remedial actions taken by the company, such as compensating victims;[43] agreeing to ongoing cooperation with domestic and overseas authorities;[44] and consulting the SFO with respect to responding to media coverage.[45]

The FCA has similarly articulated its expectations on cooperation, through its Principles for Business and the FCA Handbook. The FCA's Principles for Businesses are mandatory and binding on FCA-regulated firms, and Principal 11 provides that "[a] firm must deal with its regulators in an open and cooperative way, and must disclose to the [regulator] appropriately anything relating to the firm of which that regulator would reasonably expect notice."[46] Where a company's internal investigation triggers the notice requirement of Principle 11, the firm should discuss the scope of its investigation with the FCA as early as possible. Although the FCA has previously made clear that it will not rely on a company's internal investigation in place of its own, it may consider the company's findings in assessing its cooperation.[47]

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[40] *Serious Fraud Office v. Standard Bank PLC* [2015] EWHC (QB) at 52 (Eng.); *Serious Fraud Office v. XYZ Ltd.* [2016] EWHC (QB) at 26, 54 (Eng.).; *Serious Fraud Office v. Rolls Royce* [2017] EWHC (QB) ¶ 20(iii) (Eng.).

[41] *Serious Fraud Office v. Rolls Royce* [2017] EWHC (QB) ¶¶ 19-20 (Eng.).

[42] *Id.*

[43] Guidance on Corporate Prosecutions ¶ 32; Deferred Prosecution Agreements Code of Practice 2.8.2(i).

[44] *Serious Fraud Office v. Standard Bank PLC* [2015] EWHC (QB) at 30.

[45] *Serious Fraud Office v. Rolls Royce* [2017] EWHC (QB) ¶ 20 (Eng.). In this respect, Rolls Royce effectively relinquished control over the investigation by responding to media and governmental inquiries in a manner agreed upon with the SFO. *Id.* ¶¶ 20, 122.

[46] *Handbook on Rules and Guidance*, Fin. Conduct Auth., PRIN 2.1.1(11), https://www.handbook.fca.org.uk/handbook/PRIN.pdf.

[47] Jamie Symington, Director in Enforcement (Wholesale, Unauthorised Business and Intelligence), Fin. Conduct Auth., Pinsent Masons Regulatory Conference, *Internal Investigations by Firms* (Nov. 5, 2015), https://www.fca.org.uk/news/speeches/internal-investigations-firms (explaining that a company's own investigation can be "immensely helpful" to the FCA in resolving investigations efficiently, but the investigation must be conducted transparently and all relevant underlying evidence should be provided to the FCA so that it can conduct its own factual analysis).

Similarly, under the FCA Handbook, maintaining an open and cooperative relationship between the company and FCA supervisors may, in some cases, lead the FCA to decide not to carry out a formal investigation, and to instead allow the company to take the "necessary remedial action agreed with its supervisors to deal with the FCA's concerns."[48]

THE FCA'S GUIDANCE FOR COOPERATING COMPANIES: FACTORS CONSIDERED

Principle 11's requirement to disclose any information of which the FCA would reasonably expect notice, includes:

— Notifying the FCA within a reasonable time period of any significant failure of the company's systems or controls, as well as any action which a company proposes to take which would result in a material change in its capital adequacy or solvency.[49]

— Immediately notifying the FCA if the company becomes aware of significant fraud, "irregularities in its accounting or other records," serious misconduct by one of its employees,[50] or any significant violation of competition law.[51]

In addition, the FCA Handbook notes factors that are relevant to the FCA's assessment of a company's cooperation, including:

— **The Company's Overall Relationship with the FCA:** The FCA is less likely to use enforcement tools if a firm has a strong track record of open communication with the FCA, and has otherwise demonstrated that senior management takes compliance seriously. Against a background of ongoing cooperation, the FCA may conclude that the use of enforcement tools is not necessary to further the FCA's aims and objectives.[52]

— **The Company's Response to Particular Instances of Misconduct:** The FCA will also consider how the company responded to the particular misconduct under investigation, including whether the company self-reported; the extent to which the

[48] *Handbook on Rules and Guidance*, Fin. Conduct Auth., Enforcement Guide 2.12.2, https://www.handbook.fca.org.uk/handbook/EG/2/?view=chapter [hereinafter EG]. In such cases, the FCA may take disciplinary or other enforcement action if the firm fails to do so. *Id.*

[49] *Handbook on Rules and Guidance*, Fin. Conduct Auth., Supervision 15.3.8(3), https://www.handbook.fca.org.uk/handbook/SUP/15/3.html [hereinafter SUP].

[50] *Id.* at 15.3.17.

[51] *Id.* at 15.3.32.

[52] EG at 2.12.1.

company assisted the FCA in any factual investigation; and whether the company has taken remedial action.[53]

— **Voluntary Interviews:** The FCA may draw an adverse inference from refusal to cooperate in a voluntary interview; however, the failure to participate in such an interview is not necessarily itself a basis for disciplinary proceedings.[54]

European Union

In the European Union ("EU"), authorities at the national level likewise take cooperation into account in calculating fines in the context of civil and criminal investigations, and the European Commission ("EC") operates a leniency program that spans across the EU, by which it offers immunity or reductions in fines to companies that cooperate with investigations related to antitrust.

National Authorities

Authorities at the national level differ in the guidance provided for cooperating with civil and criminal investigations, as well as the credit awarded. Some illustrative examples include:

France. In France, cooperation by companies is particularly encouraged in the context of white collar crime investigations. Before 2017, there was little incentive for companies to come forward and cooperate with the French criminal authorities, because there was no effective legal mechanism to settle. This is one of the reasons why the French anticorruption legal framework (to take this example) had long been viewed as being deficient, ineffective and generally below international standards, particularly when compared to the U.S. Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act (UKBA). That changed significantly as a result of the enactment at the end of 2016 of a sweeping anti-corruption reform ("*Loi Sapin II*") and recent efforts by French authorities to prosecute acts of corruption perpetrated abroad.

[53] *Id.*

[54] *Id.* at 4.7.3.

CASE STUDY:
FAILURE TO COOPERATE WITH THE FCA

In 2015, a global banking and financial services company was fined approximately $2.12 billion by U.S. regulators and £227 million by the FCA for misconduct related to Interbank Offering Rates ("IBOR") submissions and related systems and controls failures.[55]

In imposing this significant fine, the FCA explained that it was intended to show "how seriously we view a failure to cooperate with our investigations[.]"[56] Noting that the company had failed to deal with it "in an open and cooperative way,"[57] the FCA identified the following specific deficiencies:

— An "unacceptably slow and ineffective response to some of the [FCA]'s enquiries," which "prolonged the process of formal investigation significantly."[58]

— Misleading the FCA on "issues of importance."[59]

— Incorrectly telling the FCA that the Federal Financial Supervisory Authority in Germany (*Bundesanstalt für Finanzdienstleistungsaufsicht, "BaFin"*) had prohibited disclosure of a relevant report commissioned by the company, when BaFin had not.[60]

— Providing an inaccurate "formal attestation to the [FCA] stating that its systems and controls in relation to [certain IBOR] submissions were adequate at a time when no such systems and controls were in place."[61]

— Failing to provide "accurate, complete, and timely information, explanations and documentation to the [FCA]."[62]

A legal entity can now settle allegations of criminal misconduct with the special prosecutors tasked with fighting white collar crime (*the Parquet National Financier*, or "PNF"), by negotiating a *convention judiciaire d'intérêt public* ("CJIP"), which is akin to the U.S. deferred prosecution agreement. The purpose of this mechanism

[55] Press Release, Fin. Conduct Auth., *Deutsche Bank fined £227 million by Financial Conduct Authority for LIBOR and EURIBOR failings and for misleading the regulator* (Apr. 23, 2015), https://www.fca.org.uk/news/press-releases/deutsche-bank-fined-%C2%A3227-million-financial-conduct-authority-libor-and-euribor.

[56] *Id*.

[57] *Id*.

[58] *See* Fin. Conduct Auth., *Final Notice to Deutsche Bank AG* ¶ 2.3 (Apr. 23, 2015), https://www.fca.org.uk/publication/final-notices/deutsche-bank-ag-2015.pdf.

[59] *Id*.

[60] *Id*. ¶ 2.14.

[61] *Id*. ¶ 2.15.

[62] *Id*. ¶ 2.16.

is to (i) incentivize companies to come forward, with respect to offenses that are difficult to detect, while (ii) allowing companies to continue to qualify for public tenders and other forms of licenses in jurisdictions where applicable laws provide for automatic disqualification in the event of a criminal conviction. The first CJIP was concluded with HSBC Private Bank Suisse SA in October 2017, in relation to laundering of the proceeds of tax fraud ("*blanchiment de fraude fiscale*"), followed by the conclusion of two additional CJIPs related to acts of corruption in February 2018. More recently, Société Générale settled charges of corruption in connection with bribe payments to Libyan officials with both the U.S. and French criminal authorities.[63] This was the first coordinated resolution by U.S. and French authorities of a foreign bribery case.

Separately, cooperation may also be taken into account by the *Autorité des Marchés Financiers* ("AMF"), the regulator in charge of financial markets in France, when issuing sanctions against professionals under AMF supervision for breach of their professional obligations or against any individual or company for market abuse.

Germany. In Germany, BaFin, the supervisory and enforcement authority for the banking and insurance sectors and the financial markets generally, has issued sentencing guidelines (last updated in February 2017) for fines under the Securities Trading Act, for example for insider dealing and market manipulation charges and breaches of transparency requirements. Depending on the facts and circumstances of a particular case, BaFin can levy large fines on companies, amounting to up to 5% of group turnover.[64] Under the guidelines, cooperative conduct is a significant factor influencing the amount of the fine, and includes proactive self-reporting, assisting the authority in investigating and uncovering relevant facts, and remedial measures to avoid similar conduct in the future.[65] Other enforcement authorities in Germany also typically take cooperative conduct into account when levying fines on companies.

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[63] In addition to the CJIP between the PNF and Société Générale S.A., the company entered into a deferred prosecution agreement with the DOJ. *See* Joon H. Kim and Elizabeth (Lisa) Vicens, et. al., *Société Générale Enters Into First Coordinated Resolution of Foreign Bribery* Case by U.S. and French Authorities (June 6, 2018), https://www.clearygottlieb.com/-/media/files/alert-memos-2018/societe-generale-enters-into-first-coordinated-resolution-of-foreign-bribery-case.pdf.

[64] *See* BaFin Fed. Fin. Supervisory Auth., Sec. Trading Act (Sep. 09, 1998) Federal Law Gazette I at Part 12 (Ger.), https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG_en.html.

[65] *See* BaFin Ger. Fed. Fin. Supervisory Auth., *Guidelines on the Imposition of Administrative Fines for Offences relating to the German Securities Trading Act* 10-11 (Feb. 2017), https://www.bafin.de/SharedDocs/Downloads/EN/Leitfaden/WA/dl_lf_bussgeldleitlinien_2017_en.html;jsessionid=7A9172EF967971AEC37C4CBB62C1F3FC.1_cid381?nn=9646522.

Italy. In Italy, authorities provide limited guidance on factors considered in awarding credit for cooperation. In the civil context, authorities responsible for regulating the banking and financial market—such as the Bank of Italy and CONSOB (*Commissione Nazionale per la Società e la Borsa*)—have broad authority to enforce compliance with securities laws and regulations through investigations and imposition of administrative sanctions. In determining the sanctions to be issued, administrative authorities consider both the level of cooperation provided by entities and the remedial measures adopted to prevent further violations,[66] but do not otherwise specify cooperative efforts that should be taken, nor do they quantify cooperation credits. Nonetheless, in most cases where credit is awarded, cooperative conduct includes proactive self-disclosure of documents and information material to the underlying misconduct, and timely response to the requests of the authorities.

At the criminal level, prosecutors in Italy do not offer NPAs or DPAs, and criminal investigations conclude through judicial determination or through judicially-approved settlement. Judges do, however, consider a company's cooperative efforts in reaching a determination regarding the sanction to be imposed, and a company may receive credit if a judge finds that its cooperation mitigated the consequences of the misconduct or prevented further violations.[67] Similarly, in the case of individuals, a judge may award credit for cooperation by reducing a sanction up to one third under the Italian Code of Criminal Law.[68] In either case, it is in the sole discretion of the criminal judge to determine whether cooperation entitles the accused company or individual to a reduction of the sanction to be issued.

European Commission. Although most conduct is regulated at the national level within the EU, the EC regulates application of the EU antitrust rules, which can be found in the Treaty on the Functioning of the European Union, directives, and regulations. The EC's Directorate-General for Competition operates a leniency program offering immunity or fine reduction to companies that cooperate with authorities to detect cartel conduct affecting the European market. Under this program, total immunity is granted to the first cartel participant to "blow the

[66] *See* Decreto legislativo n. 58/1998 (TUF) (It.), art. 195 Sanction procedures. http://www.ecgi.org/codes/documents/testo_unico_eng.pdf.

[67] *See* Decreto legislativo n. 231/2001 (It.), art. 11 Determination of penalty policy § 1.

[68] *See i.d.* art. 62 Application of the sanction on request.

whistle,"[69] while other participants providing evidence that "represents 'significant added value' with respect to [that] already in the Commission's possession" may be eligible for a reduction of any fine that would otherwise have been imposed.[70] Notably, however, the immunity does not exclude the whistleblower's civil liability with respect to the victims of the cartel.[71]

Analogous leniency programs are also provided by EU Member States' national competition authorities. Notably, to achieve leniency at the national level in addition to the EU level, companies must apply for leniency to all competition authorities that could file a case against them.

When Should A Company Cooperate?

Companies should consider whether to cooperate as soon as a potential issue arises. The approach to determining a cooperation strategy depends on a number of factors, including the company's objectives, the perceived risks, the potential exposure of it and its executives, and the estimated likelihood of being awarded substantial cooperation credit. The decision to cooperate may also turn on the type of misconduct at issue and the company's role in the misconduct. For example, a potential target of an investigation may choose to take a different approach from a party that is merely a potential witness, where the costs of cooperation (but also its benefits) are likely to be significantly lower.[72] Because the company's early positions will likely set the tone with the relevant authorities for the entirety of the investigation, it is especially important to weigh the benefits and drawbacks of cooperation early on, choose a cooperation strategy, and remain consistent with that strategy as the investigation progresses. General considerations that may affect the decision of whether to cooperate at the outset of an investigation include:

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[69] *See* Official Journal of the European Union, *Commission Notice on Immunity from fines and reduction of fines in cartel cases* (2006/C 298/11) Section II.A.8, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC1208(04)&from=EN. *See also id.* Sections II.A.9–13 (setting out the specific conditions for immunity).

[70] *See id.* at Section III.A.24. *See also id.* at Sections III.A.24–26 (setting out the specific conditions for reduction of fines).

[71] *See id.* at Section V.39.

[72] As set forth in the U.S. Attorney's Office Manual, a "target" is defined as a person "as to whom the prosecutor . . . has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." Dep't of Just., *U.S. Attorneys' Manual* § 9-11.151 (Nov. 1997) ("USAM") (defining "target" for purposes of grand jury investigations). By contrast, a "subject" of an investigation is "a person whose conduct is within the scope" of the investigation, but who is not necessarily a putative defendant. *See id.* A "witness" is someone who can attest to facts or events. *See generally id.* § 9-11.154.

— ***Whether the relevant authorities already know of, or are likely to learn about, the conduct at issue.*** Regulatory or law enforcement authorities may independently discover conduct (or be likely to discover conduct) from a variety of sources, including whistleblowers, their own investigations into peer institutions, public media or press reports, or public statements a company makes in its mandatory disclosures. If it is a foregone conclusion that problematic conduct will be discovered (but has not yet been discovered), there is likely more to be gained by cooperating with a regulatory or law enforcement authority through self-disclosure or voluntary production of documents.

— ***The ability to gain substantial credit early on.*** A corollary to the above consideration is that authorities often will assign the most cooperation credit to companies that affirmatively notify them of events that they may not have learned of on their own.

— ***Whether the company is regulated by, or otherwise subject to the jurisdiction of the requesting authority.*** Although a company is likely to garner credit for assisting an investigating authority with obtaining information that it is otherwise unable to access, the company may want to consider whether that information would be beyond a regulatory or law enforcement authority's jurisdictional reach entirely, such that legal action would otherwise be precluded.

— ***Whether there was likely a breach of law.*** Where there was likely a clear breach of law, a company may seek to proactively cooperate as a preemptive attempt to mitigate liability that is otherwise a near certainty.

— ***Whether the company may be in a position to help advance the government's investigation of others, including individuals.*** Authorities are often focused on whether they can build cases against individuals as well as firms. Companies

considering whether to cooperate should thus be cognizant that they will likely be expected to provide factual information concerning the conduct of individuals.[73]

Another reason that a decision to cooperate should be made early in an investigation is that it will likely influence the company's position with respect to various investigative procedures, including:

— ***Document Collection.*** If a company plans to cooperate—and, thus, voluntarily produce documents to the investigating authority—it will need to give early consideration to what, if any, data protection laws may impact its ability to review and provide certain information.[74]

— ***Witness Interviews.*** Companies should consider whether they plan to make their employees available to be interviewed and what, if any, employee rights provisions in various jurisdictions may affect that decision.[75]

— ***Legal Privileges.*** Companies should also consider whether cooperation could implicate privileged or other confidential materials—for example, through a voluntary waiver or because a particular privilege is not recognized in a certain jurisdiction—and how, if at all, that likelihood affects how information is handled.[76]

[73] In September 2015, the DOJ issued a memo to address challenges it faced in prosecuting individuals involved in or responsible for corporate misconduct. See Deputy Att'y Gen. Sally Yates, *Individual Accountability for Corporate Wrongdoing* 2 (Sept. 9, 2015), ttps://www.justice.gov/archives/dag/file/769036/download. This memo, commonly known as "the Yates Memo" for its author, former Deputy Attorney General Sally Yates, applied to any investigation of corporate misconduct, and required full disclosure of an individuals' involvement in misconduct to qualify for *any* cooperation credit. *See id*. While the Yates Memo has been under review by the Trump Administration, Deputy Attorney General Rod Rosenstein recently endorsed its central premise, stating publicly that "any changes [to the Yates Memo] will reflect our resolve to hold individuals accountable for corporate wrongdoing." Deputy Att'y Gen. Rod J. Rosenstein, Dep't of Just., Keynote Address on Corporate Enforcement Policy, NYU Program on Corporate Compliance (Oct. 6, 2017), https://wp.nyu.edu/compliance_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017/.

[74] *See* Chapter V: Data Privacy & Blocking Statues.

[75] *See* Chapter VI: Employee Rights and Privileges.

[76] *See* Chapter IV: Preserving Legal Privilege.

CASE STUDY: A FAILURE TO COOPERATE EARLY IN A DOJ INVESTIGATION

Refusal to cooperate in an investigation has been cited in assigning large fines to a company. For example, Alstom, a French power and transportation company, was fined $772 million to resolve criminal charges related to secret bribes. At the time, this was the largest criminal fine ever imposed in an FCPA enforcement action. According to the DOJ, the size of the fine was justified by Alstom's failure to voluntarily disclose broad misconduct, "refusal to fully cooperate with the department's investigation for several years," and "lack of an effective compliance and ethics program[.]" Indeed, although Alstom did eventually begin to cooperate thoroughly after the DOJ charged several of its executives, this was deemed insufficient to remedy its prior non-cooperation.[77]

CASE STUDY: WHEN COOPERATION WORKS

In June of 2016, the DOJ declined to prosecute Nortek, Inc. for possible violations of the FCPA, despite bribery by employees of Nortek's Chinese subsidiary. Reasons that were given for declination included:[78]

— Thorough internal investigation after its internal audit function identified the misconduct.

— Prompt voluntary self-disclosure.

— Identification of all individuals involved in or responsible for the misconduct, and provision of all facts relating to the misconduct to the DOJ.

— Agreement to continue to cooperate in ongoing investigations of individuals.

— Improvements to the company's compliance program and internal accounting controls.

— Full remediation of the misconduct, including terminating the employment of all individuals involved (including high-level executives).

— Disgorgement of unlawfully gained funds to the SEC.

[77] Press Release, Dep't of Just., *Alstom Sentenced to Pay $772 Million Criminal Fine to Resolve Foreign Bribery Charges* (Nov. 13, 2015), https://www.justice.gov/opa/pr/alstom-sentenced-pay-772-million-criminal-fine-resolve-foreign-bribery-charges.

[78] Letter from Daniel Kahn, Deputy Chief, Dep't of Justice, to Luke Cadigan, Esq., K&L Gates (June 3, 2016), https://www.justice.gov/criminal-fraud/file/865406/download.

Considerations For Determining Cooperation Risks

While there are many potential benefits to cooperation, it is not without risk. Accordingly, companies should be cognizant of the effects, costs, and risks associated with cooperation.[79] Relevant considerations may include:

— ***Expense.*** The expenses associated with cooperation, in legal fees and diverted personnel, may outweigh the potential benefits to be realized through cooperation credit. Further, companies may be faced with follow-on litigation brought by private parties after an investigation or a settlement is publicly disclosed, which are likely to present additional costs that may be substantial.

— ***Revelation of Misconduct.*** Information that is turned over through cooperation may alert the relevant authority to misconduct which it would not otherwise have investigated. Once the company begins to cooperate, it cannot control where the investigation will lead. For instance, information that is turned over to a regulatory agency may be provided to law enforcement divisions of that agency for prosecution. Cooperation may also result in an investigation's focus expanding into conduct the company did not envision at the start.

— ***Uncertain Outcomes.*** There is often no guarantee that cooperation will have the desired result. Indeed, an investigating authority could view the underlying conduct as more severe than the company would have expected, and may seek charges and fines beyond what the company anticipated or believes is appropriate.

In addition to the above considerations, it is important to remember that cooperation is but one factor in determining outcomes, and the amount, type, and degree of cooperation credit is often left to the discretion of the investigating authority. Government authorities may decline to award significant cooperation credit if they find that the company has been insufficiently cooperative, despite the company's best efforts. Moreover, the government may be hesitant to issue significant cooperation credit if the misconduct is particularly egregious or if the case is politically sensitive or newsworthy, even if the company provides extensive cooperation. Thus,

[79] Collateral considerations with respect to investigations are discussed in further detail in Chapter IX: Collateral Considerations.

in choosing to cooperate, a company may expend significant resources, time, and effort for an uncertain payoff.

Benefits of Cooperation

Cooperation can benefit a corporation, as well as its employees and shareholders, because it enables the authority to focus resources in a manner that may minimize disruption of the company's legitimate business operations, and, possibly, bring the investigation to a speedy conclusion.[80] Other benefits include:

— ***Reduced Penalties with the Investigating Authority.*** Cooperation credit may take the form of a deferred or non-prosecution agreement, a reduction in fines, or a reduction in jail sentence for a culpable individual. The degree and nature of cooperation credit will vary based on the facts and the investigating authority's approach to cooperation. For example, maximum cooperation credit is often reserved for companies that inform authorities about conduct of which they would not otherwise be aware. However, even short of such self-disclosure, U.S. authorities will often give some form of cooperation credit for other efforts to ease the burdens of investigation and encourage cooperation in the future.

— ***Reduced Penalties with Other Authorities.*** Steps that a company takes to cooperate with one regulatory or law enforcement authority may be communicated to another authority, and may be cited as a reason to offer cooperation credit by that other authority.[81] A company may also be credited for money paid to overseas regulators as part of a foreign investigation into the same misconduct.

[80] USAM § 9-28.700(B).

[81] The DOJ recently memorialized an anti "piling on" policy designed to limit the imposition of penalties by multiple regulatory agencies for the same misconduct in certain circumstances. *See* USAM § 1-12.100. Pursuant to this policy, "the adequacy and timeliness of a company's disclosures" and the company's cooperation with the DOJ are among the factors bearing on whether the imposition of multiple penalties is merited. *Id.*

CASE STUDY:
REDUCED PENALTIES DUE TO COOPERATION WITH ANOTHER AUTHORITY

In 2006, STATOIL, a Norwegian oil company, settled with both the SEC and the DOJ for FCPA-related violations. The DPA entered into by the DOJ and STATOIL specifically noted that the company had "fully cooperated with the [SEC]'s investigation" since it was contacted by the SEC.[82] Further, the DPA included a provision noting that the "DOJ will bring the cooperation of STATOIL and its compliance with its other obligations under this Agreement to the attention of [other] agencies and authorities if requested to do so by STATOIL and its attorneys."[83]

In the case of STATOIL, the company was assessed a $10.5 million penalty by the DOJ, but was credited $3 million for amounts paid to Norwegian authorities for the same bribery, bringing the overall DOJ penalty down to $7.5 million.[84]

— ***Maintaining Status as a Witness.*** Cooperation may protect a company's status as a witness, and prevent it from becoming a target of an investigation. However, the company may be required to assist authorities in building cases against individuals, who may be subjects or targets, to qualify for cooperation credit.

— ***Less Intrusive Investigation.*** There are a number of factors that may lead an investigating authority to be less-intrusive in its investigation of a cooperating entity. For instance, cooperating with an investigation may allow a company to help frame the issues by bringing useful evidence to the investigating authority's attention. This, in turn, may shorten an investigation. In addition, once counsel has built a rapport with the law enforcement or regulator's staff, the investigating authority may be more amenable to taking evidence by less intrusive methods, such as by attorney proffer or informal interviews, as opposed to written responses or on-the-record testimony from company employees. Finally, ongoing cooperation offers a window for continued advocacy with the attorneys conducting the investigation, including potentially, during settlement negotiations.

[82] Deferred Prosecution Agreement App'x A at 5, *United States v. Statoil, ASA*, No. 06-CR-960 (S.D.N.Y Oct. 13, 2006) (https://www.justice.gov/criminal-fraud/case/united-states-v-statoil-asa-court-docket-number-06-cr-960).

[83] *Id.* ¶ 26.

[84] *Id.* ¶ 19.

Prevention

When it comes to cooperation, an ounce of prevention may be worth a pound of cure. In addition to responding quickly when misconduct is discovered, companies with robust compliance and prevention programs in place will often be better positioned to receive cooperation credit once an issue arises. This is because such programs are often the best way to quickly detect and remediate issues, and can demonstrate to regulatory and law enforcement authorities that a company takes violations of the law seriously and has put forth its best efforts to prevent them from arising.

To maximize the likelihood of receiving cooperation credit, preventative measures should be robust and follow best practices as articulated by the relevant authorities.[85] An effective compliance program will allow a company to identify wrongdoing early on, so that the company can make a prompt disclosure to the government. This program should contain a clear process for escalating potential wrongdoing to a designated officer or team responsible for investigating the misconduct and deciding if any authorities need to be notified. Employees should be told that they must inform their supervisor or the designated agent if they observe any misconduct, or if they suspect illegal activity. If self-disclosure is appropriate, it should be made as promptly as possible.

[85] For example, the DOJ recently published a list of questions it may ask when examining the effectiveness of a corporate compliance program. *See* Criminal Div. Fraud Section, Dep't of Just., *Evaluation of Corporate Compliance Programs* (2017), https://www.justice.gov/criminal-fraud/page/file/937501/downloadhttps://www.justice.gov/criminal-fraud/page/file/937501/download.

PRACTICE TIP:
QUESTIONS TO CONSIDER IN REVIEWING COMPLIANCE PROGRAMS

- How effective are the procedures in place to detect, investigate, and remediate misconduct?
- How integrated into the program are senior and middle management?
- Are compliance personnel sufficiently resourced and independent?
- How robust is the process for implementing, communicating, executing, and improving compliance policies and procedures?
- How effective is the process for assessing risk, and using risk assessment information to inform the compliance program?
- Is the program well understood by employees and is adequate training and guidance provided to employees?
- What are the incentives for compliance and likely discipline for wrongdoing?
- Is there a periodic review and improvement to the compliance program?
- Does the company have a well-known and easily used whistleblower hotline?
- Does the program include established reporting chains in the event that wrongdoing is identified (both internally and to the government)?
- How does the company document corrective action taken under the program?

Maintaining a Record of Cooperation

It is important to maintain a clear record of all cooperative efforts and assistance provided during the course of an investigation, including the dates and content of any productions, presentations, or witness interviews or testimony. This record will help string together the various cooperation efforts into a streamlined narrative, which will likely serve as a crucial advocacy piece during the later stages of an investigation, where the decisions regarding penalties, leniency, and whether to decline prosecution altogether are imminent. The ability to reference the specific details of a company's cooperation, particularly those made at the outset of the investigation, may go a long way in reminding the relevant authorities of the company's good faith, and toward receiving credit where it is due.