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Preface

Welcome to the *Americas Investigations Review* 2022, a Global Investigations Review (GIR) special report. GIR strives to be the online home for all those who investigate, and resolve, suspected corporate wrongdoing for a living, telling them all they need to know about everything that matters – wherever it may take place.

Throughout the year, GIR's team of journalists delivers daily news, surveys and features; organises the liveliest events (GIR Live) – covid-19 permitting; and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, GIR curates a range of comprehensive regional reviews – online and in print – that go deeper into developments than the exigencies of journalism allow.

The *Americas Investigations Review*, which you are reading, is one of those reviews. It contains insight and thought leadership from 21 pre-eminent practitioners from the region. All contributors are vetted for their standing and knowledge before being invited to take part.

Across seven articles, and 142 pages, they capture and interpret the shifts of the past year in the region, supported with plenty of footnotes and statistics.

As so often with these reviews, a close read yields many nuggets. For this reader, they include that:

- foreign bribery is now a 'core' national security interest in the United States;
- 'hold notices' in Brazil routinely achieve the opposite effect;
- the OECD is so concerned about corruption in Brazil that it has established a special working group to monitor it. In the meantime, data from within Brazil is quite encouraging; and
- the US Securities and Exchange Commission and Department of Justice are at serious odds about the meaning of 'cooperation'.

And much, much more.

Every article is splendid. I thoroughly commend all the authors.

If you have any suggestions for future editions of this review, or want to take part in it, we would love to hear from you.

Please write to insight@globalinvestigationsreview.com.

David Samuels
Publisher, Global Investigations Review
September 2021

Part 1

Overviews

The Evolution and Current Approach to Corporate Cooperation in US Enforcement Investigations

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White & Case LLP

IN SUMMARY

Corporate cooperation is essential to securing a favourable resolution in a DOJ or SEC investigation. Though corporate cooperation at its core has always involved providing information helpful to the government's investigation, other requirements necessary to receive cooperation credit have changed and evolved over the years. Despite efforts by the DOJ and SEC to define what a company must do to be considered 'fully' cooperative, a number of open questions remain, as demonstrated in recent corporate enforcement resolutions. Companies could also benefit from a better understanding of how the government is prepared to reward full cooperation.

DISCUSSION POINTS

- DOJ and SEC recognise the value of corporate cooperation to their investigations and seek to incentivise companies to provide cooperation
- Companies under DOJ and SEC investigation can increase the likelihood of a favourable disposition if they fully cooperate with the government investigation
- Certain requirements for companies to receive 'full' cooperation remain undefined

REFERENCED IN THIS ARTICLE

- Principles of Federal Prosecution of Business Organizations
- Seaboard Report
- DOJ's Corporate Enforcement Policy
- United States Sentencing Guidelines, Chapter Eight (Sentencing of Organizations)

Introduction

It is widely accepted that corporate cooperation in an enforcement investigation can be critical to both a prosecutor's ability to identify and understand the wrongdoing within a company, and a company's ability to secure a favourable outcome for itself and its stakeholders. Both the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC) have long recognised the advantages of corporate cooperation to their enforcement efforts, while at the same time emphasising the benefits it can bring to companies.[1]

What corporate 'cooperation' requires, however, has changed over the years and been the subject of criticism, debate and confusion. Although the DOJ and the SEC use many of the same concepts in discussing a company's cooperation, differences in their approach to measuring and rewarding it highlight the unsettled nature of corporate cooperation, and can complicate a company's ability to understand what it must do to be considered cooperative and what it can expect in return for its cooperation.

A late 2020 resolution under the Foreign Corrupt Practices Act (FCPA) involving Beam Suntory, Inc (Beam) offers an illustrative example. The scheme at issue in that case involved improper payments to government officials in India in connection with obtaining or retaining business in the Indian market, and related internal controls and books and records violations. Although the SEC and the DOJ investigated the same conduct, their respective resolutions and, in particular, their views on Beam's cooperation, were notably different. According to the SEC settlement, Beam 'timely shared

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1 See, e.g., Memorandum from Mark R Filip, Deputy Attorney Gen., Dep't of Justice, on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep't Components and U.S. Attorneys, U.S.A.M., § 9-28.700 (28 Aug. 2008) [Filip Factors], at https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf ('Cooperation benefits the government—and ultimately shareholders, employees, and other often blameless victims—by allowing prosecutors and federal agents, for example, to avoid protracted delays . . . . At the same time, cooperation may benefit the corporation by enabling the government to focus its investigative resources in a manner that will not unduly disrupt the corporation's legitimate business operations. In addition, critically, cooperation may benefit the corporation by presenting it with the opportunity to earn credit for its efforts.'); see also U.S. Sec. & Exch. Comm'n [SEC], 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 (23 Oct. 2001) [Seaboard Report], at https://www.sec.gov/litigation/investreport/34-44969.htm ('Our willingness to credit such behavior in deciding whether and how to take enforcement action benefits investors as well as our enforcement program. When businesses seek out, self-report and rectify illegal conduct, and otherwise cooperate with Commission staff, large expenditures of government and shareholder resources can be avoided and investors can benefit more promptly.').

the facts developed during the course of an internal investigation' after voluntarily self-disclosing.[2] The SEC also noted that Beam cooperated 'by voluntarily producing documents, summarizing its factual findings, translating numerous key documents, providing timely reports on witness interviews, and making current or former employees available to the Commission staff, including those that needed to travel to the United States or elsewhere for interviews'.[3] In light of these considerations, the SEC imposed disgorgement and penalties totalling less than US$10 million.[4]

The DOJ viewed Beam's cooperation in a less positive light. It gave the company only partial cooperation credit for essentially the same cooperative acts Beam had undertaken with the SEC, namely, 'making factual presentations', 'making foreign-based employees available for interviews' and 'producing documents . . . from foreign countries'.[5] But the DOJ denied Beam full cooperation credit 'due to its inconsistent and, at times, inadequate cooperation'.[6] The DOJ stated that Beam had taken positions 'that were not consistent with full cooperation' and created 'significant delays in reaching a timely resolution' and cited its 'refusal to accept responsibility for several years'.[7] The DOJ did not specify what Beam did that was 'not consistent with full cooperation',[8] nor did it elaborate on the 'significant delays' to explain, for example, what occasioned them, the number and length of the delays, or whether they caused prejudice to the government. Notably, the DOJ also said that there had been efforts by a member of Beam's legal department to 'affirmatively avoid uncovering information related to improper activities and practices by third parties engaged by Beam in India that presented corruption risks'.[9] (The SEC's resolution, on the other hand, suggested no such activity by in-house counsel.) Beam entered into a deferred prosecution

2 Order Instituting Cease-and-Desist Proceedings, *In the Matter of Beam Inc., n/k/a Beam Suntory Inc.*, No. 3-18568 (Jul. 2, 2018), https://www.sec.gov/litigation/admin/2018/34-83575.pdf.

3 id.

4 id.

5 Deferred Prosecution Agreement, ECF 8, *United States v. Beam Suntory Inc.*, No. 20-CR-745 (N.D. Il. 23 Oct. 2020) [Beam DPA].

6 id.

7 Press Release, U.S. Dept. of Justice [DOJ], 'Beam Suntory Inc. Agrees to Pay Over $19 Million to Resolve Criminal Foreign Bribery Case' (27 Oct. 2020), available at https://www.justice.gov/opa/pr/beam-suntory-inc-agrees-pay-over-19-million-resolve-criminal-foreign-bribery-case.

8 See Beam DPA, op. cit. (footnote 5, above).

9 id.

agreement (DPA) with the DOJ, which required Beam to, among other things, pay a higher penalty than it had paid to the SEC (US$19 million), continue cooperating during the pendency of the DPA and periodically report on its compliance programme.[10]

There has been speculation about what led to these two very different results.[11] Without further explanation from the agencies themselves, however, these dissonant pronouncements about the same company's cooperation from two typically collaborative agencies only serve to highlight the unpredictability of cooperation credit.

DOJ's approach

The evolution of corporate cooperation

Corporate cooperation was first formalised as a basis for leniency when the corporate sentencing guidelines were promulgated as part of the 1991 amendments to the US Sentencing Guidelines (USSG).[12] Section 8C2.5(g)(2) of the USSG addressed corporate cooperation, providing that an organisation that 'fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct' can obtain a reduction in its guidelines calculation.[13] To qualify for the reduction, the corporate cooperation has to have been timely, which the USSG defines as beginning 'essentially at the same time as the organization [was] officially notified of a criminal investigation'.[14] It also has to have been thorough, which the USSG defines as encompassing 'the disclosure of all pertinent information known by the organization'.[15] The prime test for whether the disclosure is thorough is 'whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct'.[16]

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10 See Beam DPA, op. cit. (footnote 5, above).

11 See, e.g., Richard L Cassin, 'At Large: Did "culture shock" derail Beam Suntory's criminal FCPA resolution?', The FCPA Blog (5 Nov. 2020), available at https://fcpablog.com/2020/11/05/at-large-did-culture-shock-derail-beam-suntorys-criminal-fcpa-resolution/.

12 See U.S. Sentencing Guidelines Manual, § 8C2.5(g) (U.S. Sentencing Comm'n 1991) [USSG].

13 id.

14 id. at comment (n.13).

15 id.

16 id. If neither law enforcement nor the organisation is able to identify the responsible individuals within the organisation because of a lack of cooperation by particular individuals, however, the Sentencing Guidelines make clear that the company can 'still be given credit for full cooperation'.

Although it was helpful in identifying and beginning to define corporate cooperation as a basis for leniency, Section 8C2.5(g) of the USSG was a sentencing factor and, as such, it assumed that the company had already been criminally charged and found guilty. In 1999, the then Deputy Attorney General Eric Holder, Jr issued a memorandum titled 'Bringing Criminal Charges Against Corporations' (the Holder Memorandum), which identified factors designed to assist a prosecutor's decision whether to charge a company in the first place.[17]

The Holder Memorandum placed great importance on cooperation, stating that a corporation's 'willingness to cooperate with the government's investigation' could be a relevant factor in deciding whether to charge it, and could even provide the basis for immunity or amnesty.[18] Cooperation was to be assessed by considering 'the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney–client and work-product privileges'.[19] The Holder Memorandum noted that in the overall assessment of corporate cooperation, the prosecutor could take into consideration 'a corporation's promise of support to culpable employees or agents' through the advancing of attorneys fees or other means.[20]

In 2003, in the aftermath of corporate fraud scandals such as Enron and WorldCom, the then Deputy Attorney General Larry D Thompson issued the 'Principles of Federal Prosecution of Business Organizations' (the Thompson Memorandum) as a revision of the Holder Memorandum, to 'enhance' the DOJ's 'efforts against corporate fraud'.[21] Noting that it would be 'a minority of cases in which a corporation . . . is itself subjected to criminal charges', the Thompson Memorandum stated that its main focus was to increase the 'emphasis on and scrutiny of the authenticity of a

17 Memorandum from Eric Holder, Deputy Attorney Gen., Dep't of Justice, on Bringing Criminal Charges Against Corps. to Dep't Component Heads and U.S. Attorneys (16 Jun. 1999) [Holder Memorandum], available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF. The Holder Memorandum noted that 'prosecutors should apply the same factors in determining whether to charge a corporation as they do with respect to individuals' but that there are special considerations, including corporate cooperation, 'due to the nature of the corporate "person"'. id. at 3.

18 id. at 5.

19 id.

20 id. at 6.

21 Memorandum from Larry D Thompson, Deputy Attorney Gen., Dep't of Justice, on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep't Components and U.S. Att'ys (20 Jan. 2003) available at https://assets.hccainfo.org/Portals/0/PDFs/Resources/Conference_Handouts/Clinical_Practice_Compliance_Conference/2006/Tues/501-%20Handout%201.pdf.

corporation's cooperation'.[22] Prosecutors were permitted to continue considering the waiver of privilege when assessing a corporation's cooperation, as well as scrutinising the advancing of attorneys' fees, and were also advised to consider whether a corporation had impeded an investigation while 'purporting to cooperate' by taking actions such as directing an employee to decline to be interviewed, making a presentation with misleading 'assertions or omissions' or making 'incomplete or delayed production of records'.[23]

In 2006, the DOJ's definition of 'corporate cooperation' in the Principles of Federal Prosecution of Business Organization was further revised. In the aftermath of *United States v. Stein*,[24] the then Deputy Attorney General Paul McNulty issued guidance (the McNulty Memorandum), stating that prosecutors 'generally should not take into account' a company's advancement of employees' or agents' legal fees when assessing a failure to cooperate.[25] The McNulty Memorandum revisions also addressed the waiver of the attorney–client communication privilege, directing prosecutors to establish 'a legitimate need for the privileged information to fulfil their law enforcement obligations' prior to requesting a waiver of privilege.[26]

Two years later, the then Deputy Attorney General Mark Filip issued another revision of the Principles of Federal Prosecution of Business Organization.[27] This revision, known as the Filip Factors, focused on the 'disclosure of the relevant facts' as

22 id.

23 id. at 7–8.

24 The company in that case had conditioned payment of its employees' legal fees on the employees' cooperation with the government, in an attempt to get cooperation credit for itself. After finding that the company had taken these actions 'because the government held the proverbial gun to its head', the court held that federal prosecutors had violated the employees' Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel. See *United States v. Stein*, 435 F. Supp. 2d 330, 336, 367–73 (S.D.N.Y. 2006) [*Stein I*], aff'd, 541 F.3d 130 (2d Cir. 2008); see also *United States v. Stein*, 440 F. Supp. 2d 315 (S.D.N.Y. 2006) [*Stein II*].

25 Memorandum from Paul J McNulty, Deputy Att'y Gen., Dep't of Justice, on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep't Components and U.S. Att'ys, § VII (12 Dec. 2006), available at https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.

26 id.

27 Memorandum from Mark R Filip, Deputy Att'y Gen., Dep't of Justice, on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep't Components and U.S. Att'ys, USAM §§ 9-28.000 et seq. (28 Aug. 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf. The USAM (U.S. Attorney's Manual) is now known as the Justice Manual [JM].

the test of cooperation.[28] It expressly stated that cooperation credit was 'not predicated upon the waiver of attorney–client privilege or work-product protection'[29] and also emphasised that 'prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees' when evaluating cooperation.[30]

In September 2015, the then Deputy Attorney General Sally Q Yates issued a memorandum titled 'Individual Accountability for Corporate Wrongdoing' (the Yates Memorandum).[31] It focused on measures designed to maximise prosecutors' ability to identify and hold accountable the individuals who committed corporate crimes, one of which was corporate cooperation.[32] Although the Yates Memorandum continued the DOJ's emphasis on the disclosure of relevant facts as the primary measure of a company's cooperation, it also said that, to qualify for any cooperation credit, the facts provided by the company had to relate to the individuals responsible for the misconduct.[33] This 'all-or-nothing' approach created a threshold requirement for obtaining cooperation credit. The DOJ thus communicated what it valued the most in a company's efforts to cooperate (information about individual wrongdoing) and what it aimed to do in its corporate investigations (hold responsible individuals accountable).[34] The provisions of the Yates Memorandum were incorporated into the DOJ's Justice Manual, and the Principles of Federal Prosecution of Business Organizations were revised accordingly.[35]

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28 JM § 9-28.700.

29 id.

30 JM § 9-28.730.

31 Memorandum from Sally Q Yates, Deputy Attorney General, U.S. Dep't of Justice, to All United States Attorneys (9 Sep. 2015) [Yates Memorandum], available at https://www.justice.gov/archives/dag/file/769036/download.

32 id. at 2.

33 id.

34 In addition to introducing a threshold requirement for corporate cooperation credit, the Yates Memorandum distinguished the concept of 'cooperation' from 'voluntary self-disclosure'. Although voluntary self-disclosure had previously been treated as part of the overall assessment of cooperation, the Yates Memorandum recognised that the two were distinct, that a company could earn full cooperation credit without having made a voluntary self-disclosure, and that a company that both voluntarily self disclosed and cooperated in the government's investigation should receive more credit than one that had only done one or the other.

35 Sally Q Yates, Deputy Attorney General, Dept. of Justice, Remarks at American Banking Association and American Bar Association Money Laundering Enforcement Conference, (16 Nov. 2015), available at https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0. The Yates Memorandum's revisions to the Justice Manual were primarily made to the Filip Factors, JM § 9-28.000, et seq.

Corporate cooperation was further defined in early 2016, when the FCPA Unit of the DOJ's Criminal Division announced its Pilot Program for corporate enforcement.[36] The Pilot Program provided that companies that both fully cooperated following a voluntary self-disclosure and fully remediated were eligible for a declination.[37] The Pilot Program was permanently established as the Corporate Enforcement Policy in 2017, with some modifications,[38] and, in March 2018, it was announced that the DOJ's Criminal Division would 'consider the Policy's criteria as "nonbinding guidance" in corporate criminal cases outside the FCPA context'.[39]

The Corporate Enforcement Policy identifies the following actions required for a company to obtain full cooperation:

- disclosure 'on a timely basis of all facts relevant to the wrongdoing at issue', including all relevant facts about all individuals substantially involved in or responsible for the violation of law;[40]
- proactive (rather than reactive) cooperation by timely disclosure of 'all facts that are relevant to the investigation, even when not specifically asked to do so';
- timely preservation, collection and disclosure of relevant documents;
- 'de-confliction of witness interviews'; and

36 Leslie R Caldwell, Assistant Attorney General, U.S. Dep't of Justice, Criminal Division Launches New FCPA Pilot Program (5 Apr. 2016), available at https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program.

37 DOJ, 'The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance' (5 Apr. 2016) [Pilot Program], https://www.justice.gov/archives/opa/blog-entry/file/838386/download.

38 id.; JM § 9-47.120 [FCPA Corporate Enforcement Policy]. For example, the eligibility for a declination was changed to a 'presumption' in favour of a declination.

39 See Jody Godoy, 'DOJ Expands Leniency Beyond FCPA, Lets Barclays Off', *Law360* (1 Mar. 2018), at https://www.law360.com/articles/1017798/doj-expands-leniency-beyond-fcpa-lets-barclays-off; see also John P Cronan, Principal Deputy Assistant Attorney General, DOJ, Remarks at Practising Law Institute Event (28 Nov. 2018), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-john-p-cronan-delivers-remarks-practising-law.

40 The FCPA Corporate Enforcement Policy provides additional detail to the disclosure of facts requirement, including 'attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of facts; timely updates on a company's internal investigation, including but not limited to rolling disclosures of information; all facts related to involvement in the criminal activity by the company's officers, employees, or agents; and all facts known or that become known to the company regarding potential criminal conduct by all third-party companies (including their officers, employees, or agents'. JM § 9-47.120(3)(b) (2019).

- '[w]here requested, making available for interviews by the Department those company officers and employees who possess relevant information', including those located overseas as well as former officers and employees, and where possible, the facilitation of 'third-party production of witnesses'.[41]

DOJ's current approach

A review of corporate resolutions of the past five years shows that cooperation credit is typically awarded by the DOJ on a sliding scale, whereby a fully cooperating company pays a lesser fine whereas a partially cooperating company pays a greater fine. The type of resolution entered into (non-prosecution agreement (NPA), DPA or plea agreement) and the terms of the resolution (e.g., the imposition of a monitor or the requirement to self-report on compliance) may also be influenced by the perceived level (full or partial) of the company's cooperation during the investigation, although this is not always made explicit.

The focus on full versus partial credit suggests that cooperation has become not only grounds for a reward (the proverbial 'carrot') but also for a sort of punishment (the 'stick'). Consistent with this, the DOJ has emphasised that cooperation credit will be 'markedly less' where there is a 'deficiency'.[42] And although a company's cooperation may be described as deficient in a corporate resolution, it is not always clear, as the Beam DPA described above illustrates, what such a deficiency actually involved.

Cooperation deficiencies are frequently based on a failure to meet one or more requirements in the Justice Manual's guidance. That guidance, though detailed, leaves a number of key terms undefined. For example, it requires that certain acts (e.g., the preservation, collection and disclosure of relevant documents) be done in a timely manner, but the guidance does not state what 'timely' means.[43] This is an important term to understand. A lack of timeliness has justified a reduction in cooperation credit in a number of DOJ corporate resolutions.[44] This is so even though the purported

41 JM § 9-47.120(3)(a) (2019).

42 DOJ, 'The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance' (5 Apr. 2016), available at https://www.justice.gov/archives/opa/blog-entry/file/838386/download.

43 By contrast, USSG § 8C2.5(g), which requires that cooperation be 'timely', defines the term in that context to mean that cooperation began 'essentially at the same time as the organization [was] officially notified of a criminal investigation'.

44 See, e.g., Deferred Prosecution Agreement, at 4–5, *U.S. v.* Société Générale *S.A.*, No. 18-cr-253 (E.D.N.Y. 18 May 2018) (providing Société Générale with partial cooperation credit because of 'issues that resulted in a delay during the early stages of the investigation' even though it later

delay occurred in the early stages of the investigation, was addressed when brought to the company's attention and appeared to have caused no prejudice to the government. The same is true of the requirement that cooperation be proactive rather than reactive. According to a number of DOJ corporate resolutions, cooperation credit was partially denied on this basis.[45] The resolutions do not typically explain why responding to the government's requests, rather than anticipating them, made the company less cooperative. Nor do they indicate whether the company in those instances knew what the government needed but failed to provide until it was asked to do so. Indeed, there may be instances of the company finding out about potential wrongdoing after receiving a subpoena. Providing information to the government under these circumstances could be viewed as 'reactive', raising questions about whether the company is precluded from receiving full cooperation credit.

'provided to the [DOJ] all relevant facts known to it'); Deferred Prosecution Agreement at 3, ECF No. 3-2, *U.S. v. HSBC Holdings PLC*, No. 18-cr-30 (E.D.N.Y. 18 Jan. 2018) (providing HSBC with 'substantial credit', but not full credit, because its 'initial cooperation with the government's investigation was deficient in certain respects', even though the company later 'changed course' and fully cooperated); Deferred Prosecution Agreement at 3–4, ECF No. 1, *U.S. v. Teva Pharmaceutical Industries Ltd.*, No. 16-cr-20968 (S.D. Fl. 22 Dec. 2016) (withholding 'full credit' from Teva 'because of issues that resulted in delays to the early stages of the investigation, including vastly overbroad assertions of attorney–client privilege and not producing documents on a timely basis in response to certain Fraud Section document requests'); Deferred Prosecution Agreement at 4, ECF No. 11, *U.S. v. Och-Ziff Capital Management Group LLC*, No. 16-cr-516 (E.D.N.Y. 27 Sep. 2016) (withholding 'additional credit' from Och-Ziff because of 'issues that resulted in a delay to the early stages of the investigation, including failures to produce important, responsive documents on a timely basis, and in some instances producing documents only after the [DOJ] flagged for the Company that the documents existed and should be produced, and providing documents to other defense counsel prior to their production to the government').

45 See, e.g., Non-Prosecution Agreement between U.S. Attorney's Office for the Eastern District of New York and Imagina Media Audiovisual SL (10 Jul. 2018), at https://www.justice.gov/usao-edny/press-release/file/1079321/download (denying Imagina full credit despite its 'multiple factual presentations to the [DOJ], voluntarily making foreign-based employees available for interviews' and 'providing translations of foreign language documents' . . . 'because its cooperation was reactive, instead of proactive'); Non-Prosecution Agreement between the U.S. Attorney's Office for the Eastern District of New York and Credit Suisse (Hong Kong) Ltd (24 May 2018), https://www.justice.gov/opa/press-release/file/1077881/download (denying Credit Suisse full credit for cooperation with the investigation because its cooperation was 'reactive, instead of proactive', despite the company's actions conducting an internal investigation, making factual presentations to the DOJ, voluntarily making foreign based employees available for interviews, and translating foreign documents, among other things).

The guidance in the Justice Manual is also silent on whether acts by the company that are indisputably helpful to the government but are not specifically included in the definition of cooperation will result in cooperation credit. Relevant acts can include, for example, entering into a tolling agreement to extend the government's time to file charges, or waiving valid legal arguments. There is no clear understanding under existing DOJ guidance about whether additional cooperative efforts such as these, that are not included in the Justice Manual's list of cooperative acts, will be properly rewarded.

Just as there can be cooperating deficiencies, there can also be cooperating excesses, and this can further complicate the corporate cooperation analysis. Following the 2019 court decision in *United States v. Connolly*, which found that the DOJ's directives to the cooperating company effectively transformed the company into an agent of the government, it became clear that helping the government too much could hurt the government's efforts to hold responsible individuals to account.[46] It remains to be seen whether *Connolly*'s warning to the DOJ about over-reliance on a cooperating company could hinder a company's ability to fully cooperate with the DOJ. This could happen, in theory, if the DOJ curbed its requests for assistance, effectively sidelining the company to avoid appearing overly dependent on it. The DOJ could also expect more of what it calls 'proactive' cooperation, where a company is expected to provide information even though it is not specifically asked to do so by the government. Though there has been no formal pronouncement from the DOJ on the issue of 'too much' corporate cooperation, it is an area in which prosecutors are likely to exercise caution.

46 *U.S. v. Connolly, et al.*, 16 CR 370 (S.D.N.Y. 2 May 2019). The court found that statements obtained from an employee during the bank's internal investigation were 'fairly attributable to the Government' because the employee had been 'compelled, upon pain of losing his job' to sit for interviews during the internal investigation, and the government had directed the bank to interview him and potentially 'engineered' the interviews. id. at 23. The court also noted that the bank had 'effectively deposed their employees by company counsel and then turned over the resulting questions and answers to the investigating agencies'. id. at 24.

SEC's approach

The evolution of corporate cooperation

The SEC first issued guidance on cooperation and other related considerations approximately 20 years ago.[47] In October 2001, the SEC released a report explaining its decision not to bring an enforcement action against a public company it had been investigating. The report, which came to be known as the Seaboard Report, identifies the four primary factors the SEC will consider when evaluating the issue of corporate cooperation, which, in addition to providing the SEC with all relevant information, it is broadly defined to include considerations that the DOJ treats as bases for leniency that are distinct from cooperation, including self-policing prior to discovery of misconduct, self-reporting of misconduct and remediation.[48] The Seaboard Report further describes criteria the SEC will consider to determine whether each factor has been met, including: the egregiousness of the misconduct, including how long it lasted and how quickly after discovering it the company took steps to remediate and self-disclose; whether officers or directors were responsible or knew about the misconduct; whether there was a thorough investigation with all relevant facts voluntarily shared with the SEC; and whether there are assurances the misconduct will not occur again.

According to the Seaboard Report, undertaking the various actions it outlines can result in 'the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents [the SEC] use[s] to announce and resolve enforcement actions'.[49] However, the Report does not specify which of these actions will result in each type of credit and cautions that the Report does not limit the agency's 'broad discretion to evaluate every case individually'.[50] Further, 'there may be circumstances where conduct is so egregious, and harm so great, that no amount of cooperation or other mitigating conduct can justify a decision not to bring an enforcement action at all'.[51]

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47 Seaboard Report, op. cit. (footnote 1, above); SEC, Spotlight on Enforcement Cooperation Program (20 Sep. 2016), available at https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml. As the SEC's Seaboard Report is focused on encouraging conduct that will best protect investors, its primary focus is on companies immediately stopping the misconduct and engaging in remediation to ensure there is no additional investor loss.

48 Seaboard Report, op. cit. (footnote 1, above).

49 Seaboard Report, op. cit. (footnote 1, above).

50 id.

51 id.

With respect to the waiver of the attorney–client privilege, a footnote in the Seaboard Report states that 'the Commission does not view a company's waiver of a privilege as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the Commission staff'.[52] The SEC, unlike the DOJ, has not explicitly premised cooperation on a waiver of the attorney–client privilege. In 2007, the Director of the Enforcement Division made clear that the SEC does not and cannot 'require waiver of the attorney/client privilege' and that it is 'not a prerequisite to obtaining credit in a Commission investigation'.[53] The SEC Enforcement Division's manual also emphasises that 'a party's decision to assert a legitimate claim of privilege will not negatively affect their claim to credit for cooperation' and underscores that the primary concern is that all relevant facts within the company's knowledge have been shared with the staff.[54]

In January 2010, the SEC announced measures to further incentivise individuals and companies to cooperate with SEC investigations, in a 'Cooperation Initiative'.[55] The new measures authorised SEC staff to use tools that had been historically used by the DOJ, namely NPAs and DPAs.[56] NPAs and DPAs are to be entered into only 'if the individual or company agrees to cooperate fully and truthfully and to comply with certain reforms, controls, and other undertakings'.[57] DPAs are described as agreements in which the SEC agreed to 'forego an enforcement action against a cooperator' whereas NPAs are only to be used in 'very limited and appropriate circumstances' when the SEC agreed not to pursue an enforcement action against a cooperator.[58]

In 2015, the SEC expanded on its approach to corporate cooperation, emphasising in public remarks that cooperation credit was 'greatly enhanced by early self-reporting' and that a company which knew of misconduct but chose not to report

52 id. at n.3.

53 Linda Chatman Thomsen, Dir., Div. of Enforcement, SEC, Remarks Before the 27th Annual Ray Garrett, Jr. Corporate and Securities Law Institute (4 May 2007), available at https://www.sec.gov/news/speech/2007/spch050407lct.htm.

54 SEC, Enforcement Manual § 4.3.

55 Press Release, SEC, 'SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations' (13 Jan. 2010), available at https://www.sec.gov/news/press/2010/2010-6.htm.

56 id. They were imported by the then head of the SEC Enforcement Division, who had previously been a federal criminal prosecutor at the DOJ.

57 See Press Release, op. cit. (footnote 55, above).

58 id.

it could face significant consequences.[59] In an apparent effort to further incentivise companies to cooperate, the SEC announced that a company had to self-report misconduct for the Enforcement Division to recommend a DPA or NPA in a FCPA case,[60] and suggested that the SEC might use DPAs and NPAs where cooperation was extraordinary, but the conduct called for 'a measure of accountability', including to ensure future compliance with the law.[61] In a nod to the Yates Memorandum, which had been issued earlier in 2015, the SEC's Enforcement Division also emphasised that companies would benefit from conducting internal investigations and sharing all relevant facts with the SEC, including those that could implicate responsible senior officials and other individuals.[62]

The SEC's current approach

Despite the SEC's significant efforts to promote and define corporate cooperation, demonstrating its benefits has proven more challenging. In rare instances, the SEC has publicly announced that it was declining to bring charges against a company.[63] It

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59 Andrew Ceresney, Director, Div. of Enf't, SEC, Remarks at University of Texas School of Law's Government Enforcement Institute in Dallas, Texas, 'The SEC's Cooperation Program: Reflections on Five Years of Experience' (13 May 2015), available at https://www.sec.gov/news/speech/sec-cooperation-program.html; Andrew Ceresney, Director, Div. of Enf't, SEC, ACI's 32nd FCPA Conference Keynote Address (17 Nov. 2015), available at https://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html.

60 SEC, ACI's 32nd FCPA Conference Keynote Address, op. cit. (footnote 59, above).

61 SEC, 'The SEC's Cooperation Program: Reflections on Five Years of Experience', op. cit. (footnote 59, above).

62 id.

63 See Press Release, SEC, 'SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud' (25 Apr. 2012), at https://www.sec.gov/news/press-release/2012-2012-78htm (stating it was not charging Morgan Stanley, which had 'cooperated with the SEC's inquiry and conducted a thorough internal investigation to determine the scope of the improper payments and other misconduct involved'); Press Release, SEC, 'SEC Charges Former Credit Suisse Investment Bankers in Subprime Bond Pricing Scheme During Credit Crisis' (1 Feb. 2012), available at https://www.sec.gov/news/press-release/2012-2012-23htm (stating it was not charging Credit Suisse because of the isolated nature of the wrongdoing, its immediate self-reporting, termination of employees involved in misconduct, 'vigorous[]' cooperation, and remediation); Press Release, SEC, 'SEC Charges Six Former Officers of Putnam Fiduciary Trust Company with Defrauding Clients of $4 Million' (3 Jan. 2006), available at https://www.sec.gov/news/press/2006-2.htm (stating it was not charging Putnam Fiduciary Trust Company due to its 'extraordinary' cooperation, including 'prompt self-reporting, an independent internal investigation, sharing the results of that investigation with the government . . ., terminating and otherwise disciplining responsible wrongdoers, providing full restitution to its defrauded clients,

has been clear in these instances that the SEC took this step in light of the company's robust cooperation, and perhaps also because individual wrongdoers had been held to account, thanks at least in part to that cooperation.[64] But the SEC has stopped short of stating what features of the corporate cooperation in those specific instances resulted in the declination, and what a company could do in the future to achieve the same outcome.

As of early August 2021, it appears that the SEC has entered into only four corporate DPAs and four corporate NPAs.[65] Each of these agreements discusses the types of cooperation that resulted in the use of the agreement. For example, the SEC suggested in three FCPA matters that the companies received NPAs because they engaged in some level of self-policing, self-reported, cooperated extensively, implemented remedial measures to address the problems, and either terminated or placed on leave the employees involved, or ceased business in the country involved.[66] One of

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paying for the attorneys' and consultants' fees of its defrauded clients, and implementing new controls designed to prevent the recurrence of fraudulent conduct').

64 id.

65 SEC, Spotlight on Enforcement Cooperation Program (footnote 47, above). We do not include the non-prosecution agreements [NPAs] with Fannie Mae and Freddie Mac in our analysis because the SEC was clear that they used the NPAs in these circumstances due to the impact on taxpayers and other public policy considerations that typically do not apply to other companies.

66 Non-Prosecution Agreement between U.S. Sec. and Exch. Comm'n and Akamai Technologies, Inc., (7 Jun. 2016), available at http://www.sec.gov/news/press/2016/2016-109-npa-akamai.pdf (noting that Akamai, among other things, 'promptly self-reported', 'implemented significant remedial measures', placed an employee on administrative leave and 'provided comprehensive, organized and real-time cooperation'); Non-Prosecution Agreement between U.S. Sec. & Exch. Comm'n and Nortek, Inc. (7 Jun. 2016), available at https://www.sec.gov/news/press/2016/2016-109-npa-nortek.pdf (describing Nortek's 'timely' self-reporting, implementation of 'significant remedial measures' and 'comprehensive, organized, and real-time cooperation', among other things.); Non-Prosecution Agreement between U.S. Sec. & Exch. Comm'n and Ralph Lauren Corporation, (22 Apr. 2013), available at https://www.sec.gov/news/press/2013/2013-65-npa.pdf (noting that Ralph Lauren, among other things, 'undertook steps to further update and enhance its compliance program', including '(1) an amended anticorruption policy and translation of the policy into eight languages, (2) enhanced due diligence procedures for third parties, (3) an enhanced commissions policy, (4) an amended gift policy, and (5) in-person anticorruption training for certain employees').
Akamai and Nortek each received a declination from the DOJ. The declination letters reference the FCPA Pilot Program and factor the companies' cooperation, including 'thorough investigation[s]', 'fulsome cooperation' and 'full remediation' into the decision to close the inquiries despite the bribery. See Letter from the U.S. Dep't of Justice, Criminal Division, to Counsel for Akamai Technologies, Inc., (6 Jun. 2016), at

the four companies that entered into a DPA provided the same type of cooperation in an FCPA matter, but the fourth NPA, which involved financial fraud, does not mention self-policing.[67] Accordingly, it is difficult to discern precisely what prompted the SEC to use DPAs for certain companies and NPAs for others.

In February 2021, the SEC announced settled charges and a cease-and-desist order against Gulfport Energy Corporation and its former chief executive officer (CEO) for failure to properly disclose certain perquisites provided to the CEO, as well as 'certain related person transactions'.[68] The SEC's press release announced that the company's 'timely remediation and cooperation in our investigation' were among the 'key factors in the Commission's decision not to impose a penalty against the company'.[69] The SEC, however, did not provide details regarding the type of cooperation provided, nor is there a basis to understand why the resolution was not a DPA or NPA or even a declination.[70]

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https://www.justice.gov/criminal-fraud/file/865411/download; Letter from U.S. Dep't of Justice, Criminal Division, to Counsel for Nortek, Inc., (3 Jun. 2016), available at https://www.justice.gov/criminal-fraud/file/865406/download. Ralph Lauren Corporation entered into a Non-Prosecution Agreement with the DOJ, with the DOJ crediting its 'timely, voluntary, and complete disclosure', 'extensive, thorough, and real-time cooperation' and 'early and extensive remedial efforts', among other things. Non-Prosecution Agreement between the U.S. Dep't of Justice and Ralph Lauren Corporation (22 Apr. 2013), available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/04/23/Ralph-Lauren.-NPA-Executed.pdf.

67 Deferred Prosecution Agreement between U.S. Sec. & Exch. Comm'n and PBSJ Corporation (22 Jan. 2015), available at https://www.sec.gov/news/press/2015/2015-13-dpa.pdf (crediting PBSJ with, among other things, 'review[ing] its preexisting compliance program and revis[ing] and enhance[ing] its compliance program, including, in part, adoption of: (1) a detailed due diligence questionnaire for contractors, sponsors, and agents; (2) an enhanced FCPA compliance program with mandatory annual training for employees and third-party agents; (3) an international compliance oversight committee at the corporate level; and (4) an annual FCPA compliance audit'); Press Release, SEC, 'SEC Charges Former Carter's Executive With Fraud and Insider Trading' (20 Dec. 2010), available at https://www.sec.gov/news/press/2010/2010-252.htm (emphasising Carter's 'prompt and complete self-reporting', 'exemplary and extensive cooperation' and 'extensive and substantial remedial actions').

68 Press Release, SEC, 'SEC Charges Gas Exploration and Production Company and Former CEO with Failing to Disclose Executive Perks' (24 Feb. 2021), https://www.sec.gov/news/press-release/2021-33.

69 id.

70 Order Instituting Cease-and-Desist Proceedings, *In the Matter of Gulfport Energy Corp.*, No. 3-20232 (24 Feb. 2021), available at https://www.sec.gov/litigation/admin/2021/34-91196.pdf.

Conclusion

The core components of cooperation that the DOJ and SEC expect a company will meet are relatively straightforward: an internal investigation that gives the government the relevant facts about the wrongdoing and the responsible individuals; the production of documents, including from overseas, with translations as necessary; and making witnesses available, including those outside the United States. Beyond this, it is difficult to distil from a review of DOJ and SEC resolutions (declinations, NPAs, DPAs and plea agreements) what a company must do to qualify for full credit, what type of action or inaction will result in a partial cooperation credit, and what type of resolution will be entered into in light of the level of cooperation provided. Indeed, no amount of cooperation will guarantee full cooperation credit with the DOJ if, for example, the DOJ decides that the company was more reactive than proactive, or if there was any delay in getting information to the government. Even assuming that a company receives full cooperation credit, it is not clear how this affects a resolution, beyond reducing the amount of the applicable fine.

Although the SEC is less likely to label a company's cooperation as full or partial, or to publicly identify cooperation 'deficiencies', this does not necessarily mean that all cooperation is created equal. Different levels of cooperation may lead to different results, though the correlation between the two is not obvious. Put differently, just as the SEC can decline to charge a company based in part on its cooperation, it also can, and often does, move forward with a charge against a company that cooperated without providing an assessment of the company's cooperation, including whether it was particularly valuable, or, on the other hand, how it might have fallen short as compared to a company that received greater cooperation credit and a more favourable resolution.

When confronted with a government investigation, a company needs to make consequential decisions regarding its path forward, and corporate boards must weigh their duties to the corporation and its shareholders against the demands of the investigation. Clear and consistent expectations about the requirements of corporate cooperation can facilitate rational decision-making on these issues. Although an overly prescriptive or formulaic approach to cooperation credit is not ideal, transparent communication from enforcement agencies that both identifies and defines the key elements of successful cooperation, and concretely describes potential pitfalls, can benefit both companies and enforcement agencies. This type of approach could lead to a greater understanding of the elements that the government considers to be the most valuable to cooperation, which would, in turn, help companies that are facing an investigation decide how best to move forward with the government.

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Virginia Chavez Romano's practice focuses on conducting internal investigations and representing companies and individuals before US federal and state enforcement agencies.

Having spent 15 years in various prosecutorial roles, Virginia offers clients a unique perspective in navigating government investigations and enforcement proceedings, particularly those involving multiple agencies and jurisdictions.

From 2002 to 2012, Virginia was an Assistant United States Attorney for the Southern District of New York, where she served as lead prosecutor in dozens of investigations and prosecutions, including many that involved international money laundering and complex financial crimes, and was a member of the Securities and Commodities Fraud Task Force.

From 2012 to 2014, Virginia served as Deputy Attorney General for the Economic Justice Division of the New York State Attorney General's Office, where she led high-profile civil securities fraud investigations and litigations. In 2014, Virginia joined the US Department of Justice (DOJ) in Washington, DC, serving as Associate Deputy Attorney General and the Executive Director of President Obama's Financial Fraud Enforcement Task Force. During her time there, Virginia worked on a number of department-wide initiatives relating to corporate matters, including the DOJ's September 2015 Policy on Individual Accountability in Corporate Wrongdoing (the Yates Memorandum).

Since joining White & Case in 2016, Virginia has concentrated on representing individual and corporate clients in connection with investigations brought by the DOJ, the Securities and Exchange Commission, the New York Attorney General's Office and the New York Department of Financial Services.

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Tami combines her extensive experience advising clients on white-collar matters with her experience inside the SEC to obtain quick, efficient and successful outcomes for her clients. Tami has advised clients in matters relating to, among other things, private equity and hedge fund investment adviser conflicts of interest, the Foreign Corrupt Practices Act, financial and accounting fraud, insider trading, short and distort schemes, securities registration, and the False Claims Act.

Tami served as Assistant Regional Director in the SEC's Enforcement Division, where she led enforcement efforts alongside other regulators and agencies, including the US Department of Justice, the New York Attorney General's Office, the Financial Industry Regulatory Authority and the Options Regulatory Surveillance Authority. She conducted and supervised investigations concerning insider trading, financial and accounting fraud, investment adviser and broker-dealer violations, best execution and municipal securities fraud. She also recommended the selection of, and managed, compliance monitors and fair fund distribution consultants.

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