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Key Considerations For Parallel Criminal/Civil Investigations or Proceedings

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MCLE Certificate Information

- Approved for 1.0 hour General PP credit.
- CLE credit form must be submitted by **Wednesday, October 9th**.
- Form Link: https://gibsondunn.qualtrics.com/jfe/form/SV_a3N5HzrJdu4yEvk
 - Most participants should anticipate receiving their certificate of attendance in four to eight weeks following the webcast.
- **Please direct all questions regarding MCLE to CLE@gibsondunn.com.**

AGENDA

01 Overview of Parallel Proceedings

02 Key Strategic Questions *Before* Parallel Investigations Begin

03 Key Strategic Questions *During the Pendency of* Parallel Investigations

04 Key Strategic Questions *During Resolution of* Parallel Investigations

05 Key Strategic Questions *During Litigation of* Parallel Investigations

Overview of Parallel Proceedings

- Criminal and civil parallel proceedings have become **increasingly common**
- The civil agencies involved in these parallel proceedings **have grown in number and scope**
- There are a **number of strategic and practical considerations** when facing parallel investigations

Parallel Proceedings Are Increasingly Common



May 2024
DOJ and SEC
Ongoing



January 2024
DOJ and SEC
\$402 million

GLENCORE

May 2022
DOJ, CFTC, Brazilian
and UK Regulators
\$1.5 billion



August 2023
DOJ, SEC, Columbian
Regulator
\$80.6 million



November 2023
DOJ, CFTC,
FinCEN, OFAC
\$4.3 billion



March 2023, May 2024
DOJ and SEC
\$17 million



March 2023
DOJ, HHS
Approx. \$1 million

PHILIPS

May 2023
DOJ and SEC
\$62.2 million



September 2024
DOJ, SEC, FINRA
\$28.5 million








September 2023
DOJ and SEC
\$322 million



February 2020
DOJ and SEC
\$3 billion

March 2023
OFAC and Federal Reserve
\$97.8 million

Not Just the SEC Anymore . . .

Agency	Authority	
CFPB		<ul style="list-style-type: none">Principal federal regulator responsible for administering federal consumer financial law.
CFTC		<ul style="list-style-type: none">Federal agency with jurisdiction to regulate the futures markets, swaps, options, and certain retail commodity and retail foreign exchange transactions.
EPA		<ul style="list-style-type: none">Federal agency that has both civil and criminal authority to administer and enforce federal environmental laws and regulations.
FTC		<ul style="list-style-type: none">Federal agency that enforces a variety of antitrust and consumer protection laws.
State AGs		<ul style="list-style-type: none">State-level regulator that counsels state government agencies and legislatures, and represents the public interest in their state

Are Parallel Investigations Permitted?

There is nothing inherently problematic about parallel investigations.

- The Supreme Court has **rejected** constitutional challenges to parallel proceedings. *See e.g., United States v. Kordel*, 397 U.S. 1, 11 (1970) (parallel civil and criminal proceedings are appropriate and constitutional).
- There is also statutory authority explicitly permitting parallel investigations. *See e.g.,* Section 20(b), Securities Act; Section 21(d), Exchange Act.

Government Regulators and Prosecutors' Views on Parallel Investigations

There are **potential upsides and disadvantages** to such parallel investigations:

- Multiple investigations can provide additional **leverage** to the government
- Civil agencies may have to **defer** to criminal attorneys on investigative steps
- Criminal prosecutors may also put civil regulators at an **informational disadvantage** by collecting evidence through means that preclude information-sharing

Key Questions to
Consider *Before* There
Is a “Parallel
Proceeding”

Before a “Parallel Proceeding”

Does the focus of the current investigation potentially fall within the **scope of jurisdiction** for other agencies or regulators?

- Are there facts that may give rise to agency-specific jurisdiction, *e.g.*, SEC, CFTC, DOJ?
- Are there facts/issues that have been the focus of state and federal regulators, *e.g.*, consumer safety, cryptocurrency, social media?
- Does the particular agency have dual criminal and civil authority?
- Has there been public scrutiny on issues relevant to the investigation?

What **preservation obligations** does a company have at the time an investigation has started?

- The duty to preserve evidence attaches “when a party **should have known** that the evidence may be relevant to future litigation.” *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (emphasis added); see also *Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1190 (D. Utah 2009) (referencing knowledge of “imminent or ongoing litigation”).
- “The future litigation must be ‘**probable**,’ which has been held to mean ‘**more than a possibility**.’” *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1068 (N.D. Cal. 2006) (emphasis added).

Pragmatic Considerations: If additional investigations appear likely, would those regulators request information different from what the client is already preserving and/or preparing to produce?

Before a
“Parallel
Proceeding”

Before a “Parallel Proceeding”

Can the Company **confirm the existence** of a parallel proceeding?

- There are advantages and disadvantages of asking regulators about the interest of other regulators – for example, doing so may help a company prepare itself for additional actions, but it could also raise its profile and prompt information-sharing amongst regulators that might not otherwise have occurred.
- Regulators will not lie, but a non-answer could be informative in and of itself.
- SEC’s general policy, per their SEC Manual, is not to comment on investigations conducted by law enforcement authorities responsible for enforcing criminal laws.

Before a “Parallel Proceeding”

Is **additional fact-finding** necessary to address the Company’s potential exposure to parallel investigations?

- Are there **discrete areas** that could inform the likelihood of the launch of a parallel investigation?
- Has the Company **identified key personnel** (current and former) who may have relevant information?
- In cases where there may be criminal interest, **have any employees been approached** by law enforcement?
- Has the Company **identified key documents**, which may explain the issues more fully?
- Are there **remediations and improvements** that merit consideration?

**Key Questions to
Consider *During the
Pendency* of a “Parallel
Proceeding”**

During the Pendency of the “Parallel Proceeding”

Do you have an obligation to **disclose the existence** of a parallel investigation?

- While there is generally no obligation to inform one regulator of another’s action, doing so can be **potentially advantageous**, including because:
 - (i) it may **promote credibility and goodwill**;
 - (ii) it may introduce opportunities for **efficiencies and consistency** across **the agencies’ requests**
 - (iii) it might **reduce the costs** of an investigation
- There are **downsides** in encouraging coordination across regulators.

During the Pendency of the “Parallel Proceeding”

The DOJ published guidance on its approach to parallel civil and criminal investigations that **encourages cooperation and coordination** amongst civil and criminal authorities.

- *DOJ Yates Memorandum* (Sept. 9, 2015): Encourages “[e]arly and regular communication between civil attorneys and criminal prosecutors handling corporate investigations,” and advises that criminal attorneys should notify civil attorneys “**as early as permissible**” of potential civil liability.
- *Justice Manual, Chapter 1-12.000 and 1-12.100* (last updated in 2018): requires that the Department “endeavor, as appropriate, to **coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities** that are seeking to resolve a case with a company for the same misconduct”

During the Pendency of the “Parallel Proceeding”

The SEC has also published guidance in its **Enforcement Manual** regarding its approach to parallel investigations:

- Manual emphasizes that while the Enforcement may coordinate with criminal prosecutors, the SEC **must conduct an independent investigation** and not act as a stalking horse for a criminal prosecutor.
- Manual also addresses how staff should respond to questions from defense counsel, advising that if asked about a parallel criminal matter: the SEC Staff Attorneys “should direct counsel or the individual to the section of Form 1662” and “state that it is the general policy of the Commission **not to comment on investigations conducted by law enforcement authorities** responsible for enforcing criminal laws.”

What are the implications of a parallel criminal proceeding on the **scope of document production**?

- Regulators may ask for co-extensive productions, but that is not necessarily required.
- Considerations include:
 - Nature and seriousness of the investigations
 - Possible expansion in the scope of the investigation
 - Need for efficiency
 - Likelihood of follow-on civil litigation

During the Pendency of the “Parallel Proceeding”

During the Pendency of the “Parallel Proceeding”

Will **information be shared** between civil regulators and criminal prosecutors?

- Civil side will almost certainly share information with the criminal side.
- Criminal prosecutors are unlikely to share all information with civil side.
- Criminal prosecutors may be wary of using a civil investigations to gather information for criminal investigation in light of *United States v. Stringer*, 535 F.3d 929, 939 (9th Cir. 2008) .
- The target of a criminal investigation can use civil regulatory proceeding to their benefit.

During the Pendency of the “Parallel Proceeding”

What impact will parallel criminal investigation have on **witness testimony**?

- Should individual employees be told about the existence of a criminal investigation?
- Can the Company coordinate with individual counsel?
- Will the employees invoke the Fifth Amendment?
- Can the Company gather the facts from the employee independent of the government?
- Will there be an adverse inference?

During the Pendency of the “Parallel Proceeding”

Should you **seek a stay** of a filed civil matter when there is a parallel criminal investigation?

Courts may stay a civil action because of a parallel criminal proceeding when doing so is in the “interest[] of justice.” *Keating v. Off. of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995).

Six *Keating* factors:

1. the extent to which Fifth Amendment rights are implicated;
2. the interests of the plaintiff in proceeding expeditiously and potential prejudice caused by delay;
3. the burden on the defendant in defending against parallel proceedings;
4. the convenience to the court and judicial efficiency;
5. the interests of non-parties to the civil litigation; and
6. the interest of the public in the pending civil and criminal proceedings.

During the Pendency of the “Parallel Proceeding”

Should you **seek a stay** of a filed civil matter when there is a parallel criminal investigation? (continued)

There are also **strategic considerations** when assessing whether to seek a stay, including:

- Civil discovery can be used to **obtain documents and information earlier** than in a criminal case
- Civil discovery could also **involve civil depositions**, in which witnesses may be forced to assert their 5th Amendment rights to avoid criminal liability.

An intermediate approach could be to seek a **partial stay** permitting document production and/or third-party depositions, but not depositions of defendants.

How is the **attorney-client privilege** impacted by parallel proceedings?

- Is there any parallel civil litigation arising out of the fact pattern? If not, does the Company anticipate any civil litigation? If so, there may be issues of subject matter waiver over materials and information provided to regulators.
- Are any employees implicated in the fact pattern? If so, is there an actual or potential conflict of interest in dual representation?
- Will the Company have to communicate with any former employees as part of the investigation? If so, there may be issues of privilege that arise related to those communications.

During the
Pendency of the
“Parallel
Proceeding”

Key Questions to
Consider *During the
Resolution* of “Parallel
Proceedings”

During the Resolution of “Parallel Proceedings”

What **effect does resolution** of one investigation have on the other parallel investigations?

Considerations:

- Does a resolution with one agency impact the priorities of any other agency?
- Will settling with one agency give you a strategic advantage with another?
- Is a global resolution possible and beneficial?
- Would settling with one agency result in an “arms race” amongst the others, particularly with regards to the amount of civil penalties?

**Key Questions to
Consider *During the
Litigation* of “Parallel
Proceedings”**

During the Litigation of “Parallel Proceedings”

What **effect does the lack of a global resolution** have on the parallel investigations?

- Considerations:
 - Can the defendant use civil process to gather more information from the regulators?
 - Can the defendant force DOJ to produce more information given the existence of parallel investigations?

Upcoming Programs – Fall White Collar Webcast Series

Date and Time	Program	Registration Link
<p style="text-align: center;">Wednesday, October 9, 2024 12:30 PM – 1:30 PM ET 9:30 AM – 10:00 AM PT</p>	<p>SDNY and EDNY Prosecution Trends Presenters: F. Joseph Warin, Zainab Ahmad, Karin Portlock</p>	<p style="text-align: center;">Event Details</p>
<p style="text-align: center;">Thursday, October 17, 2024 12:00 PM – 1:00 PM ET 9:00 AM – 10:00 AM PT</p>	<p>Sanctions and Export Controls: Key Regulatory and Enforcement Trends Presenters: Adam Smith, Christopher Timura, Scott Toussaint, Anna Searcey</p>	<p style="text-align: center;">Event Details</p>
<p style="text-align: center;">Tuesday, October 22, 2024 12:30 PM – 1:30 PM ET 9:30 AM – 10:00 AM PT</p>	<p>A New Era of Environmental Criminal Enforcement Presenters: Michael Diamant, Rachel Levick, Stacie Fletcher, David Fotouhi</p>	<p style="text-align: center;">Event Details</p>

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