Chapter 6

Representing Corporations in United States Attorney's Office and DOJ Investigations

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§ 6:1 Introduction

For a company facing an investigation and potential prosecution by the Department of Justice (DOJ) or a United States Attorney's Office (USAO), the stakes are high. The filing of an indictment has been called a "corporate death sentence" for good reason—a criminal charge, even if it is resolved short of trial, can have significant consequences for a company, including the potential for massive fines, irreparable reputational harm, parallel civil litigation, debarment, or even loss of an operating license. As a result, the vast majority of corporate investigations today are resolved before an indictment is filed, and certainly before any trial. There are a range of potential resolutions with DOJ, ranging from DOJ declining to proceed to negotiated agreements, including non-prosecution agreements (NPAs), deferred prosecution agreements (DPAs), and plea agreements. In fact, according to one source, out of 3,485 total corporate criminal prosecutions from 1992 to 2019, only 29 were tried to verdict, with the remaining cases (more than 99%) being resolved pretrial.[1] DOJ has also recently shown an increased willingness to decline the prosecution of companies that self-disclose misconduct, cooperate, and implement appropriate remediation.

Good lawyering and effective advocacy can make a significant difference in the outcome for a company trying to navigate this difficult process. The possibility of obtaining a declination or a negotiated resolution with DOJ places a premium on understanding how the process works. For example, the range of what can

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[Section 6:1]

[1]Data & Documents, Corp. Prosecution Registry, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/browse/browse.html.

be required as part of such a negotiated resolution include financial penalties, changes to business practices, the retention of a third-party monitor, and admissions of wrongdoing (that can then be used against the company in any parallel civil litigation). The risks and consequences can be compounded by parallel or joint investigations with other authorities, which are increasingly common as DOJ's cooperation with other authorities in the United States and around the world continues to improve and grow.

With this in mind, the purpose of this chapter is to provide a guide to practitioners who have corporate clients facing a federal corporate criminal investigation. This chapter covers topics including DOJ's organizational structure, the typical path of a corporate criminal investigation, recent policy initiatives at DOJ that reflect an effort to provide greater transparency with respect to corporate investigations, the process by which federal prosecutors make critical decisions about filing charges and resolving investigations, and the opportunities for counsel to advocate for their clients along the way.[2]

§ 6:2 DOJ's organizational structure

Understanding DOJ's organizational structure and who will be making decisions in a particular case is a critical starting point when navigating an investigation. Decisions are made at various levels throughout the agency, and counsel may be interacting with decision makers at one or more DOJ components during the process.

DOJ is the primary agency responsible for the enforcement of federal criminal law in the United States. By its own account, DOJ is the largest law enforcement agency in the world and exercises broad authority over all aspects of federal law enforcement.[1] DOJ is composed of dozens of agencies, including

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[2]The discussion in this chapter is solely concerned with DOJ criminal investigations and prosecutions. Thus, we do not discuss the other federal, state, local, and sometimes international parallel investigations that can frequently accompany a DOJ inquiry. In addition, we do not address civil enforcement investigations under, for example, the False Claims Act or Financial Institutions Reform, Recovery, and Enforcement Act of 1989. Such actions, which are brought federally by civil litigation units within DOJ and the USAOs, also present unique issues worthy of separate treatment.

[Section 6:2]

[1]See About the Office, U.S. Dep't of Just., https://www.justice.gov/ag/about-office (last visited Sept. 27, 2019); About DOJ, U.S. Dep't of Just., http://www.justice.gov/about/about.html (last visited Sept. 27, 2019); Organizational Chart, U.S. Dep't of Just., https://www.justice.gov/agencies/chart (last visited Sept. 27, 2019).

the USAOs, the Federal Bureau of Investigation, the Drug Enforcement Administration, and the U.S. Marshals Service.

Criminal cases and civil enforcement matters are investigated and prosecuted by any of the 93 USAOs, one for each of the judicial districts (with the exception of the District of Guam and the District of the Northern Mariana Islands, which are served by a single USAO). Federal criminal cases and related civil enforcement matters are also investigated and prosecuted through one of a number of DOJ "divisions" based in DOJ's headquarters in Washington, D.C. These include, for example, the Criminal Division, the Antitrust Division, the Tax Division, the Environment and Natural Resources Division (ENRD), and the Civil Rights Division. The DOJ hierarchy and divisions based in DOJ's headquarters are often referred to as "Main Justice."

The Department's operations are supervised day-to-day by the Office of the Deputy Attorney General (the DAG). All of the components of the Department report through the DAG to the Attorney General. The third-ranking official within the Department is the Associate Attorney General. The Tax Division, Antitrust Division, Civil Division, ENRD, and the Civil Rights Division report through the Associate Attorney General to the DAG. Each of these divisions in turn, along with the Criminal Division, is led by an Assistant Attorney General. The Assistant Attorney General responsible for the Criminal Division, however, reports directly to the DAG.

The Criminal Division is further subdivided by specialized sections handling particular types of criminal cases (with the exception of criminal antitrust, tax, environmental, and civil rights matters, which are handled within their own separate divisions). Each of these sections reports to a Deputy Assistant Attorney General, who in turn reports to the Assistant Attorney General responsible for the Criminal Division. Each section has a lead supervisor—the "chief"—and several deputy chiefs, often divided by subject matter. For example, the Fraud Section within the Criminal Division of Main Justice (Fraud Section), which investigates and brings white collar criminal prosecutions, is typically supervised by a chief and a principal deputy chief, while different deputy chiefs are separately responsible for supervising trial attorneys handling investigations under the Foreign Corrupt Practices Act ("FCPA"), securities and financial fraud, and health care fraud. Of course, the priorities and organizational structure of a particular section or division can change, so it is important to review the most up-to-date information regarding the entity supervising a matter, which is typically available on DOJ's website.

§ 6:3 The United States Attorney's Offices

Notwithstanding the broad range of litigation that is handled

by Main Justice, the majority of DOJ's litigation efforts are conducted by individual USAOs. Each of the USAOs is overseen by a Presidentially appointed and Senate-confirmed United States Attorney (U.S. Attorney), or an "Interim" or "Acting" U.S. Attorney.[1] On the Department's organizational chart, each U.S. Attorney is on the same level as the Assistant Attorney General responsible for the Criminal Division, reporting directly to the DAG. In practice, U.S. Attorneys have significant autonomy in the vast majority of cases, and often jealously guard their independence from Main Justice. With respect to corporate criminal investigations and charging decisions, the autonomy of an individual U.S. Attorney within the Department varies widely depending on the individual U.S. Attorney, the District, and the particulars of a specific case.

Not all USAOs are structured the same way, and variations may be due to differences in the office's size, the types of cases common to a particular district, the priorities of individual U.S. Attorneys, and/or the office's history. Nevertheless, there are certain common characteristics. The front office will typically consist of the U.S. Attorney and, at a minimum, a First Assistant or Deputy U.S. Attorney. USAOs generally have a separate criminal division and civil division, each managed by a separate chief (who, in turn, may have a deputy or deputies). Depending upon the size of the office, those divisions may be divided into separate units focusing on a particular type of case (white collar crime, public corruption, violent crime, etc.), under the supervision of a unit chief. Assistant United States Attorneys (AUSAs) in each office have day-to-day responsibility for handling investigations and prosecutions.

Understanding the priorities and practices of the prosecuting office is important to developing an effective defense strategy. All USAOs and Main Justice Divisions are guided by the same regulations and procedures, memorialized principally in the Justice Manual (which was, until recently, known as the U.S. Attorney's Manual). However, each USAO and Main Justice Division has its own history, culture, internal practices, and areas of expertise. One crucial area of individuality, which is discussed in greater detail below, is how each office handles appeals "up the chain" to supervisors from decisions by line prosecutors. In some offices, there is a customary route for such appeals, and it is important to follow that path or risk alienating the very individuals who will most likely be deciding your client's fate.

[Section 6:3]

[1]28 U.S.C.A. § 541.

§ 6:4 Coordination among USAOs and main justice

U.S. Attorneys have significant autonomy to initiate investigations, to authorize or decline the prosecution of a particular matter, and to determine grand jury and trial-related questions. There are, however, exceptions. Notably, in tax prosecutions and terrorism and national security matters, approval of the relevant Divisions in Main Justice is required before a prosecution can be brought or resolved. FCPA investigations are also a special case—under the Justice Manual, a USAO is required to obtain approval from the Fraud Section before prosecuting an FCPA case.[1] The Antitrust Division, which is part of Main Justice, maintains the exclusive authority to prosecute criminal violations of the federal antitrust laws.

Despite the high degree of autonomy exercised by individual USAOs, Main Justice and USAOs often collaborate on cases. In part, this may reflect the more limited resources available to certain USAOs, particularly in complex or very sensitive matters. In such cases, Main Justice frequently assigns trial attorneys from an applicable Division to manage the case in partnership with local prosecutors. In cases where a charging decision must be approved by a particular unit or division within Main Justice, such as with FCPA or tax cases, a USAO and attorneys from the approving division—the Fraud Section of the Criminal Division or the Tax Division, respectively—will work together on the case, with joint supervision.[2] In such instances, an attorney seeking to appeal a decision above the line-prosecutor level may well be required to appeal to different hierarchies, or to arrange (or seek) a consolidated appeal to both DOJ components.

Main Justice and individual USAOs also work collaboratively on nationwide task forces that have been created to address particular department priorities. For example, in 2009, the Financial Fraud Enforcement Task Force (the FFETF) was established by Executive Order to provide cross-agency coordination in connection with the investigation of wrongdoing related to the financial crisis.[3] The FFETF is composed of over 20 federal agencies, every

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[Section 6:4]

[1]Justice Manual, 9-47.110, Policy Concerning Criminal Investigations and Prosecutions of the Foreign Corrupt Practices Act (2018).

[2]Justice Manual, 9-47.110, Policy Concerning Criminal Investigations and Prosecutions of the Foreign Corrupt Practices Act (2018); see, e.g., Justice Manual, 9-105.300, Approval Requirements for Money Laundering Cases (2018) (requiring approval from Tax Division prior to any prosecution under the Money Laundering Control Act, 18 U.S.C.A. § 1956(a)(1)(ii), where the sole purpose of the underlying transaction was to evade the payment of taxes).

[3]Press Release, Dep't of Justice, Office of Pub. Affairs, President Obama

USAO, and state and local officials,[4] and it also established a financial fraud coordinator in every USAO.[5] Similarly, in 2018, the Task Force on Market Integrity and Consumer Fraud (TFMICF) was established by Executive Order to fight consumer fraud, particularly among the elderly, service members, and veterans, and corporate fraud victimizing the general public and the government.[6] In performing its functions, the TFMICF is directed to invite participation from various agencies, including the Small Business Administration, the Bureau of Consumer Financial Protection, the Federal Trade Commission, and the Securities and Exchange Commission (SEC), among others.[7] More targeted DOJ-led task forces are also created from time to time and can each present unique challenges to counsel for a client in the crosshairs of such a task force, particularly where the prosecutors are determined to bring cases quickly.[8]

While prosecutors from different offices or components of DOJ typically work together productively, that is not always the case, and clients can occasionally get caught in the middle of a turf battle, where two (or more) federal prosecuting authorities fight over a case. This can happen, for example, in situations where there is overlapping venue between several USAOs and/or in high-profile (or high-priority) cases where various prosecutors may seek to be the first to issue a subpoena in an effort to stake a claim to a case. While most of these conflicts will be resolved without intervention from senior officials, the DAG has the authority to mediate any conflicts and, if necessary, is likely to be the final arbiter of where a case will reside. While there is little an outsider can do to resolve the dispute, counsel for a client caught in the middle of a turf battle (in order to avoid the burden, costs, and distractions of addressing varying demands) should

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Establishes Interagency Financial Fraud Enforcement Task Force (Nov. 17, 2009), http://www.justice.gov/opa/pr/president-obama-establishes-interagency-financial-fraud-enforcement-task-force.

[4]About the Task Force, Fin. Fraud Enforcement Task Force, https://www.justice.gov/archives/stopfraud-archive/about-task-force (last updated Dec. 6, 2018).

[5]The Financial Fraud Enforcement Task Force, 58 U.S. Attorney's Bull.1, 3 (Sept. 2010).

[6]Exec. Order No. 13844, Establishment of the Task Force on Market Integrity and Consumer Fraud, 83 Fed. Reg. 33,115 (July 16, 2018).

[7]Exec. Order No. 13844, 83 Fed. Reg. 33,115 (July 16, 2018).

[8]Other examples of DOJ Task Forces that were created to address particular priorities include the former Hurricane Katrina Task Force (later renamed the Disaster Fraud Task Force), which was established to deter, detect, and prosecute fraud relating to the Hurricane Katrina disaster, and the former Enron Task Force, which was charged with investigating and prosecuting criminal activity relating to Enron's collapse in 2001.

seek to ensure that each prosecuting entity is aware of the other and promote coordination or, at least, consistency, until the turf battle is resolved.

§ 6:5 Life cycle of a DOJ or USAO investigation

A company can become aware of its involvement in a DOJ or USAO investigation in a number of ways. On the informal end of the spectrum, company counsel (or a company employee) might receive a phone call from a prosecutor's office or a visit from a federal agent. On the more formal end of the spectrum, a company may receive a written request for documents—sometimes in the form of a letter seeking the "voluntary" production of documents and information—or a grand jury subpoena requiring the company to produce documents or witnesses. A company may also discover that it is involved in an investigation when a current or former employee is arrested, or when federal agents show up at the company's office with a search warrant. And, of course, a company may decide to inform DOJ itself of misconduct that it has identified (or that it has learned about through an investigation outside of the United States). As discussed in greater detail below, self-reporting has taken on increased importance as DOJ policy seeks to provide greater transparency and more concrete benefits for doing so, including the possible declination of prosecution or specified reduction in penalties by DOJ.[1]

Once a company becomes aware of a DOJ or a USAO investigation, it should generally retain outside counsel to assist.[2] With the assistance of outside counsel, the company should contact the prosecutors and open a dialogue with them. The company should attempt to clarify whether the government views the company as a subject or target of the investigation, or as a witness—meaning just as a source of information.

If prosecutors view the company as a potential wrongdoer, the company will need to make a number of decisions about how best to respond. A company may, for example, choose not to cooperate with the investigation, merely responding to demands for documents and not engaging with the government. There are significant risks to such an approach, and, as a result, most companies decide to cooperate. Such cooperation can be critical to resolving the matter favorably because it is one of the primary means by which the company can influence the investigation after it has begun.

[Section 6:5]

[1]See infra § 6:10.

[2]How an internal investigation is conducted is covered elsewhere in this book. *See supra* Chapter 3, Conducting Internal Investigations.

For a number of reasons, once the company learns that it is the subject of an investigation, the company, through counsel, will want to conduct a thorough inquiry into the conduct and events at issue, including by reviewing documents and interviewing employees with relevant information (preferably before they are interviewed by the government, though this may not always be possible).[3] Doing so will help the company prevent further wrongdoing, understand its risks, and consider the best strategic approach for dealing with the matter. On the other side, the government will also be attempting to get to the bottom of the facts, including by making document requests to the company and conducting its own interviews. One significant way in which a company can earn cooperation credit with the government is to report its findings to the prosecutors handling the matter to assist the government in its investigation. To maximize cooperation credit, counsel can consider providing "real-time" or frequent updates on its internal investigation to the government, including, for example, by providing attorney proffers or downloads regarding information learned during the interviews of key individuals, and producing relevant documents of potential interest. As the investigation proceeds, counsel may also make periodic presentations to prosecutors that analyze aspects of the matter or its investigation.[4]

Once the company has a better handle on the facts, it should also consider taking remedial action to address any misconduct identified and prevent similar misconduct from happening again.[5] Like a company's decision to cooperate, its remedial efforts are one of the few factors a company can control once it is aware it is under investigation. As with cooperation, swift and comprehensive remedial action can also help secure more lenient treatment.

Once the government has gathered enough information, it will choose how to resolve the investigation. Counsel should be, and should seek to be, an integral part of the government's decision-making process. In this regard, counsel will generally make a presentation, or series of presentations, to prosecutors to attempt to convince them to either decline to proceed, to adopt a particular type of resolution, or to address the components of a resolution. Counsel's credibility with the government is critical in discussions about how to resolve an investigation. Ultimately, the government may decide to decline to pursue criminal charges, or to enter into either a non-prosecution or deferred prosecution

[3]See infra § 6:12.

[4]See infra §§ 6:16 to 6:19.

[5]See infra §§ 6:13 to 6:14.

agreement with the corporation.[6] Or, the government might decide to pursue criminal charges against the corporation, and either a guilty plea[7] or a trial will follow. Resolutions will often involve admissions,[8] monetary sanctions,[9] required remedial action[10] (potentially also including the institution of an independent compliance monitor and/or reporting obligations).[11] Other consequences, such as debarment, may also automatically be triggered as a result of the resolution.[12]

§ 6:6 Principles underlying corporate criminal prosecutions

When DOJ sets its sights on investigating corporate misconduct, it is relying on the well-settled legal principle that corporations are liable for criminal acts committed by their employees acting within the scope of their employment. Over a century ago, in *New York Central & Hudson River Railroad Co. v. United States*, the Supreme Court held that a corporation may be held responsible for a crime committed by an employee or agent who was acting: (1) within the scope of his authority and (2) with an intent, at least in part, to benefit the corporation.[1] This expansive theory of corporate liability has repeatedly been reaffirmed and applied by lower courts.[2]

This standard provides federal prosecutors with broad discretion in deciding whether to pursue corporate criminal prosecutions, and, given the potential consequences to a company of an indictment, enormous leverage. The ease with which a company can theoretically be held liable for its employees' misconduct means that companies confront at least the possibility of criminal liability in essentially any instance where business-related

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[6]See infra § 6:21.

[7]See infra § 6:22.

[8]See infra § 6:21.

[9]See infra § 6:23.

[10]See infra § 6:13.

[11]See infra § 6:24.

[12]See infra § 6:25.

[Section 6:6]

[1]See New York Cent. & H.R.R. Co. v. U.S., 212 U.S. 481, 493–95, 29 S. Ct. 304, 53 L. Ed. 613 (1909).

[2]See, e.g., U.S. v. Ionia Management S.A., 555 F.3d 303, 309–11, 2009 A.M.C. 153, 38 A.L.R. Fed. 2d 767 (2d Cir. 2009); U.S. v. Potter, 463 F.3d 9, 25 (1st Cir. 2006); U.S. v. Sun-Diamond Growers of California, 138 F.3d 961, 970 (D.C. Cir. 1998), judgment aff'd, 526 U.S. 398, 119 S. Ct. 1402, 143 L. Ed. 2d 576 (1999); U.S. v. Automated Medical Laboratories, Inc., 770 F.2d 399, 406 (4th Cir. 1985); Standard Oil Co. of Tex. v. U.S., 307 F.2d 120, 127–28 (5th Cir. 1962).

wrongdoing has occurred within the company's ranks. Some commentators have found this troubling and called for either the reform of, or an end to, corporate criminal liability.[3]

In recognition of the vast discretion afforded federal prosecutors in this area, DOJ promulgated the Principles of Federal Prosecution of Business Organizations (the Principles).[4] The Principles, which are incorporated into the Justice Manual and have been updated from time to time to address new priorities and initiatives of the Department, provide a non-exhaustive list of 10 factors that prosecutors should consider when conducting a corporate criminal investigation, determining whether to bring charges, and otherwise deciding whether and how to resolve a case.[5] In discussing corporate criminal liability generally, the Principles state that "[v]igorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime."[6] The Principles reason that, in certain instances, "[i]ndicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes."[7]

§ 6:7 DOJ's "principles of federal prosecution of business organizations"

The Principles provide that corporations should neither be treated "leniently" nor "subject to harsher treatment" because of their artificial nature.[1] Prosecutors generally "apply the same factors in determining whether to charge a corporation as they do

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[3]See generally Samuel W. Buell, The Blaming Function of Entity Criminal Liability, 81 Ind. L.J. 473, 474 (2006) ("Despite sustained and deep attention, the criminal form of enterprise liability remains of puzzling legitimacy."); Maria S. Boss & Barbara Crutchfield George, Challenging Conventional Views of White-Collar Crime, 28 Crim. L. Bull. 32, 57–58 (1992) (arguing that legislators should consider starting over with respect to corporate crime and develop standards without reference to the common law); Pamela H. Bucy, Corporate Ethos: A Standard for Imposing Corporate Criminal Liability, 75 Minn. L. Rev. 1095, 1104 (1991) ("Under this approach all corporations, honest or dishonest, good or bad, are convicted if the government can prove that even one maverick employee committed criminal conduct.").

[4]The Principles are also referred to as the "Filip Factors," after former Deputy Attorney General Mark Filip.

[5]See Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.300, Factors to Be Considered (2018).

[6]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.200, General Considerations of Corporate Liability (2018).

[7]Justice Manual, 9-28.200 (2018).

[Section 6:7]

[1]Justice Manual, Principles of Federal Prosecution of Business Organiza-

with respect to individuals."[2] These factors include "the sufficiency of the evidence[,] the likelihood of success at trial[,] the probable deterrent, rehabilitative, and other consequences of conviction[,] and the adequacy of noncriminal approaches."[3] Corporations, however, present additional factors not present when making decisions about individuals.

Prosecutors are directed to consider the following factors when "conducting an investigation, determining whether to bring charges, and negotiating [a] plea or other agreements" with a potential corporate defendant:

> [(1)] the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime; [(2)] the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management; [(3)] the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it; [(4)] the corporation's willingness to cooperate, including as to potential wrongdoing by its agents; [(5)] the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision; [(6)] the corporation's timely and voluntary disclosure of wrongdoing; [(7)] the corporation's remedial actions, including, but not limited to, any efforts to implement an adequate and effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, or to pay restitution; [(8)] collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution; [(9)] the adequacy of remedies such as civil or regulatory enforcement actions, including remedies resulting from the corporation's cooperation with relevant government agencies; and [(10)] the adequacy of the prosecution of individuals responsible for the corporation's malfeasance.[4]

Each of the 10 factors is discussed in greater detail in the Principles.

This list of factors is flexible, and the prosecuting office will consider them in light of the particular facts and circumstances

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tions, 9-28.200 (2018).

[2]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.300 (2018).

[3]Justice Manual, 9-28.300 (2018); see also Justice Manual, Principles of Federal Prosecution, 9-27.220, et seq. (2018).

[4]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.300 (2018) (citations omitted).

of a given case.[5] The list is not intended to be exhaustive, and other factors not listed may be relevant in a particular case. And, some of the factors may not be applicable. In addition, as a practical matter, while the nature and seriousness of the offense is considered (and will undoubtedly be) a "primary factor," the factors are not accorded any specific relative weight. One or more factors may have great significance in one case but not in another.[6] Accordingly, the Principles advise that "prosecutors must exercise their thoughtful and pragmatic judgment in applying and balancing these factors, so as to achieve a fair and just outcome and promote respect for the law."[7] Similarly, defense counsel must exercise sound judgment about how these factors, and others, apply in a particular case, both in representing the company during the course of the investigation and in presenting arguments to prosecutors about the appropriate resolution of the investigation.

§ 6:8 The corporate enforcement policy and self-reporting

Over the last several years, DOJ has announced a series of policy changes designed to encourage self-reporting and cooperation by providing greater transparency regarding the benefits of such an approach. These changes impact a company's strategy in deciding whether to self-report misconduct and in negotiating a resolution under the Principles. Most significantly, in late 2017, DOJ announced the FCPA Corporate Enforcement Policy (Corporate Enforcement Policy).[1] Under this policy, absent "aggravating circumstances" such as pervasive wrongdoing or the involvement

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[5]Justice Manual, 9-28.300 (2018).

[6]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.300 (2018); Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.400, Special Policy Concerns (2018).

[7]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.300 (2018).

[Section 6:8]

[1]The FCPA Corporate Enforcement Policy was originally released in 2016 as the FCPA Pilot Program. See Memorandum from U.S. Dep't of Justice, Criminal Div., The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), https://www.justice.gov/archives/opa/blog-entry/file/838386/download. Although the program was set to expire after a year, DOJ decided to continue the program on a temporary basis as it reviewed the program's effectiveness. See Kenneth A. Blanco, Acting Assistant Attorney Gen., U.S. Dep't of Justice, Speech at the American Bar Association National Institute on White Collar Crime (Mar. 10, 2017), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national. Subsequently, on November 29, 2017, DOJ announced that it would be permanently replacing the FCPA Pilot Program with the FCPA Corporate Enforcement Policy. See Rod Rosenstein, Deputy Attorney Gen., U.S. Dep't of

of senior management, there is a presumption that DOJ will decline to prosecute a company that voluntarily discloses wrongdoing (before the government is aware of or would imminently become aware of the misconduct), fully cooperates in the government's investigation (including by coordinating interviews with DOJ upon request, which is known as "deconfliction," so as not to interfere with its investigation), and engages in swift and comprehensive remediation.[2] Moreover, companies that self-report but are not eligible for a declination due to the presence of one or more aggravating factors can receive up to a 50% discount on penalties if they meet these three requirements, and up to a 25% discount if they did everything but self-report.[3] In March 2018, DOJ expanded the policy's application, announcing that it would serve as nonbinding guidance in *all* Criminal Division matters, not just FCPA cases. In doing so, DOJ highlighted the recent example of a criminal investigation where the company had received a declination after it self-reported certain wrongdoing leading to the indictment of an individual.[4]

The Corporate Enforcement Policy provides companies with a more concrete way to understand the benefits of cooperating and self-reporting in Criminal Division investigations. Clearly, the Policy places a premium on identifying and self-reporting misconduct—and the potential benefits of doing so, assuming the government was not already aware of the misconduct, can be significant. However, ambiguities about the benefits of cooperation remain. For example, even if a company self-reports, there is no guarantee that the government has not already learned of the wrongdoing from some other source—including a cooperating witness, a whistleblower, or even a news report—or that the government may take the position that it would have imminently become aware of the misconduct. In addition, the Policy's description of what constitutes "aggravating factors" for purposes of qualifying for a declination leaves some uncertainty as to whether

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Justice, Speech at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

[2]DOJ issued four public declination letters in 2018 pursuant to the FCPA Corporate Enforcement Policy. See 2018 Year-End FCPA Update, Gibson Dunn (Jan. 7, 2019), https://www.gibsondunn.com/2018-year-end-fcpa-update.

[3]See Justice Manual, Foreign Corrupt Practices Act of 1977, 9-47.120, FCPA Corporate Enforcement Policy (2018); DOJ Releases FCPA Corporate Enforcement Policy, Cleary Gottlieb (Dec. 1, 2017), https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/2017/publications/alert-memos/doj-releases-fcpa-corporate-enforcement-policy-12-1-17.pdf.

[4]See DOJ Announces Expansion of Approach Encouraging Self Reporting and Cooperation, Cleary Gottlieb (Mar. 5, 2018), https://www.clearyenforcementwatch.com/2018/03/doj-announces-expansion-approach-encouraging-self-reporting-cooperation.

a company that self-reports will actually be entitled to a declination. And, while a 50% or 25% discount is specific, the question remains how DOJ will calculate the numerator because, in practice, there is often debate about how to calculate the appropriate fine. Finally, there is some uncertainty as to whether the USAOs (and other components of DOJ) will apply the Corporate Enforcement Policy, which, as a technical matter, only applies to cases involving the Criminal Division.

§ 6:9 Analyzing the factors federal prosecutors consider

As in any case, and whether a company believes it is eligible for a declination or other benefits under the Corporate Enforcement Policy, in dealing with a federal criminal investigation, well-founded arguments about the sufficiency of the government's evidence are always a good place to start, and may—putting aside the other factors—be dispositive. Unlike ordinary litigants, the mission of federal prosecutors is to see that justice is done in each and every case, and not simply to "win." Federal prosecutors, who must prove their cases beyond a reasonable doubt, routinely focus on the facts and the applicable law in each case. But a corresponding argument about the government's ability to prevail with its evidence at trial (and sustain a conviction on appeal), which often resonates in cases involving individuals, may not resonate with similar force in the case of a corporate client because it is generally understood that few corporations want to, or can, tolerate the risk and accompanying uncertainty to the corporation of a criminal indictment (which only requires proof of probable cause that a crime has been committed), let alone a jury trial.

Turning to the factors specific to the treatment of corporations, once a corporation is aware that it is under investigation, it has direct control of only a few of the listed factors: timely reporting, cooperation with the government's investigation (including by providing evidence of wrongdoing by its employees), and remedial efforts. Of these, cooperation generally provides companies with the greatest opportunities, as well as the greatest risks. The other factors listed involve events that have already occurred by the time an investigation is under way (unless there is some continued wrongdoing or active obstruction of the investigation, either of which would, of course, have a significant impact on any given case). However, even as to those factors that are outside of the company's control, including the nature and circumstances of the offense, advocacy can still have a significant impact on the outcome.

§ 6:10 Timely reporting

The timely, voluntary disclosure of wrongdoing may be within

the company's control. As noted above, this effort may start even before a government investigation has begun, because the client may discover wrongdoing on its own and must consider whether to self-report. The Principles, and in particular, the Corporate Enforcement Policy, encourage self-reporting, and most companies will be both justifiably reluctant to forego the possible benefits of self-reporting in the hope that a criminal problem will not come to light, and justifiably concerned that the government will view the corporation adversely should it learn of the conduct before receiving a voluntary report. And, in the context of a DOJ Criminal Division investigation in particular, self-reporting can mean that a company is eligible to receive a declination, or at least a 50% reduction off the low end of the U.S. Sentencing Guidelines fine range.[1]

When a client has decided to self-report (or even just to provide timely and regular reporting on the progress of its investigation in order to assist the government), counsel should take every opportunity to emphasize the significance of self-reporting as a measure of the values of an institution, its acceptance of responsibility, and its commitment to preventing wrongdoing. As an investigation proceeds, the government can sometimes focus on what went wrong to the exclusion of what went right. Counsel can emphasize self-reporting as a balancing factor and remind the prosecutor what such reporting says about the company's leadership. Indeed, this argument becomes particularly compelling where the government would not have known about the conduct at issue absent the decision to report it by the company.

§ 6:11 Cooperation as a mitigating factor

Cooperation is a potentially mitigating factor, but it is not dispositive. Cooperation does not "automatically entitle [a

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[Section 6:10]

[1]See Justice Manual, Foreign Corrupt Practices Act of 1977, 9-47.120, FCPA Corporate Enforcement Policy (2018); see also DOJ Releases FCPA Corporate Enforcement Policy, Cleary Gottlieb (Dec. 1, 2017), https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/2017/publications/alert-memos/doj-releases-fcpa-corporate-enforcement-policy-12-1-17.pdf. Although DOJ Criminal Antitrust investigations are outside the scope of this Chapter, it is worth noting that self-reporting may be critical in such investigations under DOJ's antitrust leniency program. See Leniency Program, U.S. Dep't of Justice, http://www.justice.gov/atr/public/criminal/leniency.html. Only the first entity to report wrongdoing to the Department is eligible for complete immunity; to the extent DOJ pursues the case, it will typically require other participants in an antitrust conspiracy to plead guilty to that conduct. See U.S. Dep't of Justice, Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters at 1, 5–6 (2017), https://www.justice.gov/atr/page/file/926521/download.

company] to immunity from prosecution or a favorable resolution of its case."[1] While cooperation is assessed qualitatively, and may be difficult to quantify, appropriate cooperation can entitle a company to certain defined benefits under the Corporate Enforcement Policy if the investigation involves DOJ's Criminal Division. Alternatively, according to the Principles, a company's decision not to cooperate is not itself evidence of misconduct, nor does it support the filing of charges.[2] Nonetheless, companies usually decide that cooperation is the only viable option because the entity's preeminent objective is to mitigate the harm arising from an investigation and possible charges, and cooperation often places a company in the best position to reduce potential penalties and other consequences from an investigation.

The steps a company can take to provide valuable cooperation in a given case will vary depending on the facts and circumstances. Generally, in evaluating a company's cooperation, the Principles direct prosecutors to consider "among other things" whether the company voluntarily self-reported the misconduct in a timely manner, and the willingness to provide relevant evidence and information, and identify relevant actors "substantially involved in or responsible for" the misconduct—including senior executives and other culpable employees—in the company.[3] As a practical matter, however, there are numerous ways for companies to provide meaningful cooperation—and receive cooperation credit—even if they did not detect and self-report the conduct under investigation or identify the relevant actors, including by providing relevant evidence and information (especially where DOJ would not have otherwise accessed such evidence and information).[4]

§ 6:12 Issues related to cooperation

Cooperation raises many issues for counsel representing a company. Six that have garnered much attention involve: (1) the attorney-client privilege and work-product protection; (2) providing information as to individual wrongdoers; (3) joint-defense

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[Section 6:11]

[1]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.740, Offering Cooperation: No Entitlement to Immunity (2018); see also Leniency Program, U.S. Dep't of Justice, http://www.justice.gov/atr/public/criminal/leniency.html.

[2]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.700, The Value of Cooperation (2018).

[3]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.70 (2018).

[4]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.70 (2018).

agreements; (4) the advancement of attorney's fees and making independent counsel available to employees; (5) difficulties in producing materials and making witnesses located in other jurisdictions available due to data privacy or employee protections; and (6) the limits to cooperation in light of the recent *United States v. Connolly* decision.

Privilege waivers. When prior versions of the Principles were applicable, there had been debate about whether waiver of attorney-client privilege and work product protection, either relating to an internal investigation or advice the company was given by its lawyers, was required to gain credit for cooperation and, relatedly, whether prosecutors were authorized to ask for waivers.[1] The current version of the Principles, however, states that "[e]ligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection," and prosecutors are directed not to ask for such waivers.[2] Instead, the Principles direct prosecutors to focus on whether a corporation timely discloses relevant facts about potential misconduct, regardless of whether that disclosure involves a waiver of any applicable privileges. In a particular case, it may be possible to provide the prosecutors with the relevant facts without waiving any privileges or, at least, to do so in a way that lessens the risk of waiver.[3] Even where a waiver is possible, it might make sense in a particular case to run this risk to make prosecutors aware of key facts, in a presentation, in interview downloads, or even, where appropriate, in writing. Because prosecutors are directed by the Principles to focus on whether the relevant facts have been timely disclosed, a waiver or a partial waiver may therefore prove an essential step toward achieving credit, or at least partial credit, for cooperation. In our experience, this issue needs to be assessed on a case-by-case basis, weighing the risks in the DOJ investigation against the collateral consequences from a possible waiver in other investigations and civil litigation. Nevertheless, we have seen a number of investigations during the past several years resolved without waivers, in which counsel have devised ways of summarizing information and providing documents and

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[Section 6:12]

[1]See, e.g., Thomas Vartanian, Michael Bromwich & Karen S. Bloom, Assault on the Shrine: The Demise and Possible Revival of the Attorney-Client Privilege, 15 Banking L. Committee J. (July 14, 2008).

[2]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.720, Cooperation: Disclosing the Relevant Facts (2018).

[3]See, e.g., Jeffrey Rosenthal & Molly Lens, Selective Waiver and Privilege in the Southern District of New York, U.S. L. Wk. (Jan. 4, 2011), https://news.bloomberglaw.com/us-law-week/selective-waiver-and-privilege-in-the-southern-district-of-new-york.

information that are designed to preserve the privilege. In others, especially where counsel contends that lawyers provided relevant advice or input that is probative of the client's good faith, counsel have offered defined waivers of the privilege.

Providing Information as to Individuals. Following widespread criticism of the DOJ for the lack of individual prosecutions arising out of the financial crisis, in September 2015, DOJ issued the so-called "Yates Memo" (named after then-DAG Sally Yates), designed to strengthen "pursuit of individual corporate wrongdoing."[4] Among other things, the Yates Memo limited the cooperation credit available to a company unless it disclosed "all relevant facts" regarding individuals involved in corporate misconduct.[5] In November 2018, DOJ reinforced the substance of this guidance but relaxed its "all or nothing" approach to focus on disclosure of wrongdoing by individuals "substantially involved in or responsible for" the misconduct at issue.[6] The new policy also allows for the possibility of cooperation credit even if companies are unable to provide evidence on all relevant individual wrongdoers; in such cases, corporate counsel bears the burden of explaining the impediments to DOJ.[7]

Joint-defense agreements. Relatedly, joint-defense (or "common-interest") agreements, either between companies or a company and relevant individuals, present a potential concern for companies that decide to cooperate with a government investigation. Joint-defense agreements had once been widely

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[4]See Memorandum from Sally Quillian Yates, Deputy Attorney Gen., U.S. Dep't of Justice, Office of the Attorney Gen., Individual Accountability for Corporate Wrongdoing at 2 (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.

[5]See Yates, Memorandum, Individual Accountability for Corporate Wrongdoing at 2; see also U.S. Justice Department Issues New Guidelines Prioritizing Individual Liability for Corporate Wrongdoing, Cleary M&A & Corp. Governance Watch (Sept. 10, 2015), https://www.clearymawatch.com/2015/09/u-s-justice-department-issues-new-guidelines-prioritizing-individual-liability-for-corporate-wrongdoing.

[6]See Rod. J. Rosenstein, Deputy Attorney Gen., U.S. Dep't of Justice, Speech at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0; Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.700, The Value of Cooperation (2018); Effective Compliance Programs in 2019, Cleary Gottlieb (Jan. 16, 2019), https://www.clearygottlieb.com/news-and-insights/publication-listing/effective-compliance-programs-in-2019-bod-2019?search=.

[7]See Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.700, The Value of Cooperation (2018).

interpreted as inconsistent with cooperation.[8] The Principles now state that "mere participation" in joint-defense agreements does not make a company ineligible for cooperation credit.[9] As with privilege waivers, the focus is on whether the government receives the relevant facts in a timely fashion, and not on whether there is a joint-defense agreement. The Principles, therefore, also state that a company "may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek . . . cooperation credit."[10]

Attorney's fees. With respect to attorney's fees, under the Principles, the advancement of attorney's fees and provision of counsel for individual witnesses—which are often required by state law, articles of incorporation, corporate by-laws, or employment agreements, or are otherwise offered to employees—are not to be considered negatively by prosecutors in evaluating cooperation. Despite prior controversy about whether such conduct could be deemed obstructive,[11] the Principles now provide that prosecutors "should not take into account whether a corporation is advancing or reimbursing attorney['s] fees or providing counsel to employees, officers, or directors under investigation or indictment" and instructs prosecutors that they "may not request that a corporation refrain from taking such action."[12] In fact, perhaps as a result of the Principles, prosecutors often expect a corporation to provide counsel to current and former employees who face potential exposure in an investigation (and counsel may

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[8]See, e.g., Craig S. Lerner, Conspirators' Privilege and Innocents' Refuge: A New Approach to Joint Defense Agreements, 77 Notre Dame L. Rev. 1449, 1502–03 (2002) (noting that joint defense agreements often require parties to notify other participants of an intent to withdraw and impose penalties on withdrawing parties, a feature that tends to "deter cooperation with prosecutors"); David Douglass et al., Impact of DOJ's Corporate Healthcare Fraud Enforcement Strategies on Organizations and Defense Counsel, 29 Health Law. 42, 42–43 (2017) (noting that a former DOJ policy permitted prosecutors to consider as a negative factor in weighing the value of a company's cooperation the fact that a company supported "culpable employees by providing information to them about the government's investigation pursuant to a joint defense agreement").

[9]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.730, Obstructing the Investigation (2018).

[10]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.730 (2018).

[11]John J. Rehmann, Paying the Price: Should Corporations' Payment of Their Employees' Legal Fees Be a Factor in Corporate Indictment Decisions?, 26. Wash. U. J. L. & Pol'y 379 (2008).

[12]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.730 (2018).

point this out to DOJ as one example of the company's cooperation).

Country-specific considerations. As investigations have become more international in scope, they have correspondingly involved documents and witnesses in other countries to a greater extent than ever before. This can complicate (and potentially limit) a corporation's ability to cooperate as fluidly as it might like and DOJ might expect. For example, the countries in which relevant documents are located may have powerful data privacy or secrecy laws that prevent the production of personal or banking information to a foreign regulator or authority (such as DOJ) except in certain limited circumstances. Those countries may also have strong employee rights laws that protect an employee who declines to be interviewed unless particular formalities are followed, such as compulsion and immunity regarding the witness' testimony. In practice, there may be limitations and exceptions to these rules that permit the direct production of the materials in question to DOJ, or allow the company to make a particular individual available to be interviewed; thus, it is important to understand fully the scope of the relevant laws, which often requires consultation with local counsel. DOJ itself may have the means to obtain documents located in foreign jurisdictions through memoranda of understanding with local regulators or applications for the production of documents or to conduct interviews pursuant to Mutual Legal Assistance Treaties. That said, such requests are often time-consuming to complete. As a result, DOJ will carefully scrutinize claims that foreign laws present obstacles to the production of materials and witnesses, and companies should seek ways to explore reasonable alternatives to expedite the process.

Limits to cooperation? As we have discussed, DOJ has issued extensive guidance encouraging cooperation from companies under investigation, including as to all individuals who were "substantially involved in or responsible for the misconduct."[13] Likewise, the Corporate Enforcement Policy quantifies specific benefits from cooperation, which, short of a declination, include, among other things, a significant discount on a possible penalty. At times, DOJ may be inclined to provide specific guidance to the company as to certain investigative steps that it wants a company to take. A recent decision of the Southern District of New York—*United States v. Connolly*—raises concerns with such potential government "outsourcing" of its investigation to a company.[14] In *Connolly*, the government allegedly directed the company to initi-

[13]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.700, The Value of Cooperation (2018).

[14]United States v. Connolly, No. 16-CR-0370 (CM), slip op. (S.D.N.Y. May 2,

ate an internal investigation, instructed company counsel to interview various employees, suggested approaches to witnesses, and required regular updates—all in order for the company to receive cooperation credit. The court expressed the view that such behavior threatened the constitutional rights of individuals who were subjects of the government investigation. In that regard, likely in response to *Connolly*, DOJ recently added a footnote to guidance in the Corporate Enforcement Policy stating that, "[a]lthough the Department may, where appropriate, request that a company refrain from taking a specific action for a limited period of time for de-confliction purposes, the Department will not take any steps to affirmatively direct a company's internal investigation efforts."[15] While a company may provide extensive cooperation, this principle underscores that counsel may appropriately push back if the government risks crossing the line into directing the company's internal investigation.

§ 6:13 Remedial action as a mitigating factor

The second factor companies can control once they learn about an investigation is remedial action. The Principles refer to a number of actions as remedial, including cooperation (which is explicitly addressed in a separate factor)[1] and efforts to implement an effective compliance program or improve an existing one (which is also addressed in a separate factor).[2] While no concrete list of remedial actions is provided in the Principles, they refer to "personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct

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2019); SDNY Judge Finds Government "Outsourcing" of Investigation to External Counsel Runs Afoul of Fifth Amendment, Cleary Gottlieb (May 7, 2019), https://www.clearygottlieb.com/-/media/files/alert-memos-2019/sdny-judge-finds-government-outsourcing—pdf.pdf.

[15]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-47.120 n.1, FCPA Corporate Enforcement Policy (2018); SDNY Judge Finds Government "Outsourcing" of Investigation to External Counsel Runs Afoul of Fifth Amendment, Cleary Gottlieb (May 7, 2019), https://www.clearygottlieb.com/-/media/files/alert-memos-2019/sdny-judge-finds-government-outsourcing—pdf.pdf.

[Section 6:13]

[1]See Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.300, Factors to Be Considered (2018); Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.700, The Value of Cooperation (2018); supra § 6:11.

[2]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.300 (2018); Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.800, Corporate Compliance Programs (2018); Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.1000, Restitution and Remediation (2018); infra § 6:14.

will not be tolerated."[3] For example, prosecutors are directed to consider whether a company has appropriately disciplined wrongdoers "once those employees are identified by the corporation as culpable for the misconduct."[4] The payment of restitution or "efforts to pay restitution even in advance of any court order" are also considered, as would be the payment of fines or sanctions in a settlement with a noncriminal regulator.[5]

§ 6:14 Compliance programs

As noted above, both as an element of remediation and as its own independent factor entitled to weight in the eyes of the government, the Principles emphasize the existence and effectiveness of the entity's pre-existing compliance program and, where applicable, any efforts by the entity to implement an effective compliance program or to improve an existing one. As the Principles recognize, no compliance program can prevent or detect "all criminal activity by a corporation's employees."[1] Indeed, DOJ has explicitly acknowledged that the "existence of misconduct does not, by itself, mean that a compliance program did not work or was ineffective at the time of the offense."[2] On the other hand, the mere existence of a compliance program, even one that specifically prohibits the conduct at issue, is not sufficient to foreclose liability.

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[3]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.1000 (2018).

[4]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.1000 (2018). In the same way that certain countries' data privacy laws may complicate a company's cooperation efforts, see supra § 6:12, employee-friendly labor and employment laws in certain countries may also complicate a company's efforts at disciplining employees. When disciplinary action seems less-than-appropriate from a U.S. perspective, counsel should be prepared to explain how the company took meaningful steps within the governing legal framework.

[5]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.1000 (2018).

[Section 6:14]

[1]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.800, Corporate Compliance Programs (2018).

[2]See U.S. Dep't of Justice, Criminal Div., Evaluation of Corporate Compliance Program: Guidance Document 13 (Apr. 2019) (hereinafter DOJ Compliance Guidance), https://www.justice.gov/criminal-fraud/page/file/937501/download; DOJ Updates Guidance for Evaluating Corporate Compliance Programs, Cleary Gottlieb (May 3, 2019), https://www.clearygottlieb.com/-/media/files/alert-memos-2019/doj-updates-guidance-for-evaluating-corporate-compliance-programs-v2.pdf.

While there is "neither a checklist nor a formula" for prosecutors (or corporations) to use in evaluating a compliance program,[3] DOJ's recently published guidance[4] on the topic instructs prosecutors to ask three "fundamental questions" in this regard: (1) whether the program is well-designed; (2) whether management is implementing the program earnestly and in good faith; and (3) whether the program actually works in practice.[5] The answers to these questions allow prosecutors to determine whether the corporation maintains a compliance program in paper form only or whether the program is actually effective as a control on, and in rooting out, wrongdoing.[6] This key consideration, in turn, informs prosecutors' decisions at three critical investigatory stages: (1) deciding whether or not, and how, to bring a criminal case; (2) determining a company's culpability score under the U.S. Sentencing Guidelines; and (3) determining whether an independent monitor is needed post-resolution.[7]

When addressing a client's compliance program, where consistent with the facts, counsel may highlight for prosecutors the aspects that demonstrate its effectiveness pre-misconduct, contrasting the program's comprehensive scope and the company's culture of compliance with the limited, isolated nature of the misconduct. Similarly, counsel can also help the company conduct a root cause analysis of the wrongdoing, which will allow the company to argue both that it has identified those causes and that its compliance program has evolved post-misconduct to incorporate "lessons learned" from the investigation—a factor

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[3]See Brian A. Benczkowski, Ass't Attorney Gen., Dep't of Justice, Keynote Address at the Ethics and Compliance Initiative (ECI) 2019 Annual Impact Conference (Apr. 30, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-keynote-address-ethics-and.

[4]See sources cited supra § 6:14, n.2. Published in April 2019, the DOJ Compliance Guidance builds off of, and in some cases explicitly cross-references, similar guidance in the Justice Manual, the U.S. Sentencing Guidelines, the 10 "Hallmarks of Effective Compliance Programs" found in DOJ's and the SEC's A Resource Guide to the U.S. Foreign Corrupt Practices Act (Nov. 2012), and a prior version of these guidelines that was published in February 2017, the Evaluation of Corporate Compliance Programs Guidelines.

[5]Brian A. Benczkowski, Ass't Attorney Gen., Dep't of Justice, Keynote Address at the Ethics and Compliance Initiative (ECI) 2019 Annual Impact Conference (Apr. 30, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-keynote-address-ethics-and; DOJ Compliance Guidance at 1; see also infra § 6:24.

[6]Notably, there is an entire chapter of this book dedicated to developing an appropriate and effective compliance program. See supra Chapter 2, Developing an Effective Compliance Program.

[7]See Brian A. Benczkowski, Ass't Attorney Gen., Dep't of Justice, Keynote Address at the Ethics and Compliance Initiative (ECI) 2019 Annual Impact Conference (Apr. 30, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-keynote-address-ethics-and.

weighing in favor of leniency and against the imposition of a monitor.

To the extent possible, counsel can also highlight:

- The company's strong culture of compliance and ethical behavior and, relatedly, both senior and middle management's commitment to compliance through their words and actions;
- The compliance program's scope, including how the program is appropriately tailored to the business needs and risk profile of the company;
- The degree to which the program is tested and self-evaluated at regular intervals, and evolves accordingly;
- The size and expertise of the staff employed to run the program and analyze and act upon its results, as well as the amount of time they dedicate to it;
- The existence of an internal information and reporting system that timely and accurately provides information to management and directors;
- The independence of directors and internal auditors from the company's officers in conducting reviews of the program;
- The isolated nature and limited extent of the criminal misconduct and its inconsistency with compliance controls;
- The relatively few employees involved in the misconduct and the low level of their positions at the company; and
- The corporation's prompt and complete responses to past violations, including through disciplining or dismissing violators, revising its compliance program, and disclosing violations to the government.

§ 6:15 Other factors

The first three listed factors in the Principles generally are considered together. The nature and seriousness (or lack thereof) of the offense, the pervasiveness (or lack thereof) of wrongdoing within the corporation, and the corporation's history (or lack thereof) of similar misconduct, should all be considered as advocacy points.[1] Effective advocacy and good judgment are critical when arguing these factors to the government. In our experience, counsel can sometimes fall into the trap of attempting to say something affirmative as to all of the factors listed in the Principles when one or more of these three factors should, for credibility reasons, have been simply conceded as adverse or inapplicable.

[Section 6:15]

[1]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.300, Factors to Be Considered (2018).

In addition, the Principles provide that prosecutors may consider the collateral consequences to innocent third parties in "determining whether to charge [a] corporation with a criminal offense and how to resolve corporate criminal cases."[2] Such third parties include "a corporation's employees, investors, pensioners, and customers."[3] Prosecutors should also consider "non-penal sanctions that may accompany a criminal charge," such as debarment from obtaining federal government contracts or funding.[4] While this factor is generally considered "not sufficient to preclude prosecution of the corporation," it may appropriately play a crucial role in how prosecutors think about the case and, ultimately, whether charges are brought against a corporation and the terms of any resolution.[5] This is an area in which the corporation typically has better access to relevant information and, as a result, where defense counsel often can provide important information and insights to the government. Given that an indictment and conviction might mean a death sentence for a corporation, counsel may even find that this argument becomes the centerpiece of any presentation to the prosecutors.

Two additional factors that often dovetail with the consideration of collateral consequences are the adequacy of prosecution of individuals responsible for the criminal conduct (as opposed to prosecution of the company itself) and the adequacy of noncriminal alternatives (such as regulatory or civil enforcement actions).[6] The emphasis placed on these factors by prosecutors, and by counsel, will depend largely on whether the goals of deterrence, punishment, and rehabilitation can be vindicated absent a corporate criminal charge or resolution when considered in light of all the other factors in any given case. Obviously, to the extent that there are additional enforcement actions brought by other agencies and regulators in the United States or elsewhere, counsel may have a strong argument that DOJ should not pursue a criminal resolution.

§ 6:16 Making presentations to the prosecutors

Whether as part of an effort to cooperate once an investigation

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[2]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.1100, Collateral Consequences (2018).

[3]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.1100 (2018).

[4]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.1100 (2018).

[5]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.1100 (2018).

[6]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.300, Factors to Be Considered (2018).

has commenced or as part of an attempt to influence the prosecutor's view of the case, or both, it is obviously important for counsel, in almost every case, to initiate a dialogue with the prosecutors. Such discussions may clarify, for example, whether the prosecutors view the company as a potential target, a witness, or have not yet gathered sufficient evidence to make a determination. Public company disclosure may be guided by such distinctions. In any event, it is notable that in most cases, counsel, in addition to communications with the line prosecutor, will be afforded opportunities to present to the investigating office an analysis of the matter or parts of the matter as the investigation proceeds. Making the most of these presentations is critical and can shape the ultimate resolution with the government. We note below some general process points to be considered in this regard.[1]

§ 6:17 Making presentations to the prosecutors—Know your audience

Because the mission of federal prosecutors is to ensure that justice is done in each case, the most convincing presentations often argue persuasively that counsel's request is consistent with the government's agenda to do justice. That said, decisions regarding the substance of counsel's presentation will be influenced in part by your audience. The USAO in each district and each of the other criminal components of DOJ is a distinct audience.

As a general matter, the line prosecutors, who handle an investigation on a day-to-day basis, will be the primary point of contact in making any presentation and should not be circumvented in an effort to go "straight to the top." Counsel generally should encounter a supervisor—depending on the complexity of the matter—when taking an "appeal" of a line prosecutor's determination, and interactions with supervisors usually should only involve material already presented to the line prosecutor.

An essential prerequisite to an effective presentation is to know the audience in each case, meaning the prosecutor(s) assigned to the case, the supervisor(s), the front office, and, if possible, the investigating agent(s). Such knowledge can be helpful. For example, some offices may be relatively experienced in a type of case, such as a health care fraud investigation or an insider trading or FCPA matter. In such an office or component, counsel may not need to devote as much attention to a discussion of industry norms and practices as counsel might in an office or component

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[Section 6:16]

[1]See infra §§ 6:17 to 6:19.

that is engaged in its first or second such investigation. In addition, an experienced prosecutor may view such a discussion as a waste of time. In this setting, it also may not make sense to emphasize the general trial burden associated with such prosecutions, given that such an office will have already overcome these difficulties in previous cases. To cite another example, a particular prosecutor or supervisor may take an especially dim view of business conduct that she sees as unethical or unduly sharp but that counsel will argue is nonetheless noncriminal. In such circumstances, counsel's presentation may benefit from a dispassionate focus on the evidence and the law, while at the same time making an effort not to minimize the significance of the conduct or the prosecutor's concerns about it. In such a context, it may be possible, for example, to suggest that a species of conduct is better suited to regulatory enforcement than criminal prosecution.

Counsel should attempt to learn at a minimum whether a prosecutor or prosecuting office has made comments about the case in court in a related matter or to other counsel that may frame specific issues and/or documents to address. The prosecutor may have also made public statements—in court or at conferences (for instance, if individual defendants have been charged in relation to the investigation)—concerning similar cases and/or issues. Additionally, it is worth learning whether the particular prosecutors involved have unique approaches to interaction with defense counsel. Some, for example, will discuss key facts in the case, which can be very helpful when formalizing a presentation.

§ 6:18 Making presentations to the prosecutors—Know the process

Although fair process is integral to our system of justice, including its prosecutorial component, there is no formal or written policy for making pre-charge presentations to a prosecutor or "appealing" her decision up the chain, except in certain specific categories of cases (for example, appeals to the Tax Division in criminal tax prosecutions). Practices vary by office and, sometimes, by individual prosecutor. For example, a prosecutor, in her discretion, might decline to listen to a presentation, and in some offices supervisors may rarely hear "appeals" from defense lawyers.

Whatever the specific practice of an office or DOJ component with regard to appeals, one fundamental "rule" is worth keeping in mind: respect the chain of command. Within a USAO, there are three possible levels of appeal from an AUSA's decision to charge a case: the unit supervisor, the criminal division chief, and the U.S. Attorney. While it is possible in principle to also appeal a U.S. Attorney's decision to DOJ in Washington, with some distinct exceptions where agreement of a DOJ component's

involvement is required to file charges (e.g., tax and FCPA counts), DOJ will rarely second-guess, much less override, a local U.S. Attorney's charging decision.

It is generally a mistake for counsel to go "straight to the top." A lawyer's ability to pick up the phone and have access to supervisors is not a reason, in and of itself, to take advantage of that access. Disregard for the chain of command is likely to be viewed as an indication that counsel is inappropriately maneuvering around the line prosecutor to gain a strategic advantage.

Respect for the chain of command may also have practical benefits. *First*, if the line prosecutor has the authority to grant counsel's request without supervisory authority, the line prosecutor is the appropriate person to resolve the issue. Obviously, if counsel convinces the line prosecutor, counsel will have achieved her goals without the need for an appeal to a supervisor. *Second*, if the line prosecutor does not have the authority to grant counsel's request, the request is more likely to succeed if the line prosecutor agrees with, or will not contest, some or all of counsel's positions. Supervisors rely on line prosecutors to assess the strengths and weaknesses of each case and communicate them faithfully. A line prosecutor's recommendation or position on an issue, therefore, will often carry great weight with a supervisor. If the prosecutor becomes an advocate behind the scenes, counsel's work will be aided. *Third*, even if counsel cannot convince the line prosecutor, counsel will have an opportunity to hear the line prosecutor's opposing arguments and may be able to use that information to tailor her appeal to more senior prosecutors in the office. *Fourth*, counsel generally will gain credibility with the line prosecutor and her supervisors by raising issues with the line prosecutor first. By doing so, counsel shows respect for her adversary and the office and its process of review. If counsel is ultimately unsuccessful in the pre-charge phase, she may be in litigation with the government for some time; having the respect of the assigned prosecutor (and her colleagues) can inure to the client's benefit in various ways (and make such litigation less difficult on a day-to-day basis).

Respecting the chain of command also means alerting the line prosecutor to the fact that defense counsel intends to appeal to a supervisor. The line prosecutor can then advise the supervisor (and perhaps coordinate the scheduling of the appeal) and convey a preview of the substance of defense counsel's arguments to the supervisor.

Supervisors and front office personnel will generally require that any appeals be made with the line prosecutor present, even if the presentation concerns alleged misconduct by the line prosecutor, because the presence of the line prosecutor in the

meeting generally promotes transparent decision-making; the line prosecutor will generally have the most knowledge of the matter and be in a position, during or after the meeting, to address issues that the defense raises; and the supervisor(s) and/or front office personnel will generally be inclined to employ a process that conveys respect for line prosecutors.

§ 6:19 Making presentations to the prosecutors—Scope of presentations

The judgment of counsel regarding what specifically to present and how to present it will depend on counsel's analysis of the particular details of each case. In addition, defense presentations will vary, of course, depending on their purpose—from presenting facts and other information if counsel is in a cooperative posture, to attempting to convince the government to accept a particular resolution based on an application of the Principles. In the context of the specific judgments made by counsel in this regard, a number of practical considerations commonly arise.

First, it is crucial to acknowledge and address facts that are helpful to the government and unhelpful to the client. The failure to do so undermines the strength of any presentation and the credibility of the presenter. This does not mean that counsel needs to endorse the government's theory of the case or views on a particular issue. The most principled and strongest arguments, however, will account for "bad" facts. Indeed, to the extent that the presentation, as part of an effort at cooperation, is designed to present the facts and circumstances determined through counsel's investigation, the presentation will likely be focused on such "bad" facts and how the company has addressed them in some fashion.

Second, it is rarely effective to lecture prosecutors about how to do their jobs. If counsel believes that the prosecutors are taking a position that is wrong or unfair, or do not understand a crucial point, counsel should be prepared to explain why without resorting to vitriol. Similarly, it is rarely helpful to express anger or contempt for a prosecutor (or agent). A client's interests are usually better served by identifying objective areas of concern, discussing them with the prosecutor, and, where appropriate, following the process for appealing an adverse decision up the chain.[1] (Along these lines, former federal prosecutors should avoid the temptation to begin a sentence with the phrase, "When I was an Assistant . . . .")

Third, counsel's request for relief should be clear. A critical

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[Section 6:19]

[1]See supra § 6:18.

component of an effective presentation includes "the ask"—namely, the explicit request for relief desired. While counsel may—in certain circumstances—prefer ambiguity to provide flexibility depending on how things unfold, such ambiguity should always be the result of a strategic decision. Similarly, whether to ask for one or more alternative forms of relief requires a nuanced judgment. On the one hand, a request for specific relief may enhance the chance of a more favorable outcome. On the other hand, it may signal that the defense is willing to "settle" for that specific, less favorable outcome.

Fourth, counsel should consider what ground rules apply to the presentation and discuss them with the prosecutor. There are a number of practical considerations to coordinate. Two examples include whether counsel in discussing the matter with the prosecutor will seek the protection of any applicable privileges (including through a "non-waiver" understanding) and the protection of confidentiality (including coverage by Federal Rules of Evidence 408 and 410[2]).

Finally, an important component of any presentation is who should participate. Effective—and ultimately successful—presentations have been given by one lawyer and as many as a dozen lawyers. When more than one lawyer will participate on a client's behalf, careful consideration should be given to the role each lawyer will play to enhance the overall presentation. Another issue that arises is whether a representative of the client should attend and possibly take an active role. This can be effective, for example, when a corporate representative addresses issues involving the corporation itself (as opposed to the evidence in the case), such as the potential harm to the business that a criminal resolution would cause and the corporation's commitment to compliance and remedial efforts.

§ 6:20 Resolving the case—Forms of resolution

Ultimately, the purpose of making presentations to the government, and engaging in negotiations, is to attempt to reach a resolution that will conclude the investigation in as favorable a manner as possible under the circumstances. The decision regarding which type of resolution is appropriate will likely be the focus of an ongoing dialogue with the prosecutors regarding the factors

[2]Rule 408 prohibits the use of settlement-related evidence, such as statements made in settlement negotiations, from being introduced at trial "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement." See Fed. R. Evid. 408. Rule 410 excludes evidence of unconsummated plea negotiations and related statements when offered in a civil or criminal case against the defendant who participated in the negotiations. See Fed. R. Evid. 410.

set out in the Principles, as well as the applicability of the Corporate Enforcement Policy. In applying those to a particular investigation, federal prosecutors ultimately have a range of options in deciding how they wish to resolve an open matter. In general, the government must decide, under all of the facts and circumstances, whether to decline to pursue the matter further (a so-called "declination"), to seek a non-prosecution agreement or deferred prosecution agreement, or to bring charges against the corporation, which may or may not be resolved pursuant to a plea agreement. The range of options not only gives the government flexibility to craft a resolution, but also gives defense counsel some flexibility in negotiating a disposition.

§ 6:21 Non-prosecution and deferred prosecution agreements

In instances where the government has uncovered wrongdoing, the vast majority of resolutions over the last decade have taken one of two forms: a non-prosecution agreement (NPA) or a deferred prosecution agreement (DPA).[1] Unlike an indictment, NPAs and DPAs—both of which will be the subject of intensive negotiations—generally allow prosecutors to vindicate the government's interests at the same time that they allow a corporation to avoid the often significant negative collateral consequences of prosecution, which may impact a company's ability to do business, result in loss of jobs, and undermine shareholder value.[2]

The major difference between an NPA and a DPA is that under a DPA, prosecutors file a criminal charge, called an information, against the entity, and the DPA itself is approved by a federal judge. The DPA has a sunset period: the charges are subsequently dismissed so long as the corporation complies with the require-

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[Section 6:21]

[1]*See* Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.200, General Considerations of Corporate Liability (2018) ("Non-prosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation.").

[2]In cases of "national or multi-national corporations," NPAs and DPAs "may only be entered into with the approval of each affected district or the appropriate Department official." Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.1100 n.1, Collateral Consequences (2018); *see also* Justice Manual, Principles of Federal Prosecution, 9-27.641, Multi-District (Global) Agreement Requests (2018) ("No district or division shall make any agreement, including any agreement not to prosecute, which purports to bind any other district(s) or division without the approval of the United States Attorney(s) in each affected district and/or the appropriate Assistant Attorney General.").

ments of the agreement. While an NPA may also have a sunset period, no formal charges are filed under an NPA and "the agreement is maintained by the parties,"[3] with the understanding that the parties shall be released from the terms of the agreement, and the government may file charges, if the company fails to comply with the terms of the agreement.[4] Because DPAs are filed with the court, they are usually a matter of public record, whereas NPAs typically become public when they are announced and made public by the parties (terms that are usually the subject of provisions in the NPA itself). However, notwithstanding the fact that DPAs are filed with the district court, courts have limited supervisory authority over the DPA itself.[5]

NPAs and DPAs are otherwise often similar in form and substance. Under both types of agreements, the company is generally required to prevent further (and to report future) violations of the law, implement certain significant compliance measures, and cooperate with DOJ's investigation of individuals at the company or elsewhere who were involved in the wrongdoing. In exchange, the government agrees to forego indictment and prosecution. According to one report, the average length of NPAs and DPAs entered into by DOJ from 2000 through mid-2014 is approximately 29 months, with over 65% of agreements

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[3]Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., to Heads of Dep't Components & U.S. Attorneys on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, at 1 n. 2 (Mar. 7, 2008) (hereinafter Morford Memorandum), http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

[4]The Justice Manual suggests that "serious consideration" should be given to possible alternatives to an NPA, because "permitting an offender to avoid any liability for his/her conduct" is not the preferred outcome, and "[o]nly when it appears that the person's timely cooperation cannot be obtained by other means, or cannot be obtained effectively, should the attorney for the government consider entering into a non-prosecution agreement." Justice Manual, Principles of Federal Prosecution, 9-27.600, Entering into Non-Prosecution Agreements in Return for Cooperation—Generally (2018). Federal prosecutors are authorized to enter into an NPA in exchange for cooperation when, in the attorney's judgment, "the person's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective." Justice Manual, Principles of Federal Prosecution, 9-27.600 (2018). The same general standards apply to entering into NPAs with corporations. But even if the corporation's cooperation does not meet this high bar, cooperation—in conjunction with other factors—can still lead to more lenient treatment.

[5]See United States v. HSBC Bank USA, N.A., 863 F.3d 125, 135 (2d Cir. 2017) (holding that "the district court erred in *sua sponte* invoking its supervisory power to monitor the implementation of the DPA in the absence of a showing of impropriety"); U.S. v. Lau Tung Lam, 714 F.2d 209, 210 (2d Cir. 1983) ("[T]he federal judiciary's supervisory powers over prosecutorial activities that take place outside the courthouse is extremely limited, if it exists at all.").

falling into the range of two to three years in length.[6] Entry into an NPA or DPA, therefore, typically imposes relatively long-term obligations on the company, and the compliance, cooperation, and restitution requirements can impose significant financial and procedural burdens. Counsel and client should keep these costs in mind, and discuss them with the prosecutors, when negotiating the terms of the NPA or DPA.

Significantly, NPAs and DPAs also often contain agreed upon statements of fact describing the unlawful acts and often include some admission of guilt on the part of the company. Other regulators, such as the SEC, may employ settlement procedures with more flexibility and permit a resolution by a corporation without an admission of wrongdoing. Because any criminal investigation can spawn shareholder derivative and/or securities fraud lawsuits, counsel should pay close attention to the negotiation of the statement of facts to minimize the damage these admissions may cause. In addition, while NPAs and DPAs often contain language prohibiting companies and their employees from publicly denying or otherwise contradicting the statement of facts, NPAs and DPAs may also contain a provision expressly permitting the corporation to take "good faith positions" in civil suits involving nongovernmental entities. Although there is little case law addressing whether NPAs and DPAs are themselves admissible in collateral civil suits, many such agreements contain a provision defining the statement of facts as a statement adopted by the company, making that portion of the agreement admissible as a statement by a party-opponent under Federal Rule of Evidence 801(d)(2).[7] By contrast, when a consent judgment or settlement agreement includes a provision that the defendant neither admits nor denies liability for the conduct, courts have held that the statements contained therein are not admissible in subsequent litigation.[8]

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[6]See 2014 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs), Gibson Dunn (July 8, 2014), https://www.gibsondunn.com/2014-mid-year-update-on-corporate-non-prosecution-agreements-npas-and-deferred-prosecution-agreements-dpas. The average length of NPAs and DPAs has not changed drastically since 2014. For example, in 2018, DOJ entered into at least 24 NPAs and DPAs; three were for four years, thirteen were for three years, four were for two years, two were for one year, and the rest were indefinite. See 2018 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements, Gibson Dunn (Jan. 10, 2019), https://www.gibsondunn.com/2018-year-end-npa-dpa-update.

[7]A statement is not hearsay under the Federal Rules of Evidence if it is "offered against an opposing party" and "is one the party manifested that it adopted or believed to be true." Fed. R. Evid. 801(d)(2).

[8]The Second Circuit has held that a consent judgment between the SEC

§ 6:22 Guilty pleas

In some instances, a prosecutor's evaluation of the Principles will lead to a decision to file a criminal charge. Because, in such circumstances, it is rare for a company to take a criminal matter to trial, the government and the company will likely enter into a plea agreement in which the corporation pleads guilty to some or all of the charged conduct. Guilty pleas are often accompanied by "substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters or corporate monitors."[1] Such guilty pleas can also result in significant collateral consequences, including temporary or permanent debarment from contracting with government agencies or with international development organizations, limitations on the ability of the corporation to engage in certain types of transactions or provide advice to certain clients, a loss of jobs and benefits for third parties who were not involved in the misconduct, and, if the company's presence in the market is diminished by virtue of reaction to the plea, loss of services to the market.[2] For these reasons, and if the facts and circumstances warrant, a guilty plea by a subsidiary may be worthy of consideration, thereby vindicating the government's interests while also shielding the parent company and other subsidiaries from the more pernicious consequences of a conviction. However, in some cases, DOJ will apparently settle for nothing less than a guilty plea by the parent corporation, notwithstanding the potential collateral

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and a defendant could not be used as evidence in civil suit brought by a third party, when the defendant neither admitted nor denied the substance of the allegations in the complaint. See Lipsky v. Commonwealth United Corp., 551 F.2d 887, 893, 22 Fed. R. Serv. 2d 779 (2d Cir. 1976). Similarly, the New York Supreme Court has held a statement of facts in an NPA with the Manhattan District Attorney's Office inadmissible in subsequent civil litigation when the agreement expressly provided that the defendant neither admitted nor denied criminal and civil liability, permitted the defendant to make public statements "contradicting, excusing or justifying" the statement of facts "in connection with testimony or argument in any [related] civil litigation or proceeding," and had been entered into as a "settlement of impending criminal charges," making it an inadmissible settlement agreement under New York evidence law. See Borst v. Lower Manhattan Development Corp., 2011 NY Slip Op 32372(U), at *3 (N.Y. Sup. Ct. 2011), aff'd, 957 N.Y.S.2d 859 (1st Dep't 2013).

[Section 6:22]

[1]Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.1500, Plea Agreements with Corporations (2018).

[2]See Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.1100, Collateral Consequences (2018) (noting that one of the negative consequences of a guilty plea is that "[o]btaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct").

consequences. According to news reports, in those instances in which it has insisted on a guilty plea, DOJ has worked to understand and address some of the potential collateral consequences itself, including by consulting with key regulators for the entities that are the subjects of the investigations and structuring settlements to avoid a "corporate death penalty."[3]

When the defendant is a corporation, a duly-authorized representative of the company, typically the corporation's internal counsel or another authorized corporate officer, will appear in court with counsel and admit the wrongdoing on behalf of the company. The proceeding is similar to any other plea proceeding under Rule 11 of the Federal Rules of Criminal Procedure—a district court judge will advise the representative of the company of the rights the company is waiving and the penalties it faces, and will ask for an on-the-record statement of the conduct that broke the law. Needless to say, the statement of corporate wrongdoing, and the corporate representative, should be well-prepared in advance of the proceeding to ensure that the court appearance proceeds as planned.

§ 6:23 Monetary assessments

As part of any of the resolutions described above, there is typically a specified monetary sanction, such as a financial penalty and/or restitution to identifiable victims. The monetary component may also include the resolution of parallel regulatory (or other) proceedings, the forfeiture of certain funds, and/or the allocation of certain funds for specified remedial use. (There are, of course, other financial consequences to a resolution, including the costs of implementing and complying with nonpecuniary aspects of the resolution.)[1] The government will likely seek a principled basis for the calculation of any monetary component of the resolution—that is, a way of justifying, both internally within DOJ and externally to the court and the public, how the monetary component was calculated.

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[3]See, e.g., Peter J. Henning, Seeking Guilty Pleas from Corporations While Limiting the Fallout, N.Y. Times: DealBook (May 5, 2014), http://dealbook.nytimes.com/2014/05/05/seeking-guilty-pleas-from-corporations-while-limiting-the-fallout/?_php=true&_type=blogs&_r=0.

[Section 6:23]

[1]DOJ prohibits payment of settlement funds to third parties not directly impacted by the criminal conduct as part of any settlement or resolution. See Press Release, U.S. Dep't of Justice, Attorney General Jeff Sessions Ends Third Party Settlement Practice (June 7, 2017), https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-ends-third-party-settlement-practice ("[W]e are . . . ensuring that settlement funds are only used to compensate victims, redress harm, and punish and deter unlawful conduct."); Justice Manual, Organization and Functions, 1-17.000, Settlement Payments to Third Parties (2018).

In any given case, monetary aspects, like restitution to identifiable victims, may have an identifiable framework and may be readily quantifiable. In other cases, identifying a framework and/or quantifying a monetary aspect of the resolution may itself be the subject of negotiations. With respect to any fine, both parties will look to Chapter Eight of the U.S. Sentencing Guidelines, entitled "Sentencing of Organizations."[2] That Chapter provides a detailed methodology for the calculation of fines. These Guidelines are only advisory in court proceedings,[3] but they provide a reference point for negotiations regarding the amount of any penalty. Certain general principles, namely, the seriousness of the conduct and the culpability of the entity, underpin the calculation of a fine under the Guidelines, much as those same principles are the basis for the calculation of a sentence of imprisonment for individuals. A key component of the analysis is the financial loss caused by the criminal conduct, or, if greater, the financial benefit to a company as a result of the crime.[4] The Guidelines also describe six aggravating and mitigating factors relevant to the amount of the fine: (1) the organization's "involvement in or tolerance of criminal activity," (2) the organization's prior history of misconduct, (3) a violation of a court order, (4) obstruction of justice, (5) the presence of an effective compliance and ethics program at the time of the offense, and (6) self-reporting, cooperation, and acceptance of responsibility.[5]

Another consideration relevant to the amount of the fine, especially given the increasingly global nature of investigations, is DOJ's Policy on Coordination of Corporate Resolution Penalties,[6] known colloquially as the anti-"piling on" policy.[7] Pursuant to this policy, where a company that is the subject of parallel

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[2]United States Sentencing Commission, Guidelines Manual ("U.S.S.G."), ch. 8, Sentencing of Organizations (Nov. 2018).

[3]See U.S. v. Booker, 543 U.S. 220, 222, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

[4]U.S.S.G. §§ 2B1.1, 8C2.1.

[5]U.S.S.G. § 8C2.5.

[6]Justice Manual, Organization and Functions, 1-12.000, Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings (2018).

[7]Rod J. Rosenstein, Deputy Attorney Gen., Dep't of Justice, Speech at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes; Deputy Attorney General Rosenstein Announces New Policy to Limit "Piling On" in Enforcement Actions, Cleary Gottlieb (May 10, 2018), https://www.clearygottlieb.com/-/media/files/alert-memos-2018/deputy-attorney-general-rosenstein-announces-new-anti-piling-on-enforcement-policy.pdf.

investigations involving other agencies and/or foreign regulators[8] has already paid or will pay a penalty (or multiple penalties) for the same underlying misconduct, federal prosecutors are encouraged to take those penalties into account when deciding whether to fine the company once more. As then-Deputy Attorney General Rod J. Rosenstein stated when announcing the policy in 2018, the idea is both to encourage intra-agency and cross-border cooperation on investigations, and to address the "risk of repeated punishment that goes beyond what is necessary to rectify the harm and deter future violations," especially for companies in highly regulated industries.[9] In practice, the policy has resulted in DOJ calculating the total criminal penalty against a company under the Guidelines' fine range, and then crediting payments to other agencies or authorities.[10]

§ 6:24 Monitors and/or reporting obligations

As a further part of a resolution, the government may also insist that the company retain an independent monitor to ensure compliance with certain provisions in the resolution. Monitors are typically third parties, unaffiliated with either the corporation or the government, who are tasked with overseeing corporate compliance efforts for a period of time after the agreement resolving the matter is finalized.

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[8]The Supreme Court has recently confirmed that one sovereign may prosecute a defendant under its laws even if another sovereign has already prosecuted the defendant for the same conduct, notwithstanding the Fifth Amendment's Double Jeopardy Clause. See Gamble v. United States, 139 S. Ct. 1960, 204 L. Ed. 2d 322 (2019). Gamble is notable because, in the event DOJ steps back from its anti-"piling on" policy, or decides it will not follow the policy in a particular case, the decision forecloses any argument a company may have that the policy is legally required under the federal Double Jeopardy Clause.

[9]Rod J. Rosenstein, Deputy Attorney Gen., Dep't of Justice, Speech at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes; Deputy Attorney General Rosenstein Announces New Policy to Limit "Piling On" in Enforcement Actions, Cleary Gottlieb (May 10, 2018), https://www.clearygottlieb.com/-/media/files/alert-memos-2018/deputy-attorney-general-rosenstein-announces-new-anti-piling-on-enforcement-policy.pdf.

[10]See, e.g., Deferred Prosecution Agreement, United States v. Société Générale S.A., No. 8-CR-253 (DLI) (E.D.N.Y. June 5, 2018), https://www.justice.gov/opa/press-release/file/1068521/download (agreement between DOJ and Société Générale, wherein DOJ credited Société Générale's payment to the Parquet National Financier in France for 50% of DOJ's total criminal penalty); Non-Prosecution Agreement Between Dep't of Justice & Petróleo Brasileiro S.A. Petrobras (Sept. 26, 2018), https://www.justice.gov/opa/press-release/file/1096706/download (agreement between DOJ and Petrobras, wherein DOJ credited Petrobras' payments to the Ministério Público Federal in Brazil and the SEC for 90% of DOJ's total criminal penalty).

While DOJ has emphasized that its goal in imposing a monitor is never to punish the company, but rather, to prevent future misconduct, the imposition of a monitor can certainly feel like a punishment, as it can impose significant monetary costs on the company and interfere with the day-to-day operations and management of the business. Due to controversy regarding the inclusion of monitors in corporate resolutions and the accompanying costs, DOJ has memorialized certain key principles concerning the imposition, selection, and responsibilities of monitors, which we summarize below.[1]

Imposition of a monitor. When considering the need for a monitor, prosecutors will engage in a cost-benefit analysis, weighing the monetary costs and operational burdens the monitor would impose against the monitor's potential benefits to the company and the public. With respect to the latter, DOJ has delineated specific factors that prosecutors should consider, including: (1) the type of misconduct (i.e., whether the misconduct involved, for example, taking advantage of an inadequate system of internal controls, such as violations of the FCPA's anti-bribery and accounting provisions); (2) the pervasiveness of the misconduct, including whether it involved senior management; (3) whether the misconduct occurred under prior leadership or in a prior compliance environment that no longer exists, given changes in leadership and/or the company's remedial efforts; (4) relatedly, whether the company's remedial improvements to its compliance program and internal controls systems are sufficient to safeguard against the recurrence of similar misconduct, including the extent to which they have been tested to demonstrate their effectiveness; and (5) the company's risk profile, "including the particular region(s) and industry in which the company operates and the nature of the company's clientele."[2] Thus, DOJ may consider the benefits of a monitor to outweigh the burden to the company in situations where, for example, a company operates in a high-risk environment, the misconduct was widespread and involved exploiting systemic deficiencies in the company's internal controls, and the company's compliance program post-misconduct is still not sufficient to prevent and detect similar future

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[Section 6:24]

[1]Morford Memorandum at 3–8; Memorandum from Brian A. Benczkowski, Assistant Attorney Gen., to All Criminal Division Personnel on Selection of Monitors in Criminal Division Matters, at 1–8 (Oct. 11, 2018) (hereinafter Benczkowski Memorandum), https://www.justice.gov/criminal-fraud/file/1100366/download (supplementing Morford Memorandum); New DOJ Guidance on the Imposition and Selection of Corporate Monitors, Cleary Gottlieb (Oct. 16, 2018), https://www.clearygottlieb.com/-/media/files/alert-memos-2018/new-doj-guidance-on-the-imposition-and-selection-of-corporate.pdf.

[2]Benczkowski Memorandum at 2.

violations. On the other hand, the opposite conclusion may be warranted where the company can demonstrate that its compliance program and internal controls are effective at the time of resolution.[3] In the final analysis, the balance often tips in favor of a resolution without a monitor; indeed, DOJ has made clear that "imposing [a] corporate monitor[ ] [is] the exception, not the rule," and, in the past five years, only one in three corporate resolutions have involved a monitor.[4]

Selection of a monitor. Once they decide to impose a monitor, Criminal Division attorneys must follow specific procedures in selecting and appointing one.[5] Companies required to appoint a monitor must submit to DOJ three candidates and identify a first choice.[6] DOJ attorneys then review the applications and provide a formal monitor recommendation memorandum to a Standing Committee on the Selection of Monitors, which is composed of various senior officers from the Criminal Division, including an ethics official.[7] The Committee can either accept the recommen-

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[3]Benczkowski Memorandum at 2. Notably, the Corporate Enforcement Policy provides that the Fraud Section "generally will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program." See Justice Manual, Foreign Corrupt Practices Act of 1977, 9-47.120, FCPA Corporate Enforcement Policy (2018). One notable example in this regard is DOJ's DPA with Telia Company AB, in which the Stockholm-based telecommunications firm and its Uzbek subsidiary agreed to pay a total penalty of nearly one billion dollars to resolve foreign bribery allegations. See Press Release, Dep't of Justice, Office of Pub. Affairs, Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017), https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965. Though Telia nearly tops the list of the all-time most expensive FCPA settlements (it comes in at number two), and the company admitted to making about $331 million in bribes to an Uzbek government official over the course of several years, DOJ did not impose a monitor on the company due to the satisfactory state of the company's compliance program at the time of the resolution. See Richard L. Cassin, With MTS in the New Top Ten, Just One U.S. Company Remains, FCPA Blog (Mar. 11, 2019), https://www.fcpablog.com/blog/2019/3/11/with-mts-in-the-new-top-ten-just-one-us-company-remains.html. The Telia resolution thus illustrates that, even if a company has engaged in severe misconduct, it may nonetheless avoid a monitor through swift and comprehensive remedial measures.

[4]Brian A. Benczkowski, Ass't Attorney Gen., Dept' of Justice, Speech at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance (Oct. 12, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program.

[5]Benczkowski Memorandum at 3–8.

[6]Benczkowski Memorandum at 4.

[7]Benczkowski Memorandum at 7.

dation or reject it.[8] If rejected, DOJ attorneys can recommend a different monitor from the three candidates provided by the company or obtain additional options from the company.[9] Ultimately, all monitor candidates must be approved by the Office of the Deputy Attorney General.[10]

A monitor's responsibilities. Because "[a] monitor's primary responsibility should be to assess and monitor a corporation's compliance with those terms of the agreement that are specifically designed to address and reduce the risk of recurrence of the corporation's misconduct,"[11] the scope of a monitor's jurisdiction is ordinarily to evaluate the design and implementation of compliance measures provided for in the criminal resolution and to recommend improvements.[12] Although there is usually room to negotiate the scope of their powers, monitors are generally granted significant authority to discharge these responsibilities. For example, monitors may be granted broad access to review company documents and to interview employees. Often, it is appropriate for monitors to report to the government about the status of the corporation's compliance, and they are required to report any new misconduct in which the corporation has engaged.[13] Monitors may also be directed to recommend "any changes [within the company] that are necessary to foster the corporation's compliance with the terms of the agreement [with the government]," including changes in corporate control and governance.[14]

Regardless of whether a monitor is required, a negotiated resolution will often impose reporting obligations on the corporation. These obligations may require a company to disclose information upon request from the prosecutor and/or to provide periodic reports regarding the status of compliance with the remedial terms of a resolution.

§ 6:25 Debarment

As mentioned above, one significant penalty that may result from any resolution is debarment. Debarment (i.e., banning a party from transacting with the government) can take various forms depending on the industry. For companies heavily dependent on government contracts or particular kinds of financial

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[8]Benczkowski Memorandum at 7.

[9]Benczkowski Memorandum at 7.

[10]Benczkowski Memorandum at 8.

[11]Morford Memorandum at 5.

[12]Morford Memorandum at 5.

[13]Morford Memorandum at 6.

[14]Morford Memorandum at 6.

transactions, debarment can be a "virtual death sentence."[1] Debarment can either be a collateral consequence of a resolution or an agreed upon provision in a negotiated agreement. Where charges are filed—as in the case of a DPA—the nature of those charges may have a significant impact on debarment decisions, as certain types of offenses require mandatory debarment.[2]

Companies facing debarment often have leverage to avoid that consequence.[3] And because debarment is such a drastic sanction, companies can also avoid it by emphasizing the collateral consequences of a particular charging decision (or provision in an NPA or DPA). Additionally, the same mitigating factors that can lead to a reduction in the fine under the U.S. Sentencing Guidelines—such as the existence of an effective ethics and compliance program and the company's cooperation with the prosecutor's office—can also affect the prosecutor's decision to expose a company to the risk of debarment.[4] Company counsel may also need to negotiate in parallel with a relevant regulatory authority in seeking to avoid debarment or limit its scope.

§ 6:26 Conclusion

Defense counsel can play a crucial role in the resolution of DOJ investigations of corporate conduct. Skilled and informed counsel can have a significant impact on a decision by the prosecutor to proceed with an investigation and ultimately with a criminal charge, the terms of any agreement short of a charge, or a determination to forego action entirely. To be effective in investigating and presenting the facts and law, interacting productively with the prosecutor, and assisting the corporate client in reaching decisions that can broadly affect the life of the corporation, counsel must be intricately familiar not only with the facts and circum-

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[1]Christopher A. Wray & Robert K. Hur, Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice, 43 Am. Crim. L. Rev. 1095, 1097 (2006).

[2]See Dep't of Justice, Response of the United States to Questions Concerning Phase 3, OECD Working Group on Bribery 45 (May 3, 2010), http://www.justice.gov/criminal/fraud/fcpa/docs/response3.pdf (noting that "credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations" is grounds for suspending and/or debarring a government contractor).

[3]See generally Drury D. Stevenson & Nicholas J. Wagoner, FCPA Sanctions: Too Big to Debar?, 80 Fordham L. Rev. 775 (2011); Scott Amey, Federal Contractor Misconduct: Failures of the Suspension and Debarment System, POGO (May 10, 2002), https://www.pogo.org/report/2002/05/federal-contractor-misconduct-failures-of-suspension-and-debarment-system.

[4]Companies with significant business abroad can also face debarment in those countries as well upon conviction of an offense.

stances of the particular case, but also with the principles and practices of the specific DOJ prosecuting office that is investigating the client, the applicable history and precedent in the relevant area of law and prosecution, and the priorities of DOJ. In our experience, when the necessary effort is invested, the result can be of discernible benefit to the client.