
Negotiating Global Settlements: The US Perspective
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24.1 Introduction

Strong incentives exist for corporations – particularly those in highly regulated industries that are vulnerable to potentially debilitating collateral consequences – to avoid litigating a case brought by the government. Among other considerations, protracted and unpredictable litigation can create risks of (1) financial and reputational harm to the company, (2) weakening relationships with regulators, (3) significant legal expense, and (4) severe legal and regulatory consequences associated with an unfavourable litigation outcome. As a result, when threatened with enforcement action, corporations often seek to enter into settlement negotiations with investigating authorities. Nevertheless, a corporation entering into such negotiations must carefully weigh the various attendant burdens and collateral consequences of such agreements.

24.2 Strategic considerations

As a preliminary matter, it is important to consider the impact of all interactions with US authorities on the company's ability to reach a settlement on favourable terms. Even early in an investigation, a corporation can develop a co-operative working relationship with an enforcement agency through prompt and complete disclosure and assistance with requests and inquiries. While co-operation is not the right strategic approach in all cases – companies may choose to take a more adversarial approach, even early in an investigation – establishing a record of proactive and complete co-operation can have a substantial effect on the final terms of any resolution, as US government authorities typically consider the nature and extent of a corporation's co-operation with the investigation in contemplating whether to settle a matter and on what terms. Indeed, both the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC, or the Commission) have explicitly included voluntary disclosure and co-operation in their enforcement policies. As outlined in the DOJ's Justice Manual, in determining whether and to what extent to award a company co-operation credit, the DOJ considers, among other things, the timeliness of the co-operation, the diligence, thoroughness and speed of the internal investigation, and...
the proactive nature of the co-operation.\textsuperscript{[2]} Similarly, the SEC Enforcement Manual provides that a company's co-operation is evaluated by considering self-policing, self-reporting of misconduct, remediation and co-operation with the investigation.\textsuperscript{[3]} As a result, by conducting an internal investigation and self-reporting potential misconduct to the authorities, a corporation may increase its chances of receiving co-operation credit and, in turn, more favourable settlement terms.\textsuperscript{[4]}

At the close of the government's investigation, when beginning to negotiate the terms of a potential settlement agreement, a corporation must be particularly attuned to both the timing and the breadth of such an agreement. Regarding timing, certain stages of litigation can be particularly costly for a corporation; securing settlements early may be advantageous for a corporation. For example, in some cases – particularly where the key facts are known early and there is public pressure on the government to act quickly – a speedy settlement may be struck before a lengthy and expensive investigation is conducted. Such circumstances are rare, however, and the government will normally be reluctant to reach a settlement before a full investigation has been completed.

Another pivotal point to consider is whether settlement can be achieved before indictment or the filing of a complaint, as such public actions carry the risk of significant legal, financial and reputational consequences. And in fact most negotiated corporate resolutions are reached before charges are filed, as companies are eager to avoid the uncertain public and shareholder reaction to a contested litigation. A recent economic study showed that a company's share price generally decreases more dramatically as a result of the announcement of a government investigation if there is no concurrent resolution.\textsuperscript{[5]} The extent of share price declines can, among other effects, have great significance in follow-on civil litigation.

In terms of the breadth of a potential settlement agreement, a corporation must consider the scope of the conduct being investigated and the scope of the potential release from liability. At the conclusion of the government's investigation, to the extent that it opts to pursue charges related to certain alleged misconduct, it can be advantageous for those charges to be reflected in a single settlement agreement or in distinct agreements announced simultaneously, so as to mitigate the risk of legal, financial and reputational harm associated with multiple days of negative press, carry-over investigations and future litigation. In the event that the government determines not to pursue charges against the company or its employees,\textsuperscript{[6]} it can be advantageous to diplomatically encourage a declination – a formal notice that the government has declined to pursue the case further,\textsuperscript{[7]} to provide the company valuable closure.

Owing to the government's increased focus on the prosecution of individuals, however, it is increasingly unlikely that the government will release from liability company employees who engaged in potential wrongdoing as part of a settlement with a company.\textsuperscript{[8]} The DOJ formalised its increased focus on the prosecution of individuals with the publication of the 'Yates Memorandum'. On 9 September 2015, the DOJ issued this new policy memorandum, signed by then Deputy Attorney General Sally Quillian Yates, regarding individual accountability for corporate wrongdoing.\textsuperscript{[9]} The Yates Memorandum memorialised certain government sentiments demonstrating an inclination toward the prosecution of individuals in corporate fraud cases.\textsuperscript{[10]} The Yates Memorandum outlined that individual accountability is important for several reasons, including (1) deterring future illegal activity, (2) incentivising changes in corporate behaviour, (3) ensuring the proper parties are held accountable for their actions and (4) promoting the public's confidence in the justice system.\textsuperscript{[11]} The Yates Memorandum provided six 'key steps' to strengthen the government's pursuit of individual wrongdoing, including, among others, by specifying
that ‘absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation.’[12] Even after the change in administration in 2017, it appears that the DOJ’s focus on individual accountability will continue.[13]

Similarly, in the securities enforcement context, the SEC recently expressed an increased focus on charging individuals responsible for wrongdoing.[14] In particular, Mary Jo White, the former Chair of the SEC, has highlighted that one new approach to charging individuals is to use Section 20(b) of the Exchange Act[15] to target those who have ‘engaged in unlawful activity but attempted to insulate themselves from liability by avoiding direct communication with the defrauded investors.’[16]

### 24.3 Legal considerations

At times during the investigative process, legal considerations may be in tension with strategic ones – a corporation should be cognisant of the potential for such tensions to navigate toward an agreeable settlement without unnecessarily waiving any valuable rights. In particular, a company may need to weigh the value of additional co-operation credit for disclosing relevant privileged documents to the government against the value of protecting privileged documents from future discovery in follow-on civil litigation.

On the one hand, the government may consider the disclosure of privileged documents in determining the corporation’s level of co-operation. Under current DOJ policy, for example, ‘cooperation credit is not predicated upon the waiver of attorney-client privilege or work-product protection,’ although co-operation – particularly under the Yates Memorandum – still requires the timely disclosure of ‘relevant facts’,[17] which may require the disclosure of some privileged materials, such as memoranda of witness interviews prepared during an internal investigation.[18] On the other hand, disclosure to the government of documents prepared during the course of an investigation may waive any relevant protections during follow-on civil litigation.[19] In such instances, a company may consider entering into a limited waiver agreement with the government as a middle ground, but it must keep in mind that courts may be sceptical of a limited waiver agreement, even when paired with a confidentiality agreement.[20] Recent amendments to the SEC Enforcement Manual indicate that advocacy materials presented to the SEC may be discoverable and admissible in evidence, notwithstanding the protections of Federal Rules of Evidence 408 and 410.[21]

As part of its investigative process, the government may also engage the company in discussions as to whether charges are warranted. Government authorities may convey this information to the company orally, through reverse proffers,[22] or in writing, through a document such as the SEC’s Wells notice.[23] Upon receipt of such information, the company then generally may respond with its arguments as to why the government should not bring an enforcement action. While providing a response is usually advisable and carries the prospect of success, in certain circumstances, a corporation may determine that it is not in the company’s best interest. Among other considerations, a Wells submission is not privileged.
or confidential, and therefore can be used later against the corporation in civil litigation or made publicly available. In the alternative, the corporation may opt to initiate a meeting with the authorities to discuss the proposed charges, to prevent the creation of discoverable material and foster a dialogue between the company and the government.

During settlement negotiations, a corporation must also be careful in sharing drafts of settlement documents because materials shared with the government may become discoverable in civil litigation. Although Federal Rule of Evidence 408 generally protects documents related to settlement negotiations, the documents may nonetheless ultimately be deemed discoverable, or even admissible as evidence.

In the course of a government investigation, statutes of limitation will often come into play. At the outset of an investigation, particularly if the investigation commences toward the end of a particular statutory period, the government may ask the company to sign a tolling agreement, an agreement to waive a right to claim that litigation should be dismissed owing to the expiry of a statute of limitations for a particular period. It may be in the best interest of the company to sign it, as a form of co-operation and to avoid a precipitous filing of charges by the government. If a tolling agreement has not been signed at an earlier stage in the investigation, the government may ask a corporation to sign one during the settlement negotiation process, especially if a potential limitations period is about to close. In this context, tolling agreements serve to relieve the government of the pressure of taking formal action before the relevant limitations period runs, and allow for time for additional sharing of information in the hope of facilitating a settlement agreement.

24.4 Forms of resolution

In past years, most corporate criminal investigations initiated by US prosecutors were resolved by deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). DPAs and NPAs are generally thought of as a middle ground between declining prosecution and obtaining a conviction. Although in recent years there have been some high-profile corporate guilty pleas, there is no indication yet that these guilty pleas will overtake NPAs and DPAs as prosecutors' primary settlement mechanism.

In a deferred prosecution, the government brings criminal charges against the company, which it agrees to dismiss at the end of a specified period if the company complies with the DPA’s terms. Because a DPA is filed with the court, it becomes a public document.

A non-prosecution differs in that no criminal charges are filed against the company. As a result, an NPA need not be made public unless prosecutors seek to publicise the results of the investigation or the company is itself required to disclose the agreement. The DOJ commonly uses both forms of agreement to resolve investigations concerning, among other things, fraud, the Foreign Corrupt Practices Act.
the False Claims Act,[33] the Bank Secrecy Act[34] and antitrust laws. In previous years, DPAs and NPAs were the exclusive domain of the DOJ, but the SEC and state prosecutors have also recently adopted their use, using the agreements to resolve certain securities law violations.[35]

Unlike an NPA, over which the government has full discretion to adopt terms and conditions, a DPA may be subject to some level of judicial review pursuant to the Speedy Trial Act. Because a DPA involves the filing of an information or indictment, the Speedy Trial Act requires trial to start within 70 days.[36] However, the Speedy Trial Act allows this 70-day period to be tolled with the ‘approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.’[37] Although this provision suggests that courts have a role in overseeing DPAs, judges have historically been relatively deferential to the government in approving them.

Two recent decisions from the Courts of Appeals for the DC and Second Circuits confirm that the longstanding practice of limited judicial oversight over consensual enforcement settlements is the favoured approach. In each case, the district court refused to approve a settlement that the court deemed too lenient, and was reversed by the Court of Appeals on the grounds that the trial court’s discretion in such circumstances is quite limited. In April 2016, in United States v. Fokker Services BV,[38] the DC Circuit Court of Appeals issued a writ of mandamus and vacated a decision by District Judge Richard Leon, rejecting as too lenient a proposed DPA between the DOJ and Fokker Services. The Court of Appeals reasoned that ‘the court’s withholding of approval would amount to a substantial and unwarranted intrusion on the Executive Branch’s fundamental prerogatives.’[39] Similarly, in June 2014, the Second Circuit issued a decision in SEC v. Citigroup Global Markets,[40] calling into question the appropriateness of judicial scrutiny of consensual settlements with the SEC. In a decision that reversed a notable opinion written by Judge Jed Rakoff criticising an SEC settlement with Citigroup as insufficient, the Second Circuit made clear that courts must afford the SEC’s policy judgements ‘significant deference’ including whether, when and how to resolve enforcement proceedings. Under Citigroup, a district court’s review of a settlement agreement is narrow and limited.[41] Subsequent cases have added glosses to the Citigroup holding, with some district courts exerting discretion over certain aspects of settlement agreements,[42] including the selection of an independent monitor.[43]

Despite the reversals, the district courts’ criticisms are broadly consistent with those expressed in recent years by a number of federal judges who have hesitated before ultimately approving DPAs and other similar government settlements. In those other instances, the courts’ criticisms commonly have included assertions that those settlements lacked (1) a large enough penalty amount[44] (relatedly, there is concern that companies will begin to view monetary penalties merely as ‘a cost of doing business’[45]), (2) admissions of wrongdoing by the company,[46] (3) charges against the individuals who were responsible for the offence,[47] (4) sufficient factual detail for the judge to evaluate the agreement,[48] (5) sufficient remedial obligations for the company[49] and (6) sufficient reporting to the court about the company’s compliance with the agreement.[50]
In recent years, perhaps as a result of political and public pressure,\(51\) including such public criticism of DPAs from the federal courts, there has been a marked uptick in guilty pleas to resolve criminal actions.\(52\) The major difference between a guilty plea and an NPA or DPA is that a guilty plea results in a conviction, which generally comes with harsher collateral regulatory consequences and more significant reputational harm. Such risks for a corporation are significant, especially in a heavily regulated industry – the ramifications can be wide-ranging and unclear.

Companies under investigation by federal and state regulators whose enforcement mechanisms are administrative or civil may resolve an investigation by voluntarily entering into a consent order where an institution typically consents to the issuance of a cease-and-desist order or the assessment of a civil monetary penalty, or both. A consent order, like a cease-and-desist order or a civil monetary penalty assessment, is a formal enforcement action; it is a public document and, although it may not always be filed, its terms are enforceable in court. Consent orders often vary in the level of detail they provide concerning the wrongdoing, although they are often less detailed than a criminal settlement. A consent cease-and-desist order may oblige the company to undertake remedial measures to correct the misconduct and ensure future compliance. The term of the order is usually indefinite. A consent civil monetary penalty assessment merely obliges the institution to pay a penalty, and the order’s terms are fully satisfied by the payment.

Some regulators have adopted NPAs and DPAs that are similar to their criminal counterparts. For example, the SEC, which is responsible for civil enforcement and administrative actions to enforce the securities laws,\(53\) has begun to use NPAs and DPAs to resolve cases where an entity or person has engaged in misconduct and where the co-operation is extraordinary, but the circumstances call for a measure of accountability.\(54\) Although available as an option, NPAs and DPAs remain relatively uncommon for civil enforcement actions by the SEC.\(55\)

### 24.5 Key settlement terms

Whether negotiating a settlement agreement in the criminal or regulatory context, many common principles come into play. To facilitate a successful negotiation, a company must have a comprehensive understanding of (1) benchmark terms for historical settlements regarding similar misconduct, (2) those terms that are most significant to the company and (3) any distinguishing factors in the matter at issue that encourage terms less severe than the benchmarks.

Nearly all corporate settlements with US authorities include some form of monetary penalty. The form largely depends on the regulator and its practices.\(56\) Typically, monetary penalties in regulatory settlements consist of a civil monetary penalty. Disgorgement of profits or restitution to harmed parties may also be required.\(57\)

The SEC considers two principal factors in determining monetary penalties: the presence or absence of a direct and material benefit to the corporation itself as a result of the violation and the degree to which the penalty will recompense or further harm the injured shareholders.\(58\) The SEC will also consider
factors such as deterring the conduct, the extent of the injury, any complicity on the part of the corporation, the intent of the individuals committing the wrong, the difficulty in detecting that particular type of wrongdoing, any remedial steps taken by the corporation and the extent of its co-operation.\[59\] Generally, the factors that US authorities consider in determining monetary penalties mirror those used to determine whether to bring charges against the corporation in the first place, including the nature of the offence, the company's timely and voluntary disclosure of wrongdoing, and the company's remedial actions.

It is important, however, to keep in mind that, in recent years, settlement values generally have been increasing though there is some indication that this trend may be slowing. In the 2015 fiscal year, the DOJ collected more than US$23 billion in civil and criminal penalties, including US$5 billion in penalties from Bank of America under the Financial Institutions Reform, Recovery and Enforcement Act.\[60\] In the 2016 fiscal year, the DOJ collected more than US$15.3 billion in civil and criminal penalties, including residential mortgage lending-related settlements from Goldman Sachs Group, Morgan Stanley & Company and Wells Fargo Bank, NA, amounting to US$2.96 billion, US$2.6 billion and US$1.2 billion, respectively.\[61\] From 2005 to 2015, the total criminal fines and penalties assessed by the DOJ's Antitrust Division increased an entire order of magnitude, from US$338 million in 2005 to US$3.6 billion in 2015.\[62\] In the 2016 fiscal year, however, the total decreased to US$399 million,\[63\] and in 2017, the total decreased to $67 million.\[64\]

Many of those settlements called for payments by the settling companies to third-party community organisations that were not directly harmed by the alleged fraud. In a policy change announced in June 2017, Attorney General Jeff Sessions issued a memorandum prohibiting DOJ attorneys from making settlements conditional on payments to non-governmental organisations not directly harmed by a company's alleged misconduct.\[65\]

The SEC has also dramatically increased its use of 'aggressive' monetary penalties.\[66\] Whereas a record-setting penalty in 2002 reached a mere US$10 million, the mean payment for certain cases between 2010 and 2013 was over US$50 million.\[67\] Three of the top 10 monetary settlements imposed in public company-related actions were imposed in 2016.\[68\] These include a US$415 million action against Merrill Lynch and a US$267 million action against JP Morgan wealth management subsidiaries. As of October 2016, SEC enforcement settlements related to misconduct leading to or arising from the financial crisis exceeded US$3.76 billion for the 204 entities and individuals charged.\[69\] An important June 2017 decision that may diminish the SEC's leverage in settlement negotiations is Kokesh v. SEC,\[70\] in which the Supreme Court held that a five-year statute of limitations applies to SEC enforcement actions seeking disgorgement.\[71\] The decision also raises the question of whether the Court would, in fact, recognise disgorgement as an available remedy in SEC enforcement proceedings.\[72\] Notably, in 2017, the SEC collected US$1.2 billion in settlements with public companies and subsidiaries, almost all of it within the first half of the year.\[73\]
In addition to monetary penalties, settlement agreements will often include other continuing obligations. In particular, settlement agreements almost always contain language stating that the company will commit to undertake remedial efforts, such as the enhancement of its compliance programmes or an obligation to report potential violations of law in the future. To ensure ongoing compliance and satisfactory remedial efforts, in recent years, government agencies have increasingly required the use of corporate monitors to keep corporations accountable.

One common obligation in corporate settlements is the imposition of a monitor to oversee the company’s compliance with the settlement agreement and report back to the government on the company’s progress. Monitorships, which may last for a number of years, are a financial and functional burden on a company. Monitorships can be draining in terms of the cost of retaining the monitor itself, the costs required to implement recommended reforms, the cost of staffing and maintaining an internal team to work closely with the monitor and the disruption to the company’s business and management. Another important consideration when contemplating a monitorship as a term of settlement is that monitors are generally given broad access to the corporation’s files, outside the protection of an attorney–client relationship. This lack of attorney–client relationship can pose a risk of further legal exposure for the company. Given that a monitor is tasked with reviewing the corporation’s practices, and reporting the findings of the review to relevant authorities, it is possible that the monitor will identify and be obliged to disclose additional violations of law to relevant authorities. In addition, once a monitor’s reports are submitted to the relevant authorities, those reports and any documents contained in them can be subject to Freedom of Information Act (FOIA) requests, which may create additional exposure in follow-on civil litigation.

Given the substantial expense and disruption caused by a monitorship, it is in a corporation’s interest to try and avoid the imposition of a monitor – especially in instances where corporate culpability is relatively low and the company has already undertaken substantial remedial efforts. The most effective means for a company of avoiding the imposition of a monitor continue to be to voluntarily report its misconduct, to co-operate fully with the government’s resulting investigation and to demonstrate to the government that the company has already undertaken a comprehensive remediation plan. Where a monitor is imposed, a corporation can mitigate the disruption by negotiating the monitor’s duration of assignment, scope of responsibility, decision-making capacity and accessibility to corporate files.

A criminal or regulatory settlement can also trigger a number of collateral consequences, which can vary depending on the types of violations the settlement covers and the industry of the affected entity. For example, a guilty plea for a bank could mean the loss of its financial holding company status and federal deposit insurance, the appointment of a receiver or conservator, and, for foreign banks, the potential termination of offices in the United States. A guilty plea for a broker-dealer could mean automatic loss of broker-dealer registration, a bar from acting as a registered investment adviser, and revocation of its status as a well-known seasoned issuer. A guilty plea for a corporation could also result in, among other things, disqualification from membership of certain self-regulatory organisations, a temporary or permanent bar from participation in federal procurement contracts (debarment), or loss of state licences. Compounding these difficulties, many of the collateral consequences that arise upon conviction travel within a corporation’s legal structure, so that even regulated businesses that were not involved in the offence can be subject to licence revocations, loss of securities law safe harbours and other consequences.

Corporations may need to seek waivers or exemptions from multiple regulators, including the SEC, the Commodity Futures Trading Commission, the Federal Reserve, the Department of Labor and the Financial Industry Regulatory Authority, to allow them to continue engaging in the affected business activities, a
process that should be planned well in advance of settlement. Each regulator may have more than one relevant exemption.[74] The company will therefore need to assess the relevant regulations for each authority that oversees the company's activities. The permutations of collateral consequences are many and depend on the form of the settlement (e.g., DPA, NPA, guilty plea, conviction or consent order)[75] or even the nature of the offence.[76] In addition to automatic disqualifications, there is a wide array of discretionary actions available to regulators for which waivers or exemptions could be sought.[77]

The method of receiving a waiver or exemption from these collateral consequences depends on the agency. For the SEC, a corporation requests an exemption from the SEC Staff, which can either make a recommendation to the Commission or act directly on the application with delegated authority from the Commission. The SEC generally grants a waiver under a finding of ‘good cause’. [78] In contrast, the Department of Labor, in granting exemptions for qualified professional asset manager status, engages in a formal rule-making process, including a public notice and comment period.[79] The Federal Reserve, which can take a range of discretionary actions, generally engages in a more informal regulatory-relations dialogue when considering the collateral consequences of a significant settlement.

Timing is critical for the waiver process, because a company will need to ensure that there is no gap in its licences and statuses. Complicating matters, regulators often take different views as to when statutory disqualifications based on convictions or settlements commence. The SEC views ‘conviction’ as entry into a guilty plea, so any relevant SEC waivers need to be lined up before then. In contrast, the Department of Labor says that conviction is at sentencing, which can take place well after the entry of the guilty plea. For this reason, sentencing after the entry of a guilty plea can be delayed for the purpose of obtaining the necessary exemption from the Department of Labor.[80]

In recent years, the granting of waivers in connection with corporate settlements has drawn criticism by some in the government and the media that enforcement agencies have been too lenient in releasing companies from the consequences of their settlements, particularly in the case of companies that have been the subject of multiple enforcement actions.[81] There is every reason to believe that going forward the relevant agencies will require increasingly high showings by companies before agreeing to grant the necessary waivers.

With increasing frequency, as a condition of settlement, government authorities are requiring corporations to make factual or legal admissions, or both. For example, prior to 2013, the SEC had a long-standing policy of settling cases without requiring admissions from defendants.[82] In June 2013, however, following public criticism, including in the wake of Judge Rakoff's denial of approval of the SEC's settlement with Citigroup, the Commission changed its policy 'by requiring admissions of misconduct in certain cases where heightened accountability and acceptance of responsibility by a defendant are appropriate and in the public interest'.[83] The SEC has defined these types of cases as including instances (1) where the violation of the securities laws involved particularly egregious conduct, (2) where large numbers of investors were harmed, (3) where the markets or investors were placed at significant risk, (4) where the conduct obstructs the Commission's investigation, (5) where an admission can send an important message to the markets or (6) where the wrongdoer poses a particular future threat to investors or the markets.[84] Nevertheless, the SEC has also acknowledged that 'for reasons of efficiency
and other benefits, including getting significant relief, eliminating litigation risk, returning money to victims expeditiously and conserving enforcement resources for other matters, ‘most cases will continue to be resolved on a “neither admit not deny” basis.  

Indeed, even under the new policy, admissions still appear to be infrequent.  

In addition to the reputational impact and collateral consequences that such admissions can impose on a corporation, admissions can expose a company to significant liability in follow-on civil litigation. Plaintiffs may be able to rely on factual or legal admissions in settlement agreements to support a complaint, and may attempt to introduce them as evidence later. A corporation will have a strong argument that an administrative consent order does not represent an adjudication and cannot be relied on in a complaint; DPAs and NPAs have been used in follow-on litigation with mixed results.

A corporation entering into a settlement agreement ideally should, to the extent possible, try and neither admit nor deny the charges, in which case the findings of the order are less likely to be able to be used against it. In the event that a corporation is unable to do so, a company should strategically negotiate for narrowly tailored factual statements and flexible language to enable it to defend itself in follow-on civil litigation. In particular, admitting to a generalised violation of law may be less likely to have future adverse consequences than admission of a specific legal violation that shares elements of claims that could be brought in follow-on civil litigation. For example, a corporation could admit to various controls-based violations in a settlement with the SEC rather than admitting to securities fraud. Or, a corporation could admit to a violation that does not contain a scienter element or does not concede that anyone was harmed as a result – necessary elements for many private causes of action.

Furthermore, a corporation should be aware that settlement agreements that dictate that the corporation cannot contradict the findings of facts can restrict the corporation's positions in follow-on civil litigation. Because any statement that could be viewed by the government as contradictory to the facts of the agreement may then be seen as a breach – thereby reviving a prosecutorial or regulatory action – it is important that such agreements, at a minimum, contain exceptions that allow a company to take good-faith positions in follow-on civil litigation.

24.6 Resolving parallel investigations

Most large-scale investigations of corporations involve a number of government agencies from federal and state governments, both prosecutorial and regulatory. The degree of coordination among these agencies varies case by case, and coordinating with multiple agencies can be challenging. However, there can be benefits to coordinated settlements, including closure for the company, enhanced legal certainty and the avoidance of unnecessary duplication, or undue burdens of disclosure. In addition, because the settlement announcements can occur on a single day, a company may be better able to control the release of information concerning the settlements and thereby limit the effect of any harmful disclosures on the market. There is a distinct trend toward more and more multi-agency settlements, as agencies increase collaboration, even across borders. Recently, the DOJ announced a new policy intended to intended to encourage coordination between it and other enforcement agencies and to
discourage the disproportionate enforcement of laws by multiple authorities. Among other things, the new policy sets forth factors that DOJ attorneys may evaluate in determining whether multiple penalties serve the interests of justice in a particular case, including the egregiousness of the wrongdoing and the adequacy and timeliness of a company’s disclosures and co-operation.\footnote{\textsuperscript{97}} It remains to be seen to what degree this policy will result in meaningful changes to the DOJ’s approach to settling investigations involving multiple agencies.

Owing at least in part to the internationalisation of enforcement, the global nature of modern-day securities frauds, increased regulatory activity on the state level and the increased complexity of the markets,\footnote{\textsuperscript{98}} regulatory investigations today tend to involve a variety of authorities.\footnote{\textsuperscript{99}} Thus a corporation must carefully evaluate whether a settlement with certain authorities should be postponed until a global resolution can be reached. Coordinated global settlements often afford the company the opportunity to predict and prevent excessive, cumulative or unnecessary monetary penalties, continuing obligations and collateral consequences.\footnote{\textsuperscript{100}}

\section*{Footnotes}

\footnote{\textsuperscript{1} } Nicolas Bourtin is a partner, and Kate Doniger is an associate at at Sullivan & Cromwell LLP. The authors acknowledge the contributions of former Sullivan & Cromwell associates Stephanie Heglund and Ryan Galisewski to versions of this chapter in previous editions.


\footnote{\textsuperscript{4} } See, e.g., Report of Investigation Pursuant to Section 21(a), Exchange Act Release No. 44,969, 76 SEC Docket 220 (23 October 2001) (declining to take action against the parent company given the company’s response to the apparent misconduct and setting forth criteria the SEC considers in determining whether, and how much, to credit self-reporting).

\footnote{\textsuperscript{5} } See Declaration of Stephen Choi, Ph.D., In re Goldman Sachs Grp., Inc. Sec. Litig., No. 1:10-cv-03461-PAC, 2015 WL 5613150 (S.D.N.Y. 6 April 2015), ECF No. 145 (finding that the average impact of an investigation announcement was -3.8 per cent when there was no concurrent resolution, compared to 0.22 per cent when there was a concurrent resolution). In one particularly striking example, Goldman
Sachs settled a case for US$550 million in 2010 to avoid the difficulty and notoriety of litigation; after news of the settlement hit the market, Goldman’s shares increased 5 per cent, resulting in a market value increase greater than the cost of the settlement. Sewell Chan & Louise Story, Goldman Pays $550 Million to Settle Fraud Case, N.Y. Times (15 July 2010), www.nytimes.com/2010/07/16/business/16goldman.html.

6 The Justice Manual lists ten factors that prosecutors should weigh in determining whether to charge a corporation, including (1) the nature and seriousness of the offence; (2) the pervasiveness of wrongdoing within the corporation; (3) the corporation’s history of similar misconduct; (4) the corporation’s willingness to co-operate in the investigation; (5) the existence and effectiveness of the corporation’s pre-existing compliance programme; (6) the corporation’s timely and voluntary disclosure of wrongdoing; (7) the corporation’s remedial actions; (8) collateral consequences; (9) the adequacy of other remedies; and (10) the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance. Justice Manual § 9-28.300, Principles of Federal Prosecution of Business Organizations, Factors to Be Considered (rev. November 2015). The SEC considers its own factors in determining whether to close an investigation, including (1) the seriousness of the conduct and potential violations; (2) the staff resources available to pursue the investigation; (3) the sufficiency and strength of the evidence; (4) the extent of potential investor harm if an action is not commenced; and (5) the age of the conduct underlying the potential violations. SEC, Office of Chief Counsel, Enforcement Manual § 2.6.1, Policies and Procedures.

7 Precise practices may differ. The policy of the SEC, for example, is to send ‘termination letters’ to ‘notify individuals and entities at the earliest opportunity when the staff has determined not to recommend an enforcement action against them to the Commission.’ SEC, Office of Chief Counsel, Enforcement Manual § 2.6.2, Termination Notices. These SEC termination letters provide somewhat less assurance than a formal declination, because ‘[a]ll that such a communication means is that the staff has completed its investigation and that at that time no enforcement action has been recommended.’ Id.

8 One exception is found in settlements with the DOJ’s Antitrust Division. Historically, antitrust settlements regularly contained non-prosecution provisions that protected a company’s employees from criminal liability related to the antitrust activity at issue. Antitrust settlements may ‘carve out’ certain individuals from this protection based on their level of culpability. See Sally Quillian Yates, Memorandum from the U.S. Dep’t of Justice on Individual Accountability for Corporate Wrongdoing (9 September 2015), https://www.justice.gov/dag/file/769036/download.

9 Id.

10 See, e.g., Marshall Miller, Principal Deputy Assistant Attorney General for the Criminal Division, Remarks at the Global Investigations Review conference (17 September 2014), https://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-miller (explaining that ‘when [corporations] come in to discuss the results of an internal investigation to the Criminal Division . . . expect that a primary focus will be on what evidence you uncovered as to culpable individuals, what steps you took to see if individual culpability crept up the corporate ladder, how tireless your efforts were to find the people responsible’); Sung-Hee Suh, Deputy Assistant Attorney General, Remarks at the PLI’s 14th Annual Institute on Securities Regulation in Europe: Implications for U.S. Law on EU Practice (20 January 2015), https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-sung-hee-suh-speaks-pli-s-14th-annual-institute-securities (explaining that ‘corporations do not act criminally, but for the actions of individuals . . . the Criminal Division intends to prosecute those individuals, whether they are sitting on a sales desk or in a corporate suite’); Leslie Caldwell, Assistant Attorney General for the Criminal Division, Remarks at New York University Law
School’s Program on Corporate Compliance and Enforcement (17 April 2015),
https://www.j ustice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law (explaining that ‘[t]rue cooperation . . . requires identifying the individuals actually responsible for the misconduct – be they executives or others – and the provision of all available facts relating to that misconduct’).


Id.

While Deputy Attorney General Rod Rosenstein has indicated that the Yates Memo, along with other policy memos, is ‘under review’, he has emphasised that any changes to the Yates Memo or other Department policy will ‘reflect our resolve to hold individuals accountable for corporate wrongdoing.’ NYU Program on Corporate Compliance and Enforcement, Deputy Attorney General Rod Rosenstein Keynote Address on Corporate Enforcement Policy (6 October 2017)
https://wp.nyu.edu/compliance_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017/. See also DOJ, Attorney General Jeff Sessions Delivers Remarks at Ethics and Compliance Initiative Annual Conference (Remarks as prepared for delivery) (24 April 2017), https://www.j ustice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual. (‘The Department of Justice will continue to emphasize the importance of holding individuals accountable for corporate misconduct.’)

Joshua Gallu and David Michaels, SEC to Shift Enforcement Focus to Individuals, White Says,
Bloomberg News (26 September 2013), www.bloomberg.com/news/articles/2013-09-26/sec-to-shift-enforcement-focus-to-individuals-white-says-1-; Mary Jo White, SEC Chair, Speech at the New York City Bar Association’s Third Annual White Collar Crime Institute: Three Key Pressure Points in the Current Enforcement Environment (19 May 2014), https://www.sec.gov/news/speech/2014-spch051914mjw.html (noting that ‘[a]n internal, back-of-the[-]envelope, analysis the staff did recently indicates that since the beginning of the 2011 fiscal year, we charged individuals in 83% of our actions . . ., [a]nd we look for ways to innovate in order to further strengthen our ability to charge individuals’).

Section 20(b) of the Securities Act of 1933 allows the Commission to bring enforcement actions against ‘any person’ who does ‘any act or thing which it would be unlawful for such person to do under the provisions of this chapter or any rule or regulation thereunder through or by means of any other person.’ See 15 U.S.C. § 78t(b) (2011).

Id.

Mem. from Mark Filip, Deputy Att’y Gen., U.S. Dept’t of Justice, Principles of Federal Prosecution of Business Organizations (28 August 2008), at pp. 9-11,

Id. at pp. 8-9. This reflects a steady retreat in the DOJ’s position. In 1999, then-Deputy Attorney General Eric Holder noted in a memorandum that the DOJ would consider the waiver of corporate attorney-client and work-product privileges as, although not an ‘absolute requirement’, at least ‘one

After some Congressional interest in corporate attorney-client privilege, the DOJ issued another memorandum in 2006 stating that, although '[w]aiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated,' prosecutors could request carefully limited waivers only in limited circumstances 'when there is a legitimate need for the privileged information to fulfill their law enforcement obligations.' Mem. from Paul J. McNulty, Deputy Att'y Gen., U.S. Dept of Justice, Principles of Federal Prosecution of Business Organizations (12 December 2006), at pp. 8-9, https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.

A court in the Southern District of New York recently held that briefs, written memos, white papers and presentations shown to the CFTC were discoverable in a subsequent civil action. See Alaska Electrical Pension Fund v. Bank of America Corp., 2017 WL 280816, at *2-3 (S.D.N.Y. 20 January 2017). The court's decision, however, noted the lack of confidentiality agreements between the government and the defendants, and the court did not claim to apply a categorical rule about confidentiality agreements and waiver of work-product privilege. See id. at *2. ([T]he Court need not decide categorically whether confidentiality agreements can ever protect work product that is shared voluntarily with a government agency because, at most, they are just one of several factors to be considered, and they are not enough to carry the day here.) (Internal quotation marks and citations omitted.)

Most federal courts of appeal have declined to allow a selective disclosure to regulators during an investigation of documents protected by the attorney-client privilege or work-product doctrine without a resultant waiver of the privilege or protection with respect to third-party civil litigants. See In re Pac. Pictures Corp., 679 F.3d 1121 (9th Cir. 2012), at pp. 1127-28 (U.S. Attorney investigation); In re Qwest Commc'ns Int'l, Inc., 450 F.3d 1179 (10th Cir. 2006) (SEC and DOJ investigations); SEC, Office of Chief Counsel, Enforcement Manual § 4.3.1, Confidentiality Agreements (28 October 2016) ('While obtaining materials that are otherwise potentially subject to privilege or the protections of the attorney work-product doctrine can be of substantial assistance in conducting an investigation, the staff should exercise judgment when deciding whether to enter into a confidentiality agreement with a company under investigation. Considerations include [...] some courts have held that companies that produce otherwise privileged materials to the SEC or the U.S. Department of Justice, even pursuant to a confidentiality agreement, waived privilege in doing so.). But see In re Steinhardt Partners, L.P., 9 F.3d. 230 (2d Cir. 1993), at p. 236 ('[W]e decline to adopt a per se rule that all voluntary disclosures to the government waive work product protection . . . Establishing a rigid rule would fail to anticipate . . . situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials;') see also In re Natural Gas Commodity Litigation, 2005 WL 1457666, at *8 (S.D.N.Y. 21 June 2005) (discussing how an explicit confidentiality agreements combined with a non-waiver agreement went a 'long way' toward establishing non-waiver).

See SEC, Office of Chief Counsel, Enforcement Manual § 3.2.3.2, White Papers and Other Materials (excluding Wells submissions) (28 October 2016).

See Andrew Ceresney, Director, SEC Division of Enforcement, Remarks at University of Texas School of Law's Government Enforcement Institute: The SEC's Cooperation Program: Reflections on Five Years of Experience (13 March 2015), https://www.sec.gov/news/speech/sec-cooperation-program.html. ('One thing we are doing more of is using reverse proffers at key points in our investigations. When appropriate, we will invite counsel in for a meeting in which we share key documents and expected
testimony that will implicate the defendant. This is another practice that is well established among
criminal prosecutors and FBI agents but historically has been used less frequently at the SEC. Sometimes
we might do a reverse proffer at a more advanced stage of an investigation in order to attempt to bring
the investigation swiftly to a close on settlement terms that we deem favourable and appropriate. But we
also might do it much earlier in an investigation, in order to demonstrate to a witness why cooperation is
worthwhile.‘

A Wells notice is a letter that a securities or commodities regulator, such as the SEC, the Commodity
Futures Trading Commission (CFTC), or the Financial Industry Regulatory Authority (FINRA), sends to a
corporation or individual when it intends to bring a civil action against them. See, e.g., Richman v.
investigation with a Wells Notice “whenever the Enforcement Division staff decides, even preliminarily, to
recommend charges”.‘) (Citation omitted.)

See Fed. R. Evid. 408 advisory committee’s note. (‘[S] tatements made during compromise negotiations
of other disputed claims are not admissible in subsequent criminal litigation, when offered to prove
liability for, invalidity of, or amount of those claims.‘)

For example, courts in the Southern District of New York consistently hold that ‘Rule 408 does not
apply to discovery.’ E.g., Small v. Nobel Biocare USA, LLC, 808 F. Supp. 2d 584 (S.D.N.Y. 2011), at p. 586;
Capital, 2000 WL 191698, at *1 (S.D.N.Y. 10 February 2000). Rather, courts apply the discovery standard of
Federal Rule of Civil Procedure 26(b)(1) to determine the discoverability of settlement negotiations. E.g.,
Small, 808 F. Supp. 2d at pp. 586-87; ABF Capital Mgmt., 2000 WL 191698, at *2. Some courts require a
‘particularized showing’ of the need for the discovery. See Bottaro v. Hatton Assocs., 96 F.R.D. 158
(E.D.N.Y. 1982), at p. 160; see also Tribune Co. v. Purcigliotti, 1996 WL 337277, at *2 (S.D.N.Y. 19 June
February 1996) (‘modest presumption against disclosure‘).

(admitting consent decree as evidence ‘not . . . to prove that New GM violated the Safety Act . . . but for
other purposes that are plainly relevant‘).

Unless otherwise provided by statute, an enforcement action by a federal regulator that seeks a civil
fine or penalty is generally subject to the standard five-year limitations period for proceedings. 28 U.S.C. §
2462.

See SEC, Office of Chief Counsel, Enforcement Manual § 3.1.2, Statutes of Limitations and Tolling
Agreements (28 October 2016). (‘If the assigned staff investigating potential violations of the federal
securities laws believes that any of the relevant conduct arguably may be outside the five-year limitations
period before the SEC would be able to file or institute an enforcement action, the staff may ask the
potential defendant or respondent to sign a “tolling agreement.” Such requests are occasionally made in
the course of settlement negotiations to allow time for sharing of information in furtherance of reaching
a settlement‘).

A tolling agreement signed by the corporation will not toll the statute of limitations against individuals.
Rather, to toll the time to bring charges against an individual, the government will have to secure a
separate tolling agreement with that person. See Sally Quillian Yates, Memorandum from the U.S. Dep’t
of Justice on Individual Accountability for Corporate Wrongdoing at p. 6 (9 September 2015) (‘[W] here it is
anticipated that a tolling agreement is . . . unavoidable and necessary, all efforts should be made either to resolve the matter against culpable individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations period by agreement or court order.


30 See Justice Manual § 9-28.1100, Principles of Federal Prosecution of Business Organizations, Collateral Consequences (rev. November 2015) ([W]here the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designated, among other things, to promote compliance with applicable law and prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other.); see also Mary Jo White, SEC Chair, Speech at the New York City Bar Association's Third Annual White Collar Crime Institute: Three Key Pressure Points in the Current Enforcement Environment (19 May 2014), https://www.sec.gov/news/speech/2014-spch051914mjw.html. ([S]ome have questioned whether it is appropriate for prosecutors to consider the consequences – direct and collateral – when they make a decision whether to indict a company. Of course they should; we want their decision to be thoughtful and in the public interest. And the DOJ's Principles of Federal Prosecutions of Business Organizations indeed require them to weigh the collateral consequences of a corporate indictment among a number of other factors.)

31 Although there is no standard form or precedent for these agreements, most prosecutorial settlement agreements include some or all of the following provisions: (1) a statement of facts describing illegal acts and/or an admission of wrongdoing; (2) an agreement that the company, its employees and its agents will not publicly contradict the statement of facts; (3) co-operation with the government for the duration of the agreement, including the provision of documents and efforts to secure employee
testimony; (4) some form of remedial action, including terminating or disciplining culpable employees, implementing revised internal controls and procedures, and/or, in some cases, appointing an independent compliance monitor; (5) fines and penalties; (6) obligations to report future violations of law; and (7) an acknowledgement that the government has the sole discretion to determine whether the agreement has been breached. For both an NPA and a DPA, because the company has generally admitted to the conduct at issue, if a company is indicted upon breach of the agreement, conviction is almost certain.


39 Id. at p. 744.
40 752 F.3d 285 (2d Cir. 2014). The Second Circuit further emphasised this holding in a recent decision, United States v. HSBC Bank, which overturned a district court’s decision to unseal a monitor’s report and found that the district court erred in involving its supervisory authority over the DPA. 863 F.3d 125 (2d Cir. 2017).
41 Id. at p. 294 (quoting eBay, Inc. v. MercExchange, 547 U.S. 388 (2006), at p. 391).
42 See, e.g., U.S. Securities and Exchange Commission v. Aronson, 665 F. App’x 78 (2d Cir. 2016), at p. 80 (holding that the district court did not abuse its discretion in ordering briefing on an issue before a related criminal case was completed, even though the consent decree provided that the parties would propose a briefing schedule after the completion of the criminal case).
43 See U.S. Commodity Futures Trading Commission v. Deutsche Bank AG, 2016 WL 6135664, at *1-3 (S.D.N.Y. 20 October 2016) (holding that it was proper for the court to select an independent monitor, when the parties’ proposed monitors were inadequate).
44 See U.S. v. Saena Tech Corp., 140 F. Supp. 3d 11 (D.D.C. 2015), at p. 31. ('An agreement that contained neither punitive measures (such as fines) nor requirements designed to deter future criminality (such as compliance programs and independent monitors) could not be said to be designed to secure a
defendant's reformation and should be rejected. Even an agreement that contained some of these elements could be ineffective if the obligations were found to be so vague or minimal as to render them a sham.)

45 See, e.g., Brett Wolf, U.S. Warns Banks It May Revoke Some Money-Laundering Settlements, Reuters (15 March 2015), http://www.reuters.com/article/us-banks-moneylaundering-idUSKBN0MC12EZ20150316 (quoting Assistant Attorney General Caldwell as saying 'We don't want DPAs and NPAs to be perceived as a cost of doing business'); Peter J. Henning, Guilty Pleas and Heavy Fines Seem to Be Cost of Business for Wall St., N.Y. Times (20 May 2015), https://www.nytimes.com/2015/05/21/business/dealbook/guilty-pleas-and-heavy-fines-seem-to-be-cost-of-business-for-wall-st.html?_r=0. ('Banks appear willing to plead guilty as long as the collateral costs are not too heavy. Thus, the potency of a criminal conviction as a deterrent seems to have been dissipated, perhaps to the point that it is just another business expense.')


47 See Saena Tech Corp., 140 F. Supp 3d at 35-36 (discussing potential concerns with a DPA that effectively immunised an individual).


49 See Saena Tech Corp., 140 F. Supp 3d at p. 31 (discussing the necessity of sufficient deterrent effects).

50 cf. U.S. v. HSBC Bank USA, N.A., 2013 WL 3306161, at *11 (E.D.N.Y. 1 July 2013) (ordering the parties to file quarterly reports and stating that it will 'notify the parties if, in its view, hearings or other appearances are necessary or appropriate').


53 See SEC, How Investigations Work (rev. 15 July 2013),
https://www.sec.gov/News/Article/Detail/Article/1356125787012; Mary Jo White, SEC Chair, Speech, All-
Encompassing Enforcement: The Robust Use of Civil and Criminal Markets to Police the Markets (31
March 2014),

54 Andrew Ceresney, Director, SEC Division of Enforcement, Remarks at University of Texas School of
Law's Government Enforcement Institute, The SEC's Cooperation Program: Reflections on Five Years of

55 See id. (‘[T]hey have been a relatively limited part of our practice. I think this is appropriate and should
continue to be the case.’); see also SEC, Office of Chief Counsel, Enforcement Manual § 6.2.3, Non-
Prosecution Agreements (28 October 2016). (‘A non-prosecution agreement is a written agreement
... entered in limited and appropriate circumstances.’)

56 See, e.g., Cornerstone Research, SEC Enforcement Activity Against Public Company Defendants: Fiscal
SEC’s monetary fines generally fall into three categories: (1) monetary penalties, (2) disgorgement with
prejudgment interest, and (3) monetary relief for harmed investors. See id.

57 Forfeiture, the seizure of assets that comprised the proceeds of the wrongdoing, or were used to
facilitate it, is rarely used in regulatory actions against business entities even when available, because the
government is generally reluctant to seize property related to an ongoing business. See Justice Manual §
9-111.124 (Business Seizures (‘Due to the complexities of seizing an ongoing business and the potential
for substantial losses from such a seizure, a United States Attorney’s Office must consult with the Asset
Forfeiture and Money Laundering Section prior to initiating a forfeiture action against, or seeking the
seizure of, or moving to restrain an ongoing business.’)). Restitution, the compensation of individuals
harmed by illegal conduct, is also rarely a part of any settlement. In particularly complex cases involving
many different classes of individuals that may have been harmed, calculation of restitution may be
especially difficult, and a corporation may find the government amenable to not seeking restitution in its
settlement, with the understanding that compensation of harmed individuals is more efficiently and
accurately handled through related civil litigation.


59 Id.

60 DOJ, Press Release, Justice Department Collects More than $23 Billion in Civil and Criminal Cases in
Fiscal Year 2015 (3 December 2015), https://www.justice.gov/opa/pr/justice-department-collects-more-23-

61 DOJ, Press Release, Justice Department Collects More than $15.3 Billion in Civil and Criminal Cases in
Fiscal Year 2016 (14 December 2016), https://www.justice.gov/opa/pr/justice-department-collects-more-
153-billion-civil-and-criminal-cases-fiscal-year-2016.

62 DOJ, Criminal Enforcement: Trends Charts Through Fiscal Year 2015 (11 December 2015),


69 SEC, SEC Enforcement Actions: Addressing Misconduct That Led To or Arose From the Financial Crisis, key statistics (22 February 2017), www.sec.gov/spotlight/enf-actions-fc.shtml (summarising all settlements resulting from the financial crisis). Other regulatory agencies have followed suit, with the CFTC enforcing a record US$3.144 billion in civil monetary penalties and US$59 million in restitution and disgorgement in 2015. Between 2010 and 2014, the New York Department of Financial Services (NYDFS) issued monetary penalties totalling near US$6 billion. Completed mainly through consent orders, NYDFS’s most notable settlements include a US$600 million penalty against Deutsche Bank and a US$2.243 billion penalty against BNP Paribas, which eventually pleaded guilty to criminal charges and paid a total of US$8.9 billion to resolve the numerous investigations.

70 137 S. Ct. 1635 (2017).


72 See id. at 1642, n. 3 (‘Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context. The sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462’s limitations period.’). See also Transcript of Oral Argument at 7-9, Kokesh, 137 S. Ct. 1635 (No. 16-529).

The SEC has many, including (1) status as a well-known seasoned issuer (WKSI); (2) status under Section 9(a) of the 1940 Act as an investment adviser, depositor or principal underwriter of registered investment companies; and (3) exemptions from certain capital-raising restrictions, under Regulations A and D. See also generally Richard A. Rosen & David S. Huntington, Waivers from the Automatic Disqualification Provisions of the Federal Securities Laws, 29 Insights: The Corp. & Sec. Law Advisor at p. 2 (August 2015) (cataloguing various SEC waivers).

Naturally, criminal convictions have much more severe consequences than a DPA, NPA or administrative consent order. For instance, Section 9(a) of the Investment Company Act of 1940 automatically bars an entity from acting as investment adviser or providing certain other services to registered investment companies if that entity or an affiliated entity has been convicted within the past ten years of any felony or misdemeanour arising out of the conduct of the business of a bank. 15 U.S.C. § 80a-9(a)(1).

For example, under the Commodities Exchange Act, an entity may be disqualified from registration under the Act if the entity has been found to have committed some kind of fraud by a settlement agreement with any federal or state agency. 7 U.S.C. § 12a(2)-(3); see also No Action and Interpretation, Letter No. 12-70 (CFTC31 December 2012), www.cftc.gov/idc/groups/public/@lrelettergeneral/documents/letter/12-70.pdf. The SEC has a policy of not enforcing the disqualifications under Section 206(4) of the Investment Advisers Act for administrative (but not civil) orders. See No-Action Letter, Dougherty & Co., 2003 WL 22204509 (SEC 3 July 2003).

For example, under Section 15(b)(4) of the Securities Exchange Act, the SEC has the discretion after a conviction to suspend or revoke the registration of a broker-dealer if it finds, after notice and comment, that it is in the public interest. See 15 U.S.C. § 78o(b)(4)(B).

17 C.F.R. § 230.405, Ineligible Issuer § 2 (‘An issuer shall not be an ineligible issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer.’); see also SEC, Div. of Corp. Fin., Revised Statement on Well-Known Seasoned Issuer Waivers (24 April 2014), www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp-031214.htm.

29 C.F.R. pt. 2570, subpt. B.

For example, in the set of plea agreements associated with manipulating foreign exchange benchmark rates, there was a term that the United States would support any motion or request to delay sentencing until the Department of Labor had issued a ruling on the request for exemption. E.g., Barclays Plea Agreement, Case No. 3:15CR00077 (D. Conn. 20 May 2015), at para. 12(e), https://www.justice.gov/file/440481/download; UBS Plea Agreement, Case No. 3:15CR00076 (D. Conn. 20 May 2015), at para. 28, https://www.justice.gov/file/440521/download.


www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541670244 (‘I fear that the Commission’s action to waive our own automatic disqualification provisions arising from RBS’s criminal misconduct may have enshrined a new policy – that some firms are just too big to bar.’).


84 Id.; see also Mary Jo White, SEC Chair, Speech for the Council of Institutional Investors fall conference in Chicago, IL, Deploying the Full Enforcement Arsenal (26 September 2013), https://www.sec.gov/News/Speech/Detail/Speech/1370539841202.

85 Id.

86 As of October 2015, according to one count, the SEC had only required admissions of fact in 18 settlements. See Marc S. Raspanti et al., The SEC’s New Admissions Policy Means Sometimes Having to Say You’re Sorry, The Champion 16 (September/October 2015), at p. 17.

87 The following decisions allowed plaintiffs to rely on admissions made in a prior government settlement agreement: Davis v. Beazer Homes, U.S.A. Inc., 2009 WL 3855935, at *7 (M.D.N.C. 17 November 2009) (finding company’s statement in DPA was a significant factor contributing to the validity of plaintiff’s claim); Somerville v. Stryker Orthopedics, 2009 WL 2901591, at *3 (N.D. Cal. 4 September 2009) (determining defendant’s prior NPA contributed to the sufficiency of plaintiff’s claim).

88 E.g., In re Gen. Motors LLC Ignition Switch Litig., 2015 WL 7769524, at *2 (S.D.N.Y. 30 November 2015) (admitting consent decree as evidence ‘not . . . to prove that New GM violated the Safety Act . . . but for other purposes that are plainly relevant’).

89 For example, the Second Circuit has held that ‘a consent judgment between a federal agency and a private corporation which is not the result of an actual adjudication of any of the issues ... can not be used as evidence in subsequent litigation between that corporation and another party.’ Lipsky v. Commonwealth United Corp., 551 F.2d 887 (2d Cir. 1976), at p. 893; see also Waterford Tp. Police & Fire Ret. Sys. v. Smithtown Bancorp, Inc., 2014 WL 3569338 (E.D.N.Y. 18 July 2014) (striking from complaint references to consent agreements with the Federal Deposit Insurance Corporation (FDIC) and the New York Banking Department); In re Platinum & Palladium Commodities Litig., 828 F. Supp. 2d 588 (S.D.N.Y. 13 September 2011) (striking from complaint references to CFTC’s findings of fact contained in an administrative consent order). But see In re Bear Stearns Mortg. Pass-Through Certificates Litig., 851 F. Supp. 2d 746 (S.D.N.Y. 2012), at p. 768 n.24 (‘[S]ome courts in this district have stretched the holding in Lipsky to mean that any portion of a pleading that relies on unadjudicated allegations in another complaint is immaterial under Rule 12(f). Neither Circuit precedent nor logic supports such an absolute rule.’) (citation omitted); Tobia v. United Grp. of Cos., Inc., 2016 WL 5417824, at *3 (N.D.N.Y. 22 September 2016) (holding that while the SEC complaint and consent order are inadmissible to prove liability under Lipsky, the allegations and findings enumerated in the SEC complaint are not made inadmissible merely by virtue of their inclusion therein).

See, e.g., In re IAP Worldwide Services Inc., NPA, FCPA claims (Dep't Of Justice June 2015), https://www.justice.gov/opa/file/478281/download ('The Company admits, accepts, and acknowledges that it is responsible under United States law for the acts of its officers, directors, employees, and agents as set forth in the Statement of Facts . . . and that the facts described . . . are true and accurate.'); c.f. SEC Release No. 9453, Order Instituting Cease-and-Desist Proceedings, In the Matter of TD Bank, N.A. (23 September 2013), https://www.sec.gov/litigation/admin/2013/33-9453.pdf (clarifying that '[t]he findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding').

See, e.g., In the Matter of Citibank, N.A., CFTC Docket No. 16-16 (25 May 2016), at p. 26, www.cftc.gov/idc/groups/public/@lenforcementactions/documents/legalpleading/en/citibankisdaoorder052516.pdf. ('Respondent agrees that neither it nor any of its successors and assigns, agents, or employees under its authority of control shall take any action or make any public statement denying directly or indirectly, any findings or conclusions in this Order or creating, or tending to create, the impression that this Order is without a factual basis; provided, however, that nothing in this provision shall affect Respondent's (i) testimonial obligations, or (ii) right to take positions in other proceedings to which the Commission is not a party.')

On 12 June 2018, the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, and Federal Deposit Insurance Corporation released a 'Policy Statement on Interagency Notification of Formal Enforcement Actions.' The statement requires the agencies to notify each other of enforcement actions against financial institutions, especially when the action they are pursuing involves the interests of another agency. If two or more of the agencies consider bringing complementary actions, they 'should coordinate the preparation, processing, presentation, potential penalties, service, and follow-up' of the enforcement action. A legislative effort to require eight federal agencies, including the Department of Justice and the Securities and Exchange Commission, to implement policies and procedures to minimise duplication of enforcement actions against financial institutions was approved by the US House of Representatives but was never voted on in the Senate.


of the extraordinary efforts of the SEC, Department of Justice, and law enforcement partners around the
globe to jointly pursue those who break the law to win business,” said Kara N. Brockmeyer, Chief of the
SEC Enforcement Division’s FCPA Unit.)

96 Recent examples of multi-agency settlements include In Re: Volkswagen ‘Clean Diesel’ Marketing,
Sales Practices, and Products Liability Litigation, 3:15-mc-02672-CRB (N.D. Cal. 17 May 2017),
https://www.ftc.gov/system/files/documents/cases/170517_volkswagen_ftc_final_order_.pdf (consent
decree with the DOJ, on behalf of the EPA and stipulated order for permanent injunction and monetary
judgment for the FTC); SEC v. Teva Pharmaceutical Industries, Ltd., 1:16-cv-25298 (S.D. Fla. 22 December
2016), https://www.sec.gov/litigation/litreleases/2016/ir23708.htm (DPA with the DOJ and interest and
disgorgement payments to the SEC in connection with civil and criminal violations of the Foreign Corrupt
Practices Act); SEC Release No. 78989, Order Instituting Administrative and Cease-and-Desist Proceedings
(29 September 2016) (Och-Ziff DPA with the DOJ and interest and disgorgement payments to the SEC to
resolve criminal charges arising out of bribes paid to public officials in the Democratic Republic of Congo
and Libya), https://www.sec.gov/litigation/admin/2016/34-78989.pdf; Commerzbank AG Plea Agreement
(D.C. 12 March 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/12/commerzbank_deferred_prosecution_agreement_1.pdf (DPAs with the
DOJ and DANY and consent orders with OCC and FinCEN); JPMorgan Chase Bank, N.A. Deferred
(DPA with the DOJ) and consent orders with the Federal Reserve, OFAC and NYDFS); SEC Release No. 9453,
Order Instituting Cease-and-Desist Proceedings, In the Matter of TD Bank, N.A. (23 September 2013),
https://www.sec.gov/litigation/admin/2013/33-9453.pdf (consent orders with the OCC and FinCEN and
cease-and-desist order with SEC).

97 DOJ, Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar
Crime Committee (Remarks as prepared for delivery) (9 May 2018),
https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-
new-york-city-bar-white-collar.

98 Mary Jo White, SEC Chair, Speech at the New York Bar Association’s Third Annual White Collar Crime
Institute, Three Key Pressure Points in the Current Enforcement Environment (19 May 2014),

99 Examples of global settlements involving regulators from multiple jurisdictions include Odebrecht S.A.
and Braskem S.A. Plea Agreements, see Dep’t of Justice, Press Release, Odebrecht and Braskem Plead
Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in
agree-pay-least-35-billion-global-penalties-resolve (plea agreements with the DOJ, in which Odebrecht
and Braskem agreed to pay a combined total penalty of at least $3.5 billion to resolve charges with
authorities in the US, Brazil and Switzerland arising out of their schemes to pay hundreds of millions of
dollars in bribes to government officials around the world); SEC v. Embracer S.A., see SEC, Press Release,
Embraer Paying $205 Million to Settle FCPA Charges (24 October 2016),
https://www.sec.gov/news/pressrelease/2016-224.html (DPA with the DOJ, and interest and disgorgement
payments to the SEC and Brazilian authorities to resolve criminal and civil charges arising out of bribery
government officials in the Dominican Republic, Saudi Arabia and Mozambique, and the false
recording payments in India via a sham agency agreement); SEC v. VimpelCom Ltd, see SEC, Press
Release, VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations (18 February 2016),

For example, as part of a global settlement regarding Odebrecht, the DOJ’s plea agreement provided that ‘the United States will credit the amount that Odebrecht pays to Brazil and Switzerland over the full term of their respective agreements.’ Dep’t of Justice, Press Release, Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (21 December 2016), available at https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve. And, as part of a global settlement with Embraer to resolve alleged FCPA violations, the SEC announced that ‘Embraer may receive up to a $20 million credit depending on the amount of disgorgement it will pay to Brazilian authorities in a parallel civil proceeding in Brazil.’ SEC, Press Release, Embraer Paying $205 Million to Settle FCPA Charges (24 October 2016), https://www.sec.gov/news/pressrelease/2016-224.html.