Global Investigations Review

The Practitioner's Guide to Global Investigations

Volume I: Global Investigations in the United Kingdom and the United States

Third Edition

Editors
Judith Seddon, Eleanor Davison, Christopher J Morvillo,
Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

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Publisher's Note

The Practitioner's Guide to Global Investigations is published by Global Investigations Review (www.globalinvestigationsreview.com) – a news and analysis service for lawyers and related professionals who specialise in cross-border white-collar crime.

The Guide was suggested by the editors to fill a gap in the literature – namely, how does one conduct such an investigation, and what should one have in mind at various times?

It is published annually as a single volume and is also available online, as an e-book and in PDF format.

The volumes

This Guide is in two volumes.

Volume I takes the reader through the issues and risks faced at every stage in the life cycle of a serious corporate investigation, from the discovery of a potential problem through its exploration (either by the company itself, a law firm or government officials) all the way to final resolution – be that in a regulatory proceeding, a criminal hearing, civil litigation, an employment tribunal, a trial in the court of public opinion, or, just occasionally, inside the company's own four walls. As such it uses the position in the two most active jurisdictions for investigations of corporate misfeasance – the United States and the United Kingdom – to illustrate the approach and thought processes of those who are at the cutting edge of this work, on the basis that others can learn much from their approach, and there is a read-across to the position elsewhere.

Volume I is then complemented by Volume II's granular look at the detail of various jurisdictions, highlighting, among other things, where they vary from the norm.

Online

The Guide is available to subscribers at www.globalinvestigationsreview.com. Containing the most up-to-date versions of the chapters in Volume I of the Guide, the website also allows visitors to quickly compare answers to questions in Volume II across all the jurisdictions covered.

The publisher would like to thank the editors for their exceptional energy and vision in putting this project together. Together we welcome any comments or suggestions from readers on how to improve it. Please write to us at:
co-publishing@globalinvestigationsreview.com.

Preface

The history of the global investigation

Over the past decade, the number and profile of multi-agency, multi-jurisdictional regulatory and criminal investigations have risen exponentially. Naturally, this global phenomenon exposes corporations and their employees to greater risk of potentially hostile encounters with foreign law enforcement authorities and regulators than ever before. This is partly owing to the continued globalisation of commerce, as well as the increasing enthusiasm of some prosecutors to use expansive theories of corporate criminal liability to extract exorbitant penalties against corporations as a deterrent, and public pressure to hold individuals accountable for the misconduct. The globalisation of corporate law enforcement, of course, has also spawned greater coordination between law enforcement agencies domestically and across borders. As a result, the pace and complexity of cross-border corporate investigations has markedly increased and created an environment in which the potential consequences, both direct and collateral, for individuals and businesses are of unprecedented magnitude.

The Guide

To aid practitioners faced with the myriad and often unexpected challenges of navigating a cross-border investigation, this book brings together for the first time the perspectives of leading experts from across the globe.

The chapters that follow in Volume I of the Guide cover in depth the broad spectrum of the law, practice and procedure applicable to cross-border investigations in both the United Kingdom and United States. Volume I tracks the development of a serious allegation (whether originating from an internal or external source) through its stages of development, considering the key risks and challenges as matters progress; it provides expert insight into the fact-gathering stage, document preservation and collection, witness interviews, and the complexities of cross-border privilege issues; and it discusses strategies to successfully resolve cross-border probes and manage corporate reputation throughout an investigation.

In Volume II, local experts from national jurisdictions respond to a common set of questions designed to identify the local nuances of law and practice that practitioners may encounter in responding to a cross-border investigation.

In the first edition we signalled our intention to update and expand both parts of the book as the law and practice evolved. The Guide continues to expand and extend its reach, in both substantive and jurisdictional terms. For this hardback edition, it has even outgrown its original single-book format; the two original parts of the Guide now have separate covers, although the hard copy of the Guide should still be viewed – and used – as a single reference work. All chapters are, of course, made available online and in other digital formats.

In this third edition, we have revised extant chapters to reflect recent developments. Following the global trend of data privacy law considerations becoming weightier in corporate and government investigations – not least after the EU General Data Protection Regulation became directly applicable in all Member States – we have added a chapter on data protection for Volume I, and we have expanded the scope and number data protection questions in Volume II.

In the United Kingdom, an eagerly awaited Court of Appeal reversal has clarified English law on legal privilege, although it remains out of step with other common law jurisdictions in this regard. In the United States, the Department of Justice modified and permanently adopted its enhanced enforcement FCPA Pilot Program, in the form of the Corporate Enforcement Policy, offering a presumption of significant co-operation credit for companies that self-report, remediate and co-operate. In both the United States and the United Kingdom, the enforcement agencies have experienced significant turnover in senior staff, which will no doubt influence enforcement priorities and activity.

Volume II now covers 21 jurisdictions, including Australia, Canada and Mexico, and we expect subsequent editions to have an even broader jurisdictional scope. As corporate investigations and enforcer co-operation crosses more borders – witness the recent Petrobras, Rolls-Royce and Keppel Offshore international, 'global' settlements – we anticipate Volume II will become an increasingly valuable resource for our readers: the external and in-house legal counsel; compliance officers and accounting practitioners; and prosecutors, regulators and advisers operating in this complex environment.

Finally, *The Practitioner's Guide to Global Investigations* has welcomed Ama A Adams and Tara McGrath to the team of eminent editors who have reviewed the content for this edition.

Acknowledgements

The Editors gratefully acknowledge the insightful contributions of the following lawyers from Clifford Chance: Zoe Osborne and Oliver Pegden in London, Amy Montour and Mary Jane Yoon in New York, and Hena Schommer and Michelle Williams in Washington, DC. The Editors would also especially like to thank Clifford Chance associate Kaitlyn Ferguson in Washington, DC, and Chris Stott, senior attorney at Ropes & Gray in London.

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath
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Introduction

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams and Tara McGrath[1]

As an introduction to Volume I of the Guide, this chapter addresses UK and US law regarding two critical concepts that a corporate facing an investigation in either or both jurisdictions will need to consider at the outset: corporate criminal liability and double jeopardy. This chapter also sets forth in summary the priorities and challenges corporations face at each stage of an investigation – topics that are explored in more detail in the chapters that follow. One topic not explored, but likely to affect chapters in this guide with a European dimension, is the United Kingdom's decision to leave the European Union, scheduled for 29 March 2019. Considerable uncertainty remains surrounding the consequences, legal and otherwise, of that decision, which we hope will have become clearer by the next edition.

Bases of corporate criminal liability 1.1

When corporate misconduct that potentially implicates multiple jurisdictions is uncovered, a critical preliminary question is: what is the test, in each jurisdiction, for corporate criminal liability? Not all countries have corporate criminal liability, but for those jurisdictions that do, it typically rests on the premise that the acts of certain employees can be attributed to the corporation. However, the category of employees that can trigger corporate liability differs between jurisdictions – in some, it is limited to those with management responsibilities, whereas in others the category of employees who can trigger corporate liability is much broader. Generally speaking, the act triggering corporate liability must occur within the

1 Judith Seddon and Ama A Adams are partners at Ropes & Gray International LLP; Christopher J Morvillo and Luke Tolaini are partners, and Tara McGrath is a senior associate, at Clifford Chance; Eleanor Davison is a barrister at Fountain Court Chambers; and Michael Bowes QC is a barrister at Outer Temple Chambers.

scope of the employee's employment activities. The act must also generally be done in the interest of, or for the benefit of, the corporation. The difference between theories of liability across jurisdictions inevitably poses challenges and complicates a company's strategy for dealing with a global investigation, and in some instances can determine the outcome.

1.1.1 Corporate criminal liability in the United Kingdom

In the United Kingdom, there are two main techniques to attribute to a corporate the acts and states of mind of the individuals it employs.

The first is by use of the 'identification principle' whereby, subject to some limited exceptions, a corporate may be held liable for the criminal acts of those who represent its directing mind and will and who control what it does. The relevant test is set out in the leading case of *Tesco Ltd v. Nattrass*:

> *Where a limited company is the employer difficult questions do arise in a wide variety of circumstances in deciding which of its officers or servants is to be identified with the company so that his guilt is the guilt of the company. I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent.*[2]

2 *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153; reaffirmed in *Attorney General's Reference (No. 2 of 1999)* [2000] 2 Cr App R 207 at 217-218 in which Rose LJ stated: '*Tesco v. Nattrass* is still authoritative … and it is impossible to find a company guilty unless its alter ego is identified. None of the authorities since *Tesco v. Nattrass* … supports the demise of the doctrine of identification: all are concerned with statutory construction of different substantive offences and the appropriate rule of attribution was decided having regard to the legislative intent, namely whether Parliament intended companies to be liable. There is a sound reason for a special rule of attribution in relation to statutory offences rather than common law offences, namely there is, subject to a defence of reasonable practicability, an absolute duty imposed by the statutes. The authorities on statutory offences do not bear on the common law principle in relation to manslaughter. Lord Hoffmann's speech in *Meridian* is a re-statement not an abandonment of existing principles … .'; and *Environment Agency v. St Regis Paper Co. Ltd* [2012] 1 Cr App R 177, at paras. 10-12 in which, at para. 12, Moses LJ said: 'It seems to us that as a matter of statutory construction it is impossible to impose criminal liability for a breach of Regulation 32(1)(g) to

It is for the judge to decide, as a matter of law, whether there is evidence on which a jury could be sure that a particular individual was a 'directing mind' within the *Tesco* principles; and, if there is such evidence, the jury must then be sure that the particular individual was in fact a directing mind for the purposes of his or her particular actions. A directing mind is not necessarily limited to board directors; it may also be found in a delegate who has full discretion to act independently of instructions from the directors. In short, under the identification principle, before a corporate can be found guilty of a criminal offence, someone who represents its directing mind and will must also be found guilty. There cannot be an aggregation of acts or omissions to attribute the company with criminal conduct; rather, the criminal act or omission must be performed by a single person who can be identified with the corporate for it to be liable.

The second technique of attributing liability to a corporate under English law is that of vicarious liability. Although, in general, in the United Kingdom a corporate entity may not be convicted for the criminal acts of its inferior employees or agents, there are some exceptions, the most important of which concerns statutory offences that impose an absolute duty on the employer, even where the employer has not authorised or consented to the criminal act.[3]

Most significantly, statutory developments in the United Kingdom, starting with the offence of corporate manslaughter under the Corporate Manslaughter and Homicide Act 2007, but more significantly the introduction of the Bribery Act 2010 and more recently Part 3 of the Criminal Finances Act 2017 (which came into force on 30 September 2017), represent a policy shift by introducing the strict liability offences of failure to prevent by an 'associated person' committed on behalf of the corporate, unless the corporate can demonstrate that it had adequate (or reasonable) procedures in place to prevent such an offence occurring. These statutes have broad jurisdictional reach. Under the Bribery Act for example, a corporate, falling within the definition of a commercial organisation under the Bribery Act, could be guilty even where no conduct occurred in, and where the associated person has no connection with, the United Kingdom.

The policy of the legislation to improve corporate governance is clear: Ministry of Justice guidance for the Bribery Act refers to the need for a corporate to create

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the company in circumstances other than those where an intention to make a false entry can be attributed by operation of the rule in *Tesco Supermarkets*. There is, in our view, no warrant for imposing liability by virtue of the intentions of one who cannot be said to be the directing mind and will of St. Regis Paper Company.' The identification principle was reaffirmed by the Court of Appeal in *R v. A Ltd, X, Y* [2016] EWCA Crim 1469. Most recently the SFO was unsuccessful in having charges against Barclays Bank PLC reinstated through a voluntary bill of indictment, after all charges against the bank were dismissed in the Crown Court. The reasoning behind Lord Justice Davis's decision cannot be reported until the conclusion of the trial of the individuals, including Barclays' former chief executive officer, https://www.sfo.gov.uk/2018/10/26/barclays-plc-and-barclays-bank-plc/.

3 These statutory offences are referred by Rose LJ in *Attorney General's Reference (No. 2 of 1999)* [2000] 2 Cr App R 207 at 217-218, at footnote 2.

an 'anti-bribery culture'.[4] Similarly, a corporate is guilty of the offence of corporate manslaughter under the Corporate Manslaughter and Homicide Act 2007 if the way in which its activities are managed or organised causes a person's death where a duty of care was owed. Guidance issued for the corporate offences of failure to prevent the criminal facilitation of tax evasion, which closely mirrors the Bribery Act guidance, also refers to the culture of the organisation. For example, top level commitment should foster 'a culture within the relevant body in which activity intended to facilitate tax evasion is never acceptable'.[5] Each piece of legislation and accompanying guidance invites consideration of the corporate's culture – its attitudes, policies, systems and practices. The test for liability is closer to the test in the regulatory context where liability is based on broad principles and considers governance, and systems and controls. In respect of the new tax offences, the UK government has stated that it expects 'rapid implementation' with companies expected to have a clear time frame and implementation plan in place by the time the offences came into force.

It may be that this model of corporate criminal liability expands, in due course, to all economic crimes; on 13 January 2017 the government issued a Call for Evidence (which ran until the end of March 2017) to examine whether the law on corporate criminal liability in the United Kingdom needs reform. The government said that it was seeking to establish whether there is evidence of corporate crime going unpunished because of the current impediments presented by the identification doctrine, as well as evidence on the costs and benefits of further reform, bearing in mind the significant changes made in certain sectors to tackle misconduct. This, it indicated, would inform government decisions over whether to make further reforms.[6] It set out five options for reform: amendment of the identification doctrine; a strict (vicarious) liability doctrine; a strict (direct) liability offence – effectively a widening of the current offence under section 7 of the UK Bribery Act (section 7 offence); incorporation of the failure-to-prevent wording into substantive offences, but with the burden on the prosecution to establish that the corporate had not taken adequate steps to prevent the unlawful conduct; and possible sector-by-sector regulatory reform (in the form of implementation in other sectors of similar arrangements to the new individual accountability regimes introduced for financial services in the United Kingdom). It is yet to be seen what impact political uncertainty in the United Kingdom will have on this thinking. In the deferred prosecution agreement (DPA) context, the current high threshold for establishing corporate criminal liability in the United Kingdom is a problem inherent in the DPA regime: to enter into a DPA, a prosecutor must satisfy the evidential test, which requires either that the evidential stage of the

4 Ministry of Justice Guidance on the Bribery Act 2010, issued pursuant to section 9 of the Bribery Act 2010.

5 Tackling tax evasion: Government guidance for the corporate offence of failure to prevent the criminal facilitation of tax evasion, 1 September 2017, at page 25.

6 Ministry of Justice, Corporate Liability for Economic Crime: Call for Evidence, Consultation Document, at p. 4.

Full Code Test in the Code for Crown Prosecutors is satisfied[7] or, that 'there is at least a reasonable suspicion based upon some admissible evidence that [the corporate] has committed the offence, and there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the Full Code Test'.[8] For that reason many expected DPAs to be used principally for section 7 offences, where the identification principle does not present an obstacle to satisfying the evidential test. The prospect for DPAs to be used for the proposed failure to prevent the facilitation of tax evasion offence is specifically laid out in the government's guidance.[9] Both the first two DPAs in the United Kingdom were for section 7 offences, although XYZ Ltd – anonymised because of ongoing criminal proceedings against individuals – also accepted misconduct in relation to conspiracies to corrupt and to bribe. However, XYZ Ltd was a small company and, as Sir Brian Leveson, President of the Queen's Bench Division, found, 'there is no question but that XYZ spiralled into criminality as a result of the conduct of a small number of senior executives bending to the will of agents'.[10] In other words, the identification principle did not, in that case, present a problem. However, in *Rolls-Royce*, the DPA spanned three decades, and dealt with conduct much of which predated the introduction of the Bribery Act 2010 and which formed the basis of seven counts of conspiracy to corrupt and false accounting. The remaining five counts related to section 7 offences. We can conclude that in that case, despite being considerably larger than XYZ Ltd, the identification principle did not present evidential hurdles in reaching a settlement. At the time of writing, no individual has been charged. The Call for Evidence recognises that 'the effectiveness of the DPA as an alternative disposal is dependent on there being a realistic threat of prosecution', which, they conclude, 'lends weight to the suggestion that the "failure to prevent" model would offer a more realistic threat of successful prosecution than a case built on the application of the identification doctrine.'[11] The failure-to-prevent model as enacted in the Bribery Act and now the Criminal Finances Act is described in the Call for Evidence as having 'some clear advantages'. Apart from being readily applicable to offending by organisations of any size, the government is explicit in the power of the model to effect corporate cultural change by acting as 'an incentive to companies to include the

7 Namely that prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case that does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

8 DPA Code of Practice, at para. 1.2(i)(b) (https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/).

9 Government Guidance, at p. 13. See footnote 5, above.

10 *SFO v. XYZ Ltd* Case No. U20150856, (Preliminary Redacted) Approved Judgment, dated 8 July 2016, at para. 34.

11 Ministry of Justice, Corporate Liability for Economic Crime: Call for Evidence, Consultation Document, at p. 23.

prevention of economic crime as an integral part of corporate governance and, should it afford a more realistic threat of prosecution, it might enhance the effectiveness of DPAs as an alternative to criminal prosecution'.[12]

1.1.2 Corporate criminal liability in the United States

The United States has long recognised principles of corporate liability based on common law and statutory bases.[13] The application of these concepts, however, has evolved over time and was most recently shaped by the global financial crisis of 2007–2008, where the spectre of industry and market collapse loomed large. Today, increasing emphasis on individual liability and corporate culture continues to shape and refine this area of law.

In the United States, the common law of agency plays an important role. Specifically, under principles of *respondeat superior*, a company may be held vicariously liable for the illegal acts of any of its agents (including employees and contract personnel) so long as those actions were within the scope of the agents' duties and were intended, even if only in part, to benefit the corporation.[14] An act is considered 'within the scope of an agent's employment' if the individual commits the act as part of his or her general line of work and with at least the partial intent to benefit the corporation.[15] The corporation need not receive an actual benefit and may be liable for these offences even if it directs its agent not to commit the offence.[16]

Moreover, even where no single employee has the requisite intent or knowledge to satisfy the *scienter* element of a crime, courts have recognised a 'collective knowledge doctrine' – where several employees collectively know enough to satisfy the intent or knowledge requirement, courts can impute this collective intent and knowledge to the corporation.[17] While historically courts have used the doctrine to establish knowledge on the part of a corporation, in recent years the doctrine has also been used to establish a corporation's intent (i.e., to establish whether the corporation acted wilfully).[18] This doctrine is not universally accepted and

12 Ibid. at p. 21.

13 Charles Doyle, Congressional Research Service, Corporate Criminal Liability: An Overview of Federal Law 1 (2013).

14 *Jones v. Federated Fin. Reserve Corp.*, 144 F.3d 961, 965 (6th Cir. 1998). See also *Hamilton v. Carell,* 243 F.3d 992, 1001 (6th Cir. 2001).

15 *United States v. Singh*, 518 F.3d 236, 249 (4th Cir. 2008) (citing *United States v. Automated Med. Labs.*, 770 F. 2d 399, 406–47 (4th Cir. 1985)).

16 *Automated Med. Labs.*, 770 F.2d at 407.

17 *United States v. Sci. Applications Int'l Corp.*, 555 F. Supp. 2d 40, 55–56 (D.C. Cir. 2008). See also *United States v. Bank of New England, N.A.*, 821 F.2d 844, 856 (1st Cir. 1987); *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738–39 (W.D. Va. 1974).

18 See *United States v. Pac. Gas & Elec. Co.*, No 14-CR-00175-TEH, 2015 WL 9460313 (N.D. Cal. 23 December 2015). There, a grand jury charged the Pacific Gas & Electric Company with violating the Pipeline Safety Act after a gas line erupted causing several deaths and injuries. The company moved to dismiss on the basis that the grand jury received incorrect instructions on, *inter alia*, collective intent. In denying the motion to dismiss, the court held that the collective knowledge of the corporation's employees demonstrated that they wilfully disregarded their legal

some courts have limited it to circumstances where the company was flagrantly indifferent to the offences being committed.[19]

Additionally, beyond the common law principle of *respondeat superior*, some legislation imposes criminal liability for companies, including in the fields of environmental and antitrust law.[20] Such statutes have the dual effects of forcing companies to internalise the costs of their wrongdoing and of increasing the deterrent effect of the law or regulation. For example, in a field such as environmental law, where misconduct can have tremendous collateral and long-term consequences, the imposition of liability on the company acts as a strong incentive for corporate monitoring of employees and thorough due diligence and risk assessment.

Although corporate criminal liability has been a feature of US law since the nineteenth century,[21] the criminal prosecution of corporations slowed abruptly and significantly – although temporarily – following the ill-fated prosecution of Arthur Andersen in 2002; the conviction (subsequently overturned by the US Supreme Court) resulted in the firm's collapse and job losses for many thousands of innocent employees.[22] In the aftermath of the *Arthur Andersen* case, prosecutors became far more hesitant to unleash the brute force of criminal charges against companies.[23] Although limited prosecutions continued following *Arthur Andersen*, they were further reduced in number when, in the wake of the financial meltdown of 2007–2008, many feared that prosecuting big banks and large employers might lead to further economic turmoil.[24] This idea, that an entity might be 'too big to fail', is now widely rejected by both prosecutors and the public, and there has

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duty to abide by the safety standards outlined in the Act. Id. at *3. Following a jury conviction on five counts, the company sought to have the case set aside; however, the court held that a reasonable juror could have found wilfulness beyond a reasonable doubt based on the evidence presented. *United States v. Pac. Gas & Elec. Co.*, No. 14-CR-00175-TEH, 2016 WL 6804575, at *3 (N.D. Cal. 17 November 2016). See also *United States v. FedEx Corp.*, 2016 U.S. Dist LEXIS 52438 (N.D. Cal. 18 April 2016) (denying FedEx's motion to dismiss, which was premised on the ground that the jury received incorrect instructions on collective intent and collective knowledge).

19 *T.I.M.E.-D.C., Inc.*, 381 F. Supp. at 740.

20 See, e.g., *United States v. Hopkins*, 53 F.3d 533 (2d Cir. 1995) (imposing a strict liability standard for a violation of the Clean Water Act); *United States v. Weitzenhhoff*, 35 F.3d 1275 (9th Cir. 1993). Contra *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996) (suggesting that there is a mens rea requirement for violations of the Clean Water Act). See also James Swann and Alex Ruoff, Self-Referral Law Seen as Barrier to New Provider Agreements, Bloomberg BNA (5 May 2016), http://www.bna.com/selfreferral-law-seen-n57982070764/ (discussing the physician self-referral law's imposition of strict liability).

21 For a discussion of the history and development of corporate criminal liability in the United States, see Kathleen F. Brickey, Corporate Criminal Accountability: A Brief History and an Observation, 60 Wash. U. L.Q. 393, 404–15 (1982).

22 *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). For a complete history of Arthur Andersen LLP, see Susan E. Squires et al., Inside Arthur Andersen: Shifting Values, Unexpected Consequences (2003).

23 See Gabriel Markoff, Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century, 15 U. Pa. J. Bus. L. 797, 805–07 (2013).

24 See Gretchen Morgenson & Louise Story, Behind the Gentler Approach to Banks by US, *N.Y Times*, 7 July 2011, at A1.

since been a marked uptick in prosecutions. Today, prosecutors are generally less willing to accept the prospect of dire collateral consequences as justification for not pursuing criminal charges against corporations and have required guilty pleas from large corporations, previously considered 'too big to jail'. As corporations survive – and even thrive – in the wake of guilty pleas, the spectre of the *Arthur Andersen* case recedes and the rigour with which prosecutors pursue companies continues to increase.[25]

In recent years, the United States has increasingly placed emphasis on an organisation's compliance culture and internal controls. The result is that self-reporting, full acceptance of responsibility and the disclosure of all relevant facts concerning culpable individuals (regardless of seniority) now form the basis on which the government awards co-operation credit. The Department of Justice's (DOJ) Justice Manual, the Security and Exchange Commission's (SEC) Seaboard factors, US Sentencing Guidelines and the 'Yates Memorandum', each of which is discussed in detail in later chapters, all reflect this pronounced shift in enforcement priorities. As a recent example, in late 2017 the DOJ introduced the Corporate Enforcement Policy, which creates a rebuttable presumption that the DOJ will grant a declination to a company in regard to Foreign Corrupt Practice Act (FCPA) violations where the company satisfies the requirements for voluntary self-disclosure, co-operation and remediation. The DOJ has also announced that it will use the Policy as non-binding guidance in criminal cases outside the FCPA context.

Although the price of attaining corporate co-operation credit is often painfully high, most companies have no choice but to tolerate it; co-operation typically provides the best prospect for a company to prevent a criminal charge, minimise financial penalties and avoid other harsh collateral consequences, such as the imposition of a monitor. Still, co-operation is not for the faint of heart, and any company operating in the United States or subject to US jurisdiction should carefully consider the far-reaching consequences – both good and bad – of setting off down the often treacherous path of co-operation. Once a company voluntarily discloses misconduct to the government, the ability to defend the case and control the process is effectively relinquished, and a company will find it very difficult to withhold sensitive, embarrassing or even harmful information. Given the highly uncertain alternative to co-operation, however, most companies accept and embrace this new reality from the start of an internal investigation and understand that factual findings far more often than not – if they involve potential criminal misconduct – will be presented to law enforcement.[26]

25 See, e.g., Peter J. Henning, Seeking Guilty Pleas From Corporations While Limiting the Fallout, N.Y. Times Dealbook (5 May 2014), https://dealbook.nytimes.com/2014/05/05/seeking-guilty-pleas-from-corporations-while-limiting-the-fallout/; Francine McKenna, Why the Ghost of Arthur Andersen No Longer Haunts Corporate Criminals, MarketWatch (21 May 2015), https://www.marketwatch.com/story/why-the-ghost-of-arthur-andersen-no-longer-haunts-corporate-criminals-2015-05-21.

26 U.S. Dep't of Justice, Justice Manual 9-28.700 (2015).

Double jeopardy 1.2

Another key question in any global investigation – where misconduct crosses borders and where more than one enforcement authority may seek to assert jurisdiction – is the extent to which different authorities can sanction the same or similar conduct. While domestic constitutional provisions on double jeopardy are similar between nation states, no universally accepted international norm exists and the protection afforded by the laws in one country may offer no protection in another. This can present a major difficulty to achieving a satisfactory global settlement for a client.

The doctrine of double jeopardy is that a person should not be tried twice for the same offence.[27] Its underlying objective is to bring finality to criminal proceedings against individuals and companies in specific circumstances. Double jeopardy applies to criminal proceedings, but has been held by the European Court of Human Rights (ECtHR) to encompass an administrative penalty, in circumstances where that penalty was classified as a criminal penalty because of the nature of the charges and the severity of the punishment.[28]

In the United Kingdom, there are two essential conditions for the doctrine to apply. First, the case must be 'finally disposed of' and second, any penalty imposed must actually have been enforced or be in the process of being enforced. The rationale for the doctrine is that it confers protection on the person (individual or corporate) from the risk of repeated prosecution by the State with its greater resources.[29] Reflecting similar concerns, the concept of double jeopardy in the United States is rooted in the Fifth Amendment to the US Constitution, which reads in relevant part: 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb'.[30] These twenty words have generated tens – if not hundreds – of thousands of pages of case law and are worthy of a treatise in themselves. Distilled to its essence, however, double jeopardy in the United States applies to prohibit subsequent prosecution or multiple punishments of an individual or corporation for the same conduct.[31] Nevertheless, the doctrine of double jeopardy is complicated by the question of dual sovereignty, which holds that double jeopardy's bar against successive prosecution for the same conduct does not apply when the prior prosecution was brought by a separate sovereign,

27 The *ne bis in idem* or double jeopardy principle is well established both in EU law and under the European Convention on Human Rights. The phrase is derived from the Roman law maxim *nemo debet bis vexari pro una et eadem causa* (a man shall not be twice vexed or tried for the same cause).

28 *Grande Stevens and Others v. Italy* (4 March 2014) Application Nos. 18640/10, 18647/10, 18668/10 and 18698/10. The judgment is not final.

29 The protection is not absolute. A second trial is permitted in defined circumstances. In the United Kingdom, a prosecutor will seek a retrial if a jury has been unable to reach a verdict in the initial trial. A further trial in murder cases may also be permitted in circumstances where compelling new evidence comes to light.

30 U.S. Const. amend. V.

31 See generally Ernest H. Schopler, Annotation, Supreme Court's Views of Fifth Amendment's Double Jeopardy Clause Pertinent to or Applied in Federal Criminal Cases, 50 L. Ed. 2d 830 (2012).

for example, the US government is not barred from bringing a case where a state or another country has already prosecuted the defendant for the same conduct or *vice versa*.

1.2.1 Double jeopardy in the United Kingdom

In England, the principle of double jeopardy is well established and has its origins in 12th-century common law and ecclesiastical law. The modern principle of double jeopardy in English law was set out by the Divisional Court in *Fofana v. Deputy Prosecutor Thubin Tribunal de Grande Instance de Meaux, France*:

> *The authorities establish two circumstances in English law that offend the principle of double jeopardy:*
> *(1) Following an acquittal or conviction for an offence, which is the same in fact and law* – autrefois acquit *or* convict*; and*
> *(2) following a trial for any offence which was founded on 'the same or substantially the same facts', where the court would normally consider it right to stay the prosecution as an abuse of process and/or unless the prosecution can show 'special circumstances' why another trial should take place.*[32]

The Divisional Court referred expressly to the United Kingdom's adoption of Article 54 of the Schengen Convention and its underlying rationale.[33] This is particularly important, as Article 54 states that a person (or company) whose case has been 'finally disposed of' by one Contracting Party may not be prosecuted by another for the 'same acts', provided that any penalty imposed has been enforced or is in the process of being enforced.[34]

Throughout the judgment, the Court stressed the need to look at the underlying acts behind each charge, rather than the label of the charge itself. In the event, the Court stayed the extradition proceedings on the basis that, although the extradition offence specified in the warrant was not based exactly, or solely, on the same facts as those charged in the UK indictment, there was such significant overlap between them as to require the proceedings to be stayed.[35]

In the case of DePuy International Limited, the Serious Fraud Office (SFO) applied the double jeopardy principle and confirmed that it will likely arise where there is or has been an investigation into the defendant's conduct by another authority overseas and the essence of a criminal offence in England and Wales is the same offence for which the defendant already faces trial, or has been acquitted or convicted. DePuy was a UK subsidiary of Johnson & Johnson, a US company that self-reported to the DOJ and the SEC bribery of foreign officials by DePuy, as well as other offences that did not involve the company, under the FCPA. Johnson

32 [2006] EWHC 744 (Admin), Judgment, at para. 18.

33 Id. at para. 14.

34 In the United Kingdom, the decision to leave the EU adds further uncertainty to the recognition of double jeopardy principle in its application to convictions in other Member States.

35 *Fofana*, Judgment, at para. 29. See footnote 32, above.

& Johnson agreed to a DPA with the DOJ covering the FCPA violations and a civil sanction with the SEC that encompassed criminal and civil fines amounting to US$70 million.

The DOJ informed the SFO of the criminal conduct and the SFO commenced an investigation into DePuy and Mr Dougall, the company's marketing manager. The SFO took the view that the DPA agreed by the parent company with the DOJ had the legal character of a formally concluded prosecution that punished the same conduct that had formed the basis of the SFO investigation. It determined that the rule against double jeopardy prevented any further criminal sanction being applied in the United Kingdom and instead pursued the company using a civil route to obtain the proceeds of crime. The civil sum obtained by the SFO took into account the global settlement in the United States, including the civil fines paid and recovered of £4.8 million.

Whether a DPA under the United Kingdom's regime would qualify for double jeopardy protection remains an open question. Although entry into a DPA does not constitute a criminal conviction, it does become the final disposal of specific intended criminal proceedings on its expiry and is almost certain to include the enforcement of a fine against the corporate subject. Furthermore, prosecution may follow in the event of a breach of the DPA.

Double jeopardy in the United States 1.2.2

As noted above, the Fifth Amendment to the US Constitution contains a double jeopardy clause. Generally speaking, the double jeopardy clause prohibits the US federal government, or any individual state, from twice prosecuting someone for the same conduct if that person has already been acquitted or convicted (or after certain mistrials once a jury has been empanelled and 'jeopardy has attached').[36] It also prohibits courts from imposing multiple punishments for the same conduct, which may be covered in multiple charges in an indictment.[37] The double jeopardy clause of the Fifth Amendment – unlike its privilege against self-incrimination – applies to both individuals and corporations.[38]

The US Supreme Court, however, has recognised a significant exception to the double jeopardy clause, known as the 'dual sovereignty' doctrine. Pursuant to this doctrine, double jeopardy does not prohibit the federal government from prosecuting a person previously convicted or acquitted by a state, or *vice versa*, or one state from prosecuting a person convicted or acquitted by another.[39] In other words, under this doctrine the US federal government can prosecute individuals and entities for the exact same conduct that they have previously been tried for in

36 See U.S. Const. amend. V; *Martinez v. Illinois*, 134 S. Ct. 2070, 2074.

37 See *Breed v. Jones*, 421 U.S. 519, 528 (1975).

38 See *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (applying double jeopardy to corporate defendants without discussing their status as corporations); *United States v. Sec. Nat'l Bank*, 546 F.2d 492, 494 (2d Cir. 1976).

39 *United States v. Lanza*, 260 U.S. 377, 385 (1922).

one of the states, regardless of whether they were convicted or acquitted in that prior case.[40]

To blunt the potentially harsh impact of the dual sovereignty exception, the DOJ has adopted a policy that precludes the initiation of federal prosecution following a prior state (or federal) prosecution based on substantially the same facts. The Dual and Successive Prosecution Policy (the Petite Policy) seeks 'to vindicate substantial federal interests through appropriate federal prosecutions, to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s), to promote efficient utilization of Department resources, and to promote coordination and cooperation between federal and state prosecutors'.[41] To overcome this policy, federal prosecutors must not only comply with the standards applicable for commencing any federal prosecution (i.e., that the defendant's conduct constitutes a federal offence and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact), but they must also obtain the approval of the appropriate Assistant Attorney General and establish that (1) the matter involves a substantial federal interest; and (2) the prior prosecution left that federal interest 'demonstrably unvindicated'. It is the second of these two factors that provides the greatest protection against successive prosecutions, as, under this policy, the DOJ 'will presume that a prior prosecution, regardless of result, has vindicated the relevant federal interest'.[42] While this presumption can, of course, be overcome (and the policy lists the factors relevant to make such an assessment),[43] federal prosecutors traditionally reserve such challenges for those cases where it perceives the preceding result to have been manifestly unjust.

Notably, the Petite Policy does not expressly preclude the DOJ from bringing criminal charges based on the same conduct previously prosecuted by a foreign sovereign. Nevertheless, similar, if not identical, principles are at play whether the prior prosecution was brought by a state or federal government, or a foreign sovereign. Counsel endeavouring to persuade the DOJ to defer to the foreign result certainly should be prepared to demonstrate why a successive prosecution would contravene that policy. The DOJ will, of course, consider if US interests have been sufficiently redressed by the foreign prosecution.[44] And, in the cases of

40 Notably, the Supreme Court very recently declined to extend the dual sovereignty doctrine to successive prosecutions by Puerto Rico and the United States, concluding that the question of separate sovereignty requires an assessment of the source of the power to punish. *Puerto Rico v.* Sanchez Valle, 136 S. Ct. 1863 (2016). There, the Court held that successive prosecutions may be brought only where two prosecuting authorities derive their power to punish from independent sources; if those authorities draw their power from the same ultimate source, successive prosecutions are prohibited.

41 U.S. Dep't of Justice, Justice Manual 9-2.031 (1999).

42 Id.

43 Id.

44 See *Thompson v. United States*, 444 U.S. 248, 248 (1980) (noting that there is an exception to the Petite Policy where US prosecution would serve 'compelling interests of federal law enforcement').

corporate criminal activity, it is likely that the DOJ will seek to extract a penalty based on the harm to its interests.

Still, if a prior prosecution by a foreign sovereign has resulted in adequate penalties proportionate to the conduct, the DOJ may well decline or defer the prosecution or, perhaps, offset any US fines or penalties by the amounts paid abroad, particularly in the corporate context. This is particularly likely in the wake of the DOJ's new policy, announced in May 2018 and since incorporated into the DOJ's Justice Manual, to discourage the 'piling on' of multiple penalties by the DOJ and foreign and domestic agencies when they are investigating the same corporate misconduct.[45] The policy articulates certain factors to be used when determining whether the imposition of multiple penalties would nevertheless serve the interest of justice, and therefore there is no certainty that prior prosecution by a foreign sovereign will result in no or lenient punishment by the United States.

The double jeopardy clause generally does not restrict the ability of the US government to pursue successive criminal and administrative remedies for the same conduct.[46] Indeed, while it is more common for administrative investigations to run in parallel with DOJ investigations, double jeopardy is not offended when a criminal prosecution follows the imposition of an administrative sanction (or *vice versa*). As the Supreme Court held in *Hudson v. United States*, the double jeopardy clause does not apply to non-criminal penalties.[47] Though the Court in *Hudson* recognised that criminal charges following in the wake of stinging administrative penalties could potentially implicate double jeopardy concerns, a defendant mounting such a challenge must establish by the 'clearest proof' that the administrative penalty was so punitive as to render it criminal for double jeopardy purposes – a very high hurdle indeed.[48]

The application of double jeopardy in the EU and under the ECHR 1.2.3

Increased focus on combating overseas corruption following the signing of the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, has resulted in a rise in multiple prosecutions. A person or company engaging in overseas corruption faces the prospect of prosecution in any signatory country where he, she or the company may have sufficient involvement, either by citizenship or place of incorporation, or as a place where relevant acts took place.

The picture is evolving on both the supranational and national levels, and this is discussed below. The double jeopardy principle is set out in Article 54 of the

45 US Dept. of Justice, Justice Manual §1-12.100; Deputy Att'y Gen. Rod Rosenstein, Remarks to the New York City Bar White Collar Crime Institute (9 May 2018), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

46 See *Hudson v. United States*, 522 U.S. 93, 96 (1997).

47 Id. at 99.

48 See id.

1985 Schengen Agreement.[49] On 29 May 2000 the United Kingdom adopted Article 54 of the Schengen Convention and so it presently forms part of the United Kingdom's domestic law.[50] The rationale for the application of the principle across the European Union was made clear in *R v. Gozutok and Brugge*,[51] as permitting finality in criminal proceedings and also engendering mutual trust in national criminal justice systems by requiring that each Member State recognise the criminal laws in force in the others even when the outcome would be different if its own national law had been applied.

The Council Framework Decision 2009 on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (the EU Framework Decision)[52] sets out measures to prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts that might lead to the final disposal of those proceedings in two or more Member States.

The EU Framework Decision is constitutionally binding on the United Kingdom as a Member State and as such must be taken into account by the SFO in its decision whether to open a criminal investigation. The double jeopardy principle is not a bar to a criminal investigation however, and the SFO has very wide discretion in deciding whether to carry out an investigation.[53]

1.2.4 European human rights jurisprudence

1.2.4.1 European Court of Human Rights (ECtHR)

Article 4 of Protocol 7 to the European Convention on Human Rights (ECHR) specifically recognises the double jeopardy principle.[54]

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49 Article 54: 'A person whose trial has been finally disposed of in one contracting party may not be prosecuted in another contracting party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing contracting party.'

50 2000/365/EC: Council Decision of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis.

51 [2003] 2 CMLR 2.

52 2009/948/JHA.

53 Section 1(3) of the Criminal Justice Act 1987; 'The Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud.' See also *R (Corner House) v. Director of the SFO* [2008] EWHC 714 (Admin), at para. 51.

54 'Article 4 – Right not to be tried or punished twice

1 No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2 The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3 No derogation from this Article shall be made under Article 15 of the Convention.'

The importance of the principle was emphasised in the ECtHR's Chamber judgment in the case of *Grande Stevens and Others v. Italy*.[55] Here, the applicants received an administrative penalty from Consob, the Italian Companies and Stock Exchange Commission, in respect of providing false or misleading information concerning financial instruments. The penalty took the form of substantial fines and various banning orders. Subsequently, the applicants were committed for trial before the Turin District Court in respect of criminal allegations of market abuse arising out of the same facts.

The applicants argued before the ECtHR that the subsequent criminal proceedings were in breach of Article 4 as the applicants had already been subject to a penalty that was akin to a criminal penalty, even though it was imposed as an administrative penalty. The court accepted their argument and ruled that the administrative penalty should be considered a criminal penalty for the purposes of the ECHR and that Article 4 prevented the criminal proceedings from taking place on the grounds of double jeopardy.[56]

The Court of Justice of the European Union (CJEU) 1.2.4.2

2018 saw three further cases arising in Italy where the principle of double jeopardy was considered, again in relation to administrative penalties imposed by Consob which were severe enough to be considered criminal in nature. All these cases were referred to the CJEU by Italy's Supreme Court of Cassation for a preliminary ruling considering Article 50 of the Charter of Fundamental Rights of the European Union and Article 4, Protocol 7 ECHR.

In the *Ricucci* matter,[57] the defendant had been fined €10.2 million by Consob, as well as being convicted in criminal proceedings resulting in a sentence of four years' imprisonment for alleged market manipulation. The Rome District Court subsequently pardoned Ricucci in a final judgment.

Ricucci challenged Consob's fine in Rome's Court of Appeal, which reduced it to €5 million in 2009. He then took his appeal to Italy's Supreme Court of Cassation, where he argued that his 2008 criminal conviction and subsequent pardon should negate any Consob proceedings. The Court of Appeal asked the CJEU whether the *ne bis in idem* principle in Article 50 gives individuals a direct right that can be applied to negate dual proceedings. The Court also asked the CJEU whether the *ne bis in idem* principle precludes Italy's law allowing

55 *Grande Stevens and Others v. Italy* (4 March 2014) Application Nos. 18640/10, 18647/10, 18668/10 and 18698/10. The judgment is not final.

56 In March 2015, France's Constitutional Court ruled that Airbus executives could not be prosecuted for insider trading because they had been cleared over similar administrative charges by France's Financial Markets Authority, the AMF. In reaching its decision the Court gave considerable weight to the decision of the ECtHR in the *Grande Stevens* case.

57 Case C-537/16: Judgment of the Court (Grand Chamber) of 20 March 2018 (request for a preliminary ruling from the Corte suprema di cassazione – Italy). See also https://globalinvestigationsreview.com/article/1168169/cjeu-italian-defendants-should-not-face-double-jeopardy.

administrative proceedings to be brought for market manipulation after a defendant has been finally convicted.

The CJEU held that dual proceedings can be pursued if they meet 'an objective of general interest' – in this case, to protect the European Union's financial interests. However, the national legislation must also ensure that proceedings and the severity of penalties are limited to 'what is strictly necessary' where dual proceedings are to be pursued. Italy's market manipulation law did not respect the principle of proportionality, and the CJEU ruled that, if a criminal penalty already punishes misconduct in an 'effective, proportionate and dissuasive manner', administrative proceedings of a criminal nature are gratuitous and so go beyond 'what is strictly necessary'.

In two other cases, *Di Puma* and *Zecca*,[58] appeals were made against Consob fines, with the defendants arguing that they should not face administrative charges for insider trading when a criminal court had found no misconduct. The appeals court asked the CJEU whether, in light of *ne bis in idem*, a court would violate an EU directive that requires Member States to provide 'effective, proportionate and dissuasive penalties' for insider trading if it did not bring administrative sanctions after a criminal court found no wrongdoing.

The CJEU determined in its preliminary ruling that not bringing administrative sanctions after a criminal court has found no misconduct is in accordance with EU law because of the principle of *res judicata*. It ruled that a defendant who is cleared of a criminal charge, should not be the subject of administrative proceedings for the same matter.

The CJEU has considered the application of the double jeopardy principle to the Schengen Agreement in the context of an individual under investigation in Poland and Germany for allegations of extortion.[59] In this case it upheld the German prosecutor's decision that the double jeopardy principle did not apply. The matter had not been finally disposed of as no detailed investigation had taken place.

On 15 November 2016, the CJEU rejected an appeal brought by two applicants who were penalised by the Norwegian Tax Authority for failing to pay tax in 2008 and then convicted of aggravated tax fraud in 2009 by the National Authority for Investigation and Prosecution of Economic Crime. The applicants claimed they were being prosecuted twice for the same misconduct in violation of double jeopardy rules. Rejecting the application, the court held that ECHR double jeopardy rules are not violated where the contracting party could satisfy the court that dual proceedings are sufficiently connected in time and space so as to represent a coherent whole, rather than two sets of proceedings.[60]

58 Joined Cases C-596/16 and C-597/16, *Di Puma and Zecca*.

59 Case C-486/14, *Kossowski*, 29 June 2016.

60 *Case of A and B v. Norway* (Applications nos. 24130/11 and 29758/11) 15 November 2016, lovdata.no/static/EMDN/emd-2011-024130.pdf.

Double jeopardy in France 1.2.5

Recent developments in France continue to warrant a special mention as the issue of double jeopardy and its application has come before the courts on a number of occasions recently. The appellate courts have recently considered the extent to which domestic law will recognise convictions in the United States as a bar to prosecution, as well as the status of US DPAs in domestic proceedings. On 18 June 2015 a criminal court in Paris acquitted four French corporates that were accused of paying bribes in connection with the United Nations' Oil-for-Food Programme on the grounds that they (or their corporate parents) had already signed DPAs with the DOJ. The rationale given was that it was inconsistent with French international obligations to prosecute the companies for a second time on what the Court found to be the same facts. The prosecutor's appeal against the acquittal was successful and in February 2016 a Paris court fined Total SA €750,000 for corrupting foreign officials.

At the time of writing, criminal proceedings in France against Total are being pursued in relation to separate Iranian corruption conduct that allegedly occurred in 2013. In relation to the same matters, Total entered into a US$245.2 million, three-year deferred prosecution agreement with the DOJ and disgorged US$153 million in an SEC cease-and-desist order. The DPA expired in November 2016.[61]

On 26 February 2018, the Court of Cassation in Paris upheld a decision to fine Swiss energy company Vitol €300,000 for making corrupt payments to the Iraq government as part of the United Nations Oil-For-Food programme.[62] The Court rejected Vitol's argument that it was protected from criminal proceedings in France because it had already been punished in the US. The Court found that double jeopardy did not apply because the company had pleaded guilty to a different charge in US proceedings[63] and stated that France must maintain its right to punish companies that break French law. In its ruling, the Court of Cassation considered double jeopardy protections enshrined in both France's Penal Code and the Charter of Fundamental Rights of the European Union. It concluded that both those protections fail to immunise a company from being prosecuted twice if part of the offence occurred within France and if the misconduct is prosecuted

61 The Court of Cassation will hear appeals from another 14 companies accused of wrongdoing as part of the UN Oil for Food scheme, with more double jeopardy arguments likely to feature in 2019. See https://globalinvestigationsreview.com/article/1168159/vitol-decision-shakes-double-jeopardy-defence-in-france.

62 The fine was in addition to a US$17.5 million sanction Vitol received in the United States in 2007 as part of a plea agreement entered to resolve identical allegations.

63 The company pleaded guilty to a single count of grand larceny in the New York State Supreme Court and paid a US$17.5 million fine, US$4.5 million of which was donated to the state of New York. Vitol admitted in the US plea deal that corrupt payments were made through its employees in France. In total, the company said it paid US$13 million to Iraqi officials between 2001 and 2002 hidden in oil contracts awarded to the company as part of the Oil-For-Food programme.

by a country that is not bound by French or EU law, such as the United States.[64] This significantly weakens the double jeopardy defence, in circumstances where some of the misconduct occurred in France.

These cases demonstrate the potential unfairness to a corporate that has effectively admitted the offence in another jurisdiction to obtain a DPA and then finds those admissions being used against it in a jurisdiction that does not recognise the DPA under the double jeopardy doctrine.

1.2.6 Conclusion

At first sight, the doctrine of double jeopardy appears to be a substantial protection against repeated prosecution in respect of the same conduct. However, although the doctrine may in some circumstances protect against a similar prosecution within the state, or member group such as the European Union, it may well fail to protect against a prosecution brought by a separate state. France's decision not to apply the principle in circumstances where part of the offence occurred within its sovereign territory is a significant restriction on its scope.

As many countries do not recognise a foreign conviction for the purposes of double jeopardy, it is not possible to reassure a corporate client that a criminal settlement in one jurisdiction will qualify as a settlement in others as well. Further, entering into a DPA in one jurisdiction may risk damaging the client's interests in another if the DPA is not recognised as a bar to prosecution, but the admissions it made to secure the DPA are admissible against it in other jurisdictions.

The picture is uncertain and many questions remain unanswered. These include:

- Should there be international recognition of criminal convictions for the purposes of double jeopardy, to encourage global settlements?
- Should DPAs be given the status of a criminal conviction for the purposes of double jeopardy?
- Should regulatory sanctions qualify for the purposes of double jeopardy?

Until these issues are resolved, a corporate client will only be able to place very limited reliance on the double jeopardy principle as a bar to further prosecution in respect of the same conduct. At present, the only safe course will be to seek to negotiate a global settlement with all the states most likely to take an interest in the conduct, before admitting guilt in any state. Whether this is practicable will vary from case to case.

In relation to individuals, an issue of note was recently referred to the CJEU stemming from a dispute between Hungary and Croatia in the case of *AY*.[65] The

64 Note that as France is a civil law jurisdiction, lower courts are not strictly bound to follow the Court of Cassation's decision.

65 Judgment in Case C-268/17 *AY (Arrest warrant — witness)*. The Court analysed whether any of the grounds for optional non-execution provided for in Article 4(3) of the framework decision applied in the *AY* case and concluded they did not. Those grounds relate to: (1) the decision of the executing judicial authority not to prosecute for the offence on which the European arrest warrant is based; (2) the fact that, in the executing Member State, the judicial authorities have decided to

Croatian court had sought a preliminary ruling on whether the double jeopardy principle under EU law means Member States may refuse to enforce European arrest warrant (EAW) requests in cases where its investigations treated individuals as witnesses and not suspects. Specifically, Croatia asked whether Hungary could refuse to enforce two EAW requests it issued for an individual, named only as AY to prevent damage to reputation, after AY was treated as a witness rather than a suspect in an investigation conducted by the Hungarian prosecutor's office. In its judgment of July 2018, the CJEU stated that execution of an EAW cannot be refused on the ground that a prosecutor had closed a criminal investigation where during that investigation, the requested person was interviewed as a witness only. The Court stated that the judicial authorities of the Member States must adopt a decision on any EAW communicated to them.

The stages of an investigation 1.3

Issues that at first glance may appear to be isolated or technical can quickly spread across borders and escalate into multifaceted threats to businesses, reputations and careers. Even within jurisdictions, different enforcement authorities operate within their own, often complex, legal and technical frameworks. Any investigation, whether an internal fact-finding inquiry aimed at establishing the size and nature of a problem or one commenced by an enforcement authority, is inevitably a dynamic process. There can be no 'one-size-fits-all' approach and the scope of an investigation can change significantly as it progresses.

Nonetheless, it is possible to identify three broad, and often overlapping, phases to an investigation, namely the commencement, information-gathering and disposal phases. Particular challenges arise, and sometimes recur, at each of these.

Conducting and handling investigations, limiting the damage they cause and bringing them to as swift and efficient a conclusion as possible is an art rather than a science. It requires advisers to anticipate, balance and respond to a wide variety of challenges, and to appreciate the potential ramifications of every interaction with a diverse cast of characters.

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halt proceedings in respect of the offence on which the warrant is based; and (3) the fact that a final judgment has been passed on the requested person in a Member State, in respect of the same acts, which prevents further proceedings. The Court determined the first and third grounds were irrelevant in the case. The Court concluded that an interpretation according to which the execution of a European arrest warrant could be refused where that warrant concerns the same acts as those that have already been the subject of a previous decision, without the identity of the person against whom criminal proceedings are brought being considered relevant, would be manifestly too broad and would entail a risk that the obligation to execute the warrant could be circumvented. As that ground for non-execution constitutes an exception, it must be interpreted strictly and in the light of the need to promote the prevention of crime. The investigation by the Hungarian authorities was conducted, not against AY, but against an unknown person, and the decision that closed that investigation was not taken in respect of AY. The Court concludes from this that the second ground for non-execution does not apply either. See also https://globalinvestigationsreview.com/article/1166589/croatian-case-to-clarify-eaw-double-jeopardy-rules.

1.3.1 Commencement

When deciding whether or how to commence an investigation, or how best to respond to one already commenced by an enforcement authority, it is axiomatic that the very first task to be carried out must be to establish as precisely as possible the size and shape of the problem. Which corporate entities and individuals are regarded as subjects of the investigation? Which offences are they thought to have committed, and which regulatory provisions might they have infringed? Are any other local or foreign agencies investigating (or likely to investigate) this misconduct?

In some cases (typically those involving alleged breaches of regulatory requirements), the answers will be self-evident from notices confirming the commencement of an investigation or the appointment of investigators, and there may be opportunities to seek to establish more detail through scoping discussions. However, in other cases (typically those involving alleged criminal misconduct), the investigators will not necessarily provide details or opportunities for discussions. In some cases, the first indication an individual or entity receives of an investigation by an enforcement authority will be a requirement to attend an interview or provide documents, or, worse still, a knock at the door from investigating officers. In all cases – whether or not enforcement authorities are already aware of alleged misconduct – steps must be taken immediately upon discovery of the alleged misconduct to preserve and to avoid the destruction or deletion (inadvertent or otherwise) of documents that are, or could become, relevant. In large multinational organisations, identifying the custodians of these documents, drafting and disseminating appropriately inclusive document-retention notices, gathering the material and suspending automatic deletion policies is a substantial undertaking in itself.

Where authorities are not already aware of apparent misconduct, considering whether, when and how to disclose matters to them will be an immediate priority. In some cases, specific regulatory obligations will require disclosures. In others, it may be appropriate to voluntarily report matters to maximise the prospects of a consensual resolution on favourable terms. Both types of disclosures require careful handling. Consideration must be given to potential consequences, both for those individuals or corporates already implicated in alleged misconduct, and for those that may become so. Where information is disclosed voluntarily, wider considerations about whether co-operation will be appropriate and would be likely to encourage the relevant enforcement authority to curtail its investigation (and on which terms) should be borne in mind. Identifying the potential risks and benefits will typically involve assessing the enforcement policy and posture of each agency involved (and often of individual investigators) and its ability and propensity to pass information to other investigating or prosecuting authorities (both within and between jurisdictions).

These assessments will inform the answers to a number of practical questions:

- Should an initial notification be made before a full internal investigation has been undertaken?
- What should be disclosed at the end of the internal investigation and to whom?
- Should information be disclosed to the authorities orally rather than in writing?
- Will investigators regard anything less than unfettered access to witnesses' first accounts and other underlying documents as true co-operation enabling them to contemplate a negotiated outcome?
- Is it feasible to maintain claims to legal professional privilege or challenge investigators' actions or demands while still seeking to claim that the subjects of the investigation are co-operating?

Choices made at this stage about how much information and control to relinquish over the investigative process and the robustness of the line to be taken with investigators in relation to issues such as privilege can be crucial in setting the tone for the rest of the investigation, and any proceedings that flow from it.

Since the second edition of this text, the Court of Appeal has allowed ENRC's appeal against the first instance decision, upholding its claim to litigation privilege over the disputed documents, including notes of witness interviews.[66] Under the leadership of the new Director of the SFO, Lisa Osofsky, the SFO decided not to appeal that decision. Given the importance of privilege in the context of global investigations, the decision has been welcomed by lawyers across the globe – the Court of Appeal's judgment aligns the law more closely with the law of privilege in the United States and its clear articulation of the applicability of litigation privilege in the context of a criminal investigation is likely to mean that the SFO will be less aggressive in making assertions that privilege claims by companies over documents created during the course of internal investigations are ill-founded. However, it is unlikely that the SFO will be any less willing to request waivers of privilege, particularly since the Court of Appeal judgment was clear that its decision should not 'impact adversely' on the deferred prosecution regime in the United Kingdom, and emphasising the relevance of waiver to an assessment of a corporate's co-operation in reaching resolutions.[67] Therefore, decisions as to the approach taken by a company to privilege, regardless of whether privilege can properly be asserted or not, will continue to be crucial decisions that set the tone and, possibly, direction of an investigation.

In cases involving allegations made by or against directors or employees, early determinations need to be made as to whether any specific whistleblower

66 *SFO v. ENRC* 2018 EWCA Civ 2006.

67 See *SFO v. ENRC* 2018 EWCA Civ 2006 at paras. 115–117, in particular: 'In any event, to determine whether a DPA is in the interests of justice, and whether the terms of the particular DPA are fair, reasonable and proportionate, the court must examine the company's conduct and the extent to which it cooperated with the SFO. Such an examination will consider whether the company was willing to waive any privilege attaching to documents produced during internal investigations, so that it could share those documents with the SFO . . .'

protection legislation or rules have been engaged and whether action should be taken to suspend or dismiss those individuals.

1.3.2 Information gathering

Once the scope of an investigation has been determined, the process of gathering and analysing relevant information, whether in documentary or electronic form or in the form of witnesses' accounts, commences. Since the advent of the European investigation order (introduced in England and Wales from 31 July 2017), the process of gathering information across borders will be a much simpler and quicker process for enforcement authorities in Europe.[68]

In substantial cross-border investigations, the task of collating relevant material, ascertaining whether it is responsive to requirements to produce documents or provide information (or whether it should otherwise be produced to demonstrate a co-operative stance), and filtering it to remove material exempt from disclosure is time- and resource-intensive. It often requires specialist technical input and expertise. Information should not be treated as a readily portable commodity, and careful consideration should be given to applicable data protection and other confidentiality constraints before information is transferred between jurisdictions or produced to investigating authorities.[69]

Witness interviews during internal investigations raise no fewer questions. When should interviews take place? Who should be present? What material and questions is it appropriate to put to them during such interviews? Should they be represented (and, if so, at whose expense)? Taking a wider view across all jurisdictions in which action could be taken, and from the individual's perspective, is it in the interests of subjects of the investigation to provide information voluntarily, or should they insist on being compelled to do so?

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68 See Criminal Justice (European Investigation Order) Regulations 2017. There are at the time of writing proposals for European production and preservation orders that would, respectively, allow electronic evidence to be requested directly from a service provider in the European Union or oblige a service provider to preserve specific data. In the United Kingdom, the Crime (Overseas Production Orders) Bill is making its way through Parliament, which would, if enacted, allow a UK court, subject to certain requirements, on the application of an appropriate officer (which would include, among others, a police officer, a member of the SFO or a person appointed by the FCA) and provided that an international co-operation agreement were in place, to make an order against a person in that jurisdiction.

69 Recent developments in the United Kingdom and United States are relevant. In the United Kingdom, a decision by the Administrative Court in September 2018 *R (on the Application of KBR Inc) v. The Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin) extended section 2 notices, served in the United Kingdom, extraterritorially to foreign companies in respect of documents held outside the jurisdiction when there is a sufficient connection between the company and the jurisdiction. In the United States, following the successful appeal by Microsoft of orders holding it in contempt for failure to comply with a warrant requiring it to produce the contents of a customer's email account stored on a server outside the United States, Congress enacted on 23 March 2018 the Clarifying Lawful Overseas Use of Data Act (CLOUD Act), providing expressly for extraterritorial application and thereafter the United States obtained a fresh warrant against Microsoft.

Of course, where investigations by the authorities have already begun, investigating authorities will be keen to interview individuals who are suspects. Depending on the nature of the investigation and the allegations against them, it may be open to individuals to remain silent in response to questions (although this course of action may limit their options in any proceedings flowing from the investigation). Conversely, it may serve such individuals' interests to proactively volunteer information to secure more lenient treatment by authorities, or ultimately the courts.

Disposal 1.3.3

As the information gathering progresses, and evidence is assimilated and understood, a decision will need to be reached as to whether this may be resolved through negotiation, or whether the individual or corporate disputes the allegations entirely or is unprepared to reach any resolution or enter into any settlement that requires admissions of misconduct.

Where settlement is an option, from economic, commercial and reputational standpoints, settling with as many investigating authorities as quickly and on the most favourable terms possible is likely to be preferable. Particularly in regulatory enforcement investigations involving corporates, it is often clear from the commencement phase that this will be the most likely outcome, and dialogue throughout the investigation will have to be directed towards this outcome.

It should not be assumed that the process leading to a negotiated disposal is a smooth or simple one. Even in cases involving only one enforcement authority, the legislation and rules governing settlement and the calculation of penalties are complex. Although the discounts available for early settlement are potentially significant, the processes leading to them can involve successive rounds of proposals, counterproposals, representations and negotiations. In criminal investigations, in jurisdictions where it is possible to achieve negotiated outcomes as an alternative to prosecution, although the degree of scrutiny varies depending on which jurisdiction is concerned, such settlements will also be examined by a judge.

Complexity is multiplied where multiple authorities or jurisdictions are involved, or where it is possible that a finding, even if it does not involve any admission of liability, may fuel subsequent litigation from third parties such as erstwhile customers, employees or shareholders.

Although major investigations are unlikely to have progressed to the disposal stage without attracting at least some publicity, it is at this stage that press and political interest will peak. Enforcement authorities usually must make the outcomes of investigations public (and indeed corporate entities themselves may be obliged to do so if their securities are listed).

Other difficult questions arise with negotiated disposals. What will be the size of the fines, if any? For individuals, is there the prospect of imprisonment or other career-threatening penalties? Will it be possible to settle with all interested investigating authorities? For the corporate to bring matters to a close, will it be necessary to assist authorities in their pursuit of individuals? Will the disposal of

the investigations mark the end of the matter, or simply the start of a new phase of litigation or the commencement of a long process of reporting to a monitor and heightened levels of regulatory scrutiny or supervision? What can be said publicly by the subjects of the investigations?

With these themes in mind, we turn now to a detailed consideration of each stage in the chapters that follow.

14

Employee Rights: The US Perspective

Milton L Williams, Avni P Patel and Jacob Gardener[1]

Introduction 14.1

Unless required to by contract or subpoena, employees and former employees may decline to provide information or documents in connection with a corporate investigation. However, many employers will insist on employee co-operation and may impose disciplinary measures – up to and including termination – on those employees who refuse.[2] In the absence of contractual protections, employees may have no legal right to refuse to submit to an interview, even if their answers tend to incriminate them. The recent decision of the United States Court of Appeals for the Second Circuit in *Gilman v. Marsh & McLennan Companies, Inc*[3] is instructive. There, two employees argued that Marsh & McLennan's demand they submit to an interview in an internal investigation constituted state action that infringed their right against self-incrimination. The court rejected this argument, calling it 'the legal equivalent of the "Hail Mary pass" in football.'[4]

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2 See Testimony of Henry W. Asbill, National Association of Criminal Defense Lawyers, to the US Sentencing Commission, at 4 (15 November 2005) ('Increasingly, companies do not hesitate to fire individual employees who refuse to "cooperate".'); Sarah Helene Duggin, Internal Corporate Investigations: Legal Ethics, Professionalism, and the Employee Interview, 2003 Colum. Bus. L. Rev. 859, 907 (2003) ('[I]n most states, [an employee's] refusal to cooperate with an internal investigation "constitutes a breach of the employee's duty of loyalty to the corporation and is good grounds" [for dismissal.]').

3 826 F.3d 69 (2d Cir. 2016).

4 826 F.3d at 76 (internal quotation marks omitted). In exceptional circumstances, where the government exerts overwhelming influence over the internal investigation and the employer's decision-making, the employer's actions may be found to constitute state action. See, e.g., *United States v. Stein*, 541 F.3d 130, 136 (2d Cir. 2008) (holding that 'KPMG's adoption and

Although employees generally cannot refuse to participate in investigations without risking their employment, they do possess various rights implicated by corporate investigations. The sources of those rights include the employer and federal and state law. With respect to the employer, many companies have policies and procedures for internal investigations. For instance, employee handbooks, company by-laws, written guidelines and employment agreements often contain provisions regarding employee data and document collection, workplace searches, communication monitoring, privacy and confidentiality. These documents may also provide guidance on an employee's right to indemnification for legal fees expended during an investigation or related proceedings. In addition, many companies maintain written policies that protect employees from retaliation for participating in an investigation. These documents, and unwritten, established company procedures, should be considered to understand the protection afforded to employees in an investigation.

Federal and state law also govern the rights of employees involved in investigations. These rights, discussed below, can be divided into three general categories: (1) the right to be free from retaliation; (2) the right to representation; and (3) the right to privacy.

14.2 The right to be free from retaliation

Although employees generally have no right to refuse to participate in a corporate investigation, they may be protected from retaliation. A number of federal employment statutes prohibit retaliation against employees who participate in corporate investigations.[5] State and local laws provide similar protection.

Moreover, employees who possess information regarding corporate misconduct have some leverage in that they may become whistleblowers. Whistleblowers are protected from retaliation under federal[6] and state whistleblower laws.

See Chapter 20 on whistleblowers

The Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) provides for both civil and criminal penalties for employers who retaliate against whistleblowers. Section 806 of the law governs civil penalties. It prohibits publicly traded companies from retaliating against employees who assist or provide information to law enforcement, Congress, or 'a person with supervisory authority over the employee' regarding activity the employee reasonably believes is a violation of: (1) federal law regarding mail, wire, securities, or bank fraud; (2) an SEC rule or regulation; or (3) any provision of federal law relating to fraud against shareholders.[7] To bring a

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enforcement of a policy under which it conditioned, capped and ultimately ceased advancing legal fees to defendants followed as a direct consequence of the government's overwhelming influence, and that KPMG's conduct therefore amounted to state action').

5 These statutes include Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act, the Family and Medical Leave Act, the National Labor Relations Act, and the Occupational Safety and Health Act.

6 The Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), the Consumer Financial Protection Act of 2010.

7 See 18 U.S.C. § 1514A(a).

Section 806 claim, an employee must first file a complaint with the Department of Labor within 90 days of the employer's retaliatory action, and must make a *prima facie* showing that the employee's protected conduct was a contributing factor in the action taken against him or her. The Occupational Safety and Health Administration, which has been delegated authority to investigate complaints of retaliation, will notify the employer of the complaint, and will decline to conduct an investigation if the employer demonstrates by clear and convincing evidence that it would have taken the same action in the absence of the employee's whistleblowing conduct.

Section 1107 of Sarbanes-Oxley provides for criminal penalties for retaliation against whistleblowers. Specifically, it criminalises '[w]hoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense.'[8]

Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) provides anti-retaliation protection for whistleblowers who report possible securities law violations to the Securities and Exchange Commission (SEC).[9] Similarly, Section 748 of Dodd-Frank protects whisteblowers who report violations of the Commodity Exchange Act to the Commodities Futures Trading Commission.[10] And Section 1057, which codifies the Consumer Financial Protection Act of 2010, forbids retaliation against employees who blow the whistle on possible violations of that statute.[11]

Despite their similarities, there are important differences between the whistleblower protections contained in Sarbanes-Oxley and Dodd-Frank. Procedurally, in contrast to Sarbanes-Oxley's requirement that complaints be filed with the Department of Labor within 90 days of the retaliatory action, Dodd-Frank permits an employee to bring a private cause of action directly, without having to go through an administrative agency,[12] and allows the employee to do so within six to ten years, depending on the circumstances.[13] In addition, Dodd-Frank provides more attractive financial incentives for whistleblowers. A whistleblowing employee who prevails under Dodd-Frank may receive up to twice the amount of wages lost due to retaliation, as well as attorneys' fees.[14] Dodd-Frank also allows a whistleblower to receive cash awards of between 10 and 30 per cent of what the

8 See 18 U.S.C. § 1513(e).
9 See 15 U.S.C. § 77a.
10 See 7 U.S.C. § 26.
11 See 12 U.S.C. § 5567.
12 See 15 U.S.C. § 78u-6(h)(1)(B)(i).
13 See 15 U.S.C. § 78u-6(h)(1)(B)(iii)(I)-(II).
14 See 15 U.S.C. § 78u-6(h)(1)(C).

SEC recovers based on the whistleblower's report.[15] This bounty programme has paid out more than $266 million to 55 individuals since 2012.[16]

Under Sarbanes-Oxley, by contrast, a whistleblower's recovery is limited to the 'relief necessary to make the employee whole', including reinstatement, back pay, 'special damages' (which includes damages for non-economic harm such as reputational injury, mental anguish and suffering), attorneys' fees and costs.[17]

Critically, however, whereas Sarbanes-Oxley protects employees who report concerns to supervisors at their company, Dodd-Frank does not. Dodd-Frank defines 'whistleblower' to mean a person who provides 'information relating to a violation of the securities laws *to the Commission*.'[18] Despite this narrow definition, in 2011, the SEC promulgated Exchange Act Rule 21F–2,[19] which provided that individuals who reported information to their employer could still avail themselves of Dodd-Frank's whistleblowing protections. Understandably, this caused confusion and, until 2018, there was a split of authority on whether an employee could qualify as a 'whistleblower' under Dodd-Frank if he or she did not provide information to the SEC itself. The Fifth Circuit adopted the literal meaning of the statute and held that employees have to report to the SEC to qualify as whistleblowers.[20] The Second and Ninth Circuits reached the opposite conclusion.[21] The Supreme Court resolved this issue in 2018, agreeing with the Fifth Circuit's literal interpretation.[22] The Court explained that restricting the definition of 'whistleblowers' to those who reported to the SEC was not only required by the plain language of Dodd-Frank, but was also consistent with its purpose. Unlike Sarbanes-Oxley – which reflected Congress's attempt 'to disturb the corporate code of silence that discouraged employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but

15 See 15 U.S.C. §§ 78u-6(b)(1)(A)-(B). Notably, in June 2018, the SEC announced proposed changes to the whistleblower programme. The SEC explained that '[t]he proposed rules would, among other things, provide the Commission with additional tools in making whistleblower awards to ensure that meritorious whistleblowers are appropriately rewarded for their efforts, increase efficiencies in the whistleblower claims review process, and clarify the requirements for anti-retaliation protection under the whistleblower statute.' Press Release, SEC, 'SEC Proposes Whistleblower Rule Amendments' (28 June 2018), https://www.sec.gov/news/press-release/2018-120.

16 See Press Release, SEC, 'SEC Awards Whistleblower More Than $2.1 Million' (12 April 2018), https://www.sec.gov/news/press-release/2018-64.

17 See 18 U.S.C. § 1514A(c).

18 See 15 U.S.C. § 78u–6(a)(6) (emphasis added).

19 17 C.F.R. § 240.21F-2.

20 See *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013).

21 See *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 156 (2d Cir. 2015); *Somers v. Digital Realty Tr. Inc.*, 850 F.3d 1045 (9th Cir.).

22 See *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018).

even internally'[23] – the 'core objective' of Dodd-Frank's whistleblower programme is 'to motivate people who know of securities law violations to *tell the SEC*.'[24]

The right to representation 14.3

Employees have no automatic right to counsel during an internal investigation,[25] unless contractually provided under the terms of their employment.[26] Nonetheless, employees may choose to retain counsel, particularly if they face liability.

Concerns over individual criminal liability have increased since September 2015, when then-Deputy Attorney General Sally Yates issued a memorandum titled 'Individual Accountability for Corporate Wrongdoing.' The 'Yates Memo' stresses the importance of combating corporate misconduct by holding individuals accountable. It lists six steps that should be part of all investigations and prosecutions of corporate misconduct, the first of which is that a corporation's eligibility for co-operation credit depends on it providing the Department of Justice (DOJ) with all relevant facts about the individuals involved in the alleged misconduct. The Yates Memo also states that all investigations must focus on individuals from the inception of the investigation, and that barring extraordinary circumstances, which must be personally approved in writing by specified DOJ personnel, DOJ attorneys will not agree to any settlement or corporate resolution that dismisses charges or provides immunity for individual officers or employees.

See chapter 31 on individual penalties

Interviews without employee's counsel 14.3.1

An employer may seek to conduct an interview of an employee, either with or without company counsel present, before that employee has appointed counsel.[27] Once the employee offers an account of events, it may be difficult to offer a different one later. When counsel for individuals are appointed, they should obtain all information regarding their clients' prior statements about the subject of the investigation, including requesting any relevant memoranda created in prior interviews. Individual counsel should also request all documents, data and other

23 *Somers*, 138 S. Ct. at 778.

24 Id. at 777 (quoting S. Rep. No. 111–176, at 38) (original emphasis, internal quotation marks omitted).

25 The Sixth Amendment right to counsel is triggered by a custodial interrogation by law enforcement authorities. See *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). An internal investigation by a private company does not generally implicate this right.

26 Union employees, however, may insist that a union representative attend any investigatory interview that could lead to the employee's discipline. See *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 256 (1975). The union representative may not interfere with the interview. *New Jersey Bell Tel. Co. & Local 827, Int'l Bhd. of Elec. Workers, Afl-Cio*, 308 NLRB 277, 279-80 (1992). Employers have no obligation to inform employees of their right to union representation or to ask if they would like a union representative present during the interview.

27 If individual counsel is retained, company counsel must be cognisant of Model Rule of Professional Conduct 4.2, which states: 'In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.'

information pertaining to their clients' involvement in the subject of the investigation. Requests for such information may be directed to the client, company counsel, law enforcement and other witnesses (or their counsel). Even if counsel is not allowed to participate in a client's investigatory interview, they should use the acquired information to prepare their clients.[28]

During an interview with no employee counsel, the employee may ask whether he or she should obtain individual counsel. This can place the interviewer in an uncomfortable position. An affirmative answer could have undesirable consequences, including delaying the investigation, chilling the employee's candour, and risking that individual counsel may approach law enforcement before the employer concludes the internal investigation. A negative answer creates complications and potential claims against the employer and investigating counsel if the employee self-incriminates or compromises future legal positions during the interview. Generally, the prudent course is to politely decline to answer the question.

See Chapter 7 on witness interviews in internal investigations and Chapter 16 on representing individuals in interviews

14.3.2 Upjohn warning

Employers often wish to disclose to the government information obtained from employees during investigatory interviews to obtain co-operation credit or general goodwill. However, in the absence of instructions to the contrary, interviewed employees may believe that their company's attorneys represent them, and may attempt to assert attorney–client privilege over their communications with company counsel. To avoid this problem, counsel should provide an *Upjohn* warning at the start of any interview.

An effective *Upjohn*[29] warning explains that: (1) company counsel is collecting facts for the purpose of providing legal advice to the company; (2) company counsel represents the company and not the employee; (3) the interview is covered by the attorney–client privilege, which belongs to and is controlled by the company, not the employee; and (4) the company may decide, in its sole discretion, whether to waive the privilege and disclose information from the interview to third parties, including the government.[30] Once the warning has been given and the employee has been afforded an opportunity to ask questions, the delivery of the *Upjohn* warning should be documented by a note-taker as contemporaneous evidence that it was provided.

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28 If counsel concludes, after reviewing the available information and conferring with the client, that the evidence establishes the client's guilt, counsel may wish to advise the client to decline an interview to avoid making potentially incriminating statements. Although that may prompt the client's termination, counsel may reasonably determine that termination is inevitable regardless of the client's participation in the interview.

29 *Upjohn Co. v. United States* 449 U.S. 383 (1981).

30 Although company counsel commonly request that the employee keep the interview confidential, it is improper to suggest that the employee must refrain from disclosing the underlying facts to the government. Such a suggestion may run afoul of SEC Rule 21F-17, which forbids any person from taking 'any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications'.

The importance of *Upjohn* warnings has been amplified by the guidelines set forth in the Yates Memo. Under the Yates Memo, a company's eligibility for co-operation credit requires that it discloses all relevant facts about individuals involved in corporate misconduct. In practice, this usually entails revealing what a culpable employee says during an investigatory interview. However, a company can only do this if it controls the attorney–client privilege, which an effective *Upjohn* warning accomplishes.

See Chapter 7 on witness interviews in internal investigations and Chapter 16 on representing individuals in interviews

Separate representation arranged by the employer 14.3.3

Whether the employer agrees to arrange for counsel can depend on a number of factors, such as the employee's contractual and indemnification rights, the corporate by-laws, and the potential conflict of interest between the employee and the corporation. Although separate representation of an employee can increase expenses and lengthen the investigation, it can also provide certain advantages to the company. It can reduce any suggestion of improper influence by the company over the employee, which can bolster the company's credibility with the government when reporting the results of the investigation and increase the company's co-operation credit. In some circumstances (particularly when individual counsel has a good working relationship with company counsel), it can facilitate communication with the employee. Company and individual counsel should come from different law firms. Further, arranging for individual representation can deter the government from communicating directly with the employee.

When confronted with multiple employees who warrant separate counsel, employers may seek to reduce costs by arranging for 'pool counsel' to represent the entire group. However, this pool arrangement must be reassessed if a conflict of interest arises within the group.

The right to privacy 14.4

Workplace searches 14.4.1

In most circumstances, an employer can conduct searches of its workplace and computer system to investigate wrongdoing. Such searches are largely unprotected by personal privacy laws as work spaces, computer systems and company-issued electronic devices are generally considered to be company property. Many companies explicitly address this in written corporate policies and employment agreements. However, unwarranted or unreasonable invasions of privacy

during a workplace search may be protected under state law – including state constitutional,[31] statutory[32] and common law.[33]

Employees who use their own personal electronic devices for work should be aware that work-related data stored on those devices belongs to the employer. Therefore, employees are advised to refrain from using their personal devices for work, and instead maintain separate work devices. If an employer seeks to obtain or review work-related data from an employee's personal device, the employer must be careful to exclude any personal data.

14.4.2 Workplace surveillance

An employer seeking to investigate wrongdoing through electronic surveillance must be mindful of federal and state law.

Title III of the federal Omnibus Crime Control and Safe Streets Act of 1968[34] criminalises the intentional interception of any wire, oral or electronic communication unless at least one of the parties to the communication has consented to such interception or the employer is monitoring or recording employee telephone calls 'in the ordinary course of its business'.[35]

Most states (and the District of Columbia) similarly prohibit electronic surveillance of communications unless at least one party to the communication provides consent. Some, but not all, of these jurisdictions provide exemptions for employer monitoring of employee communications. Eleven states – California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Montana, Nevada, New Hampshire, Pennsylvania and Washington – prohibit (either criminally or civilly) surveillance without the consent of all the parties to the communication.[36]

Notably, with respect to email, because employees generally do not possess an expectation of privacy in their work accounts, employers may access personal emails exchanged over these accounts.

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31 See, e.g., Cal. Const. art. I, § 1 (protecting right to privacy).

32 See, e.g., Cal. Lab. Code § 980 (2012) (prohibiting an employer from requiring or requesting an employee to: (1) '[d]isclose a username or password for the purpose of accessing personal social media', (2) '[a]ccess personal social media in the presence of the employer', or (3) '[d]ivulge any personal social media, except' in response to a request 'to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding'; prohibiting an employer from taking adverse action against an employee or applicant for not complying with a prohibited request or demand for access to social media).

33 See, e.g., claims for invasion of privacy, intentional infliction of emotional distress and negligent infliction of emotional distress.

34 See 18 U.S.C. § 2510 et seq.

35 See 18 U.S.C. § 2510(5)(a).

36 See Cal. Penal Code § 632 (a)-(d); Conn. Gen. Stat. Ann. § 52-570d; Fla. Stat. Ann. §§ 934.01 to .03; 720 Ill. Comp. Stat. ANN. § 5/14-1, -2; Md. Code Ann. Cts. & Jud. Proc. § 10-402; Mass. Gen. Laws Ch. 272, § 99; Mont. Code Ann. § 45-8-213; Nev. Rev. Stat. § 200.620; N.H. Rev Stat. Ann. §§ 570-A:2; 18 Pa. Cons. Stat. §§ 5702, 5704; Wash. Rev. Code §§ 9.73.030 to 9.73.230.

Polygraph testing 14.4.3

An employer's use of polygraph testing in aid of an investigation is limited by the Employee Polygraph Protection Act of 1988.[37] An employer seeking to use a polygraph must: (1) be conducting 'an ongoing investigation involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage'; (2) possess 'a reasonable suspicion that the employee was involved in the incident or activity under investigation'; (3) show that 'the employee had access to the property that is the subject of the investigation'; and (4) follow a number of statutorily mandated procedural guidelines.[38] If the employer satisfies these requirements, it can terminate an employee who refuses to take the polygraph test, or takes it and fails, provided there is 'additional supporting evidence' justifying the termination.[39]

The Secretary of Labor may bring court action to restrain employers who violate the statute and may assess monetary penalties. In addition, an employer who violates the law may be liable to the employee or prospective employee for appropriate legal and equitable relief, which may include employment, reinstatement, promotion, and payment of lost wages and benefits.

State law may provide additional restrictions on the use of polygraph tests and other tests purporting to determine truth or falsity.[40]

Indemnification 14.5

Among the significant issues that may arise from in-house counsel, and often external counsel, representing the company and not the individual is whether the employee has a right to be indemnified. The right to be indemnified may extend to legal fees, advancement of legal fees and for any potential judgment debt or settlement. As discussed above, an employee has a right to have his or her own counsel, even if the company pushes for joint representation by company counsel, but the complicated question of whether the company must indemnify the employee for costs around separate representation may arise. Determining a company's indemnification obligations requires close review of any agreements and understandings that might give rise to indemnification or advancement of fees. It is critical that an employee communicate closely with company counsel to come to a mutual understanding of the company's obligations.

37 See 29 U.S.C. §§ 2001-2009.

38 See 29 U.S.C. § 2006(d).

39 See 29 U.S.C. § 2007.

40 See, e.g., N.Y. Lab. Law §§ 733, 735 (prohibiting employer from using 'psychological stress evaluator examination' to determine truth or falsity); Cal. Lab. Code § 432.2 (prohibiting employers from 'demand[ing] or requir[ing] any applicant for employment or prospective employment or any employee to submit to or take a polygraph, lie detector or similar test or examination as a condition of employment or continued employment').

14.5.1 Determining whether an individual is indemnified

Employees should ask their counsel to assertively engage in communications with the employer and company counsel to determine whether the company will agree to indemnify the individual employee and to advance fees. This conversation should also specifically discuss the exact scope of any indemnification. If the company agrees to, or must, indemnify from any agreement or source of this right, employee's counsel should draft and execute a written agreement binding the company. Although the company may seek to impose unfavourable terms, it is generally advisable to reduce the indemnification obligation to writing.

Employees and their counsel should carefully review potential sources of right to indemnification. These sources may include company by-laws, local law in the state of incorporation, company policies and insurance policies of the employer.

14.5.2 Potential sources of right to indemnification

14.5.2.1 Corporate by-laws

Corporate by-laws often delineate the company's obligation to indemnify an employee's costs arising out of representation for internal investigations or any matters related to his or her official duties. Employee counsel must carefully review corporate by-laws because, even if indemnification obligations are provided, they are often listed with limitations or releases from obligation. For example, many companies include release provisions releasing the company from its obligations or entitling it to repayment of any indemnified cost if the costs subsequently transpire not to be indemnifiable. If these provisions exist, it is likely that the company will require the employee to sign an undertaking letter, in which the employee agrees to repay any amounts advanced if it is later determined that the employee was not entitled to indemnification. Similarly, there is a difference between the duty of an employer to indemnify an employee of costs incurred and any duty to advance defence costs. Some corporate by-laws regarding indemnification may require advancement of attorneys' fees. However, such by-laws should be reviewed carefully, because absent such language, the employee has no right to advancement of attorneys' fees. In practice, more often than not employees will be entitled to have their attorneys' fees advanced.

Many corporate by-laws also include specific language of which employee categories have a right to indemnification. For example, it is common for company by-laws to indicate that the company must indemnify an officer or director who is successful on the merits or otherwise in the defence of a qualifying claim, but remain silent on the issue of whether other private employees have a right to indemnification. These other employees, or their attorney, should ask for indemnification whenever a claim or investigation arises.

14.5.2.2 Local law in state of incorporation

Employees and their counsel should also review state and local laws in the state of incorporation. Review of state and local laws is often overlooked because employees assume indemnification provisions are exclusively contained in corporate

by-laws and any employment or subsequent agreements with the company. However, a number of states impose indemnification obligations on companies in local and state laws for private employees, especially for directors and officers.

Under Delaware corporate law, directors generally have a right to indemnification if they are, or face being, parties to a proceeding or subject to investigation, unless they did not act in good faith and in a manner reasonably believed to be in, or not opposed to, the best interests of the corporation.[41] Directors and officers who succeed in their defence are indemnified. On the other end of the permissive spectrum, if a director or officer acts in 'bad faith', they are not entitled to indemnification. Delaware courts have stated that the 'boundaries for indemnification' are 'success' and 'bad faith'.[42] To determine where on the permissive spectrum their situation lies, directors and officers should turn to any governing documents for additional language. Delaware law also allows directors and officers the right to indemnification through advanced costs for pending litigation.[43]

Both Oregon and Washington law also provide for mandatory indemnification of a director who successfully defends, on the merits or otherwise, any proceeding in which the director was made a party due to his or her position as a director with the company, unless the articles of incorporation provide otherwise.[44]

California is an example of a state that extends indemnification protections to any private employee, not only directors or officers. The California Labor Code provides that an employee has a right to reimbursement. The obligation is found in California Labor Code Section 2082, which states:

> *Any employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.*[45]

The California Supreme Court explained the statute's application to indemnification as a public policy obligation. In *Edwards v. Arthur Andersen LLP*,[46] the Court stated:

> *California has a strong public policy that favors the indemnification (and defence) of employees by their employers for claims and liabilities resulting from the employees' acts within the course and scope of their employment. Labor Code section 2082 codifies this policy and entitles employees to indemnification from their employer.*

41 See 8 Del. C. Section 145(c).

42 *Hermelin v. K-V Pharm. Co.,* 54 A.3d 1093, 1094 (Del. Ch. 2012).

43 See 8 Del. C.§ 145(e).

44 See ORS 60.394 and RCW 23B.08.520.

45 See Cal. Labor Code Section 2802(a).

46 44 Cal. 4th 937, 952 (2008).

14.5.2.3 Company policies

Employees should also look at company policies and employment contracts or subsequent agreements as sources of indemnification rights. In addition to indemnification required by corporate law, individual employees may have contractual indemnification rights in their employment agreements. Even if the company by-laws do not indicate a right to indemnification, a company must honour any obligations in individual employment agreements. For example, as good business practice and to promote co-operation with an investigation, some companies may decide to expand the scope of indemnity to include employees who might not be covered by the by-laws or state and local laws that are likely to be witnesses or subjects. As a strategic point, employers may expand the scope of indemnity to ensure co-operation of employees, which may show the company in a more favourable light to any regulator or investigative body.

14.5.2.4 Insurance policies of employer

Some employers may choose to purchase directors' and officers' (D&O) insurance to supplement or provide an alternative to indemnification. Some indemnification agreements require companies to purchase insurance. If the employer has D&O insurance, the nature of the allegation and the terms of the specific policy may trigger payment of defence costs.

D&O insurance is increasingly important in corporate culture owing to the increase in shareholder, class action, derivative action and other prosecutorial and regulatory investigations targeting not only companies, but also their directors and officers. If any employee is also a director or officer of the company, it is important to understand that D&O insurance policies are not standard and can vary in terms of protection. It is crucial for employees and their counsel to review terms, conditions, provisions and exclusions.[47]

14.5.3 Advocating for indemnification

Despite numerous possible sources giving rise to the right to indemnification, companies are not always eager to indemnify employees for representation or costs incurred during an investigation or defence. However, employees should advocate for the company to indemnify them for incurred costs or advancement of fees. The benefits to both the employer and employee should be emphasised, as indemnification can protect both parties' interests. When entering an employment or separation agreement, an employee should request and push for a specifically defined indemnification provision.

The employer or company may become more credible and promote efficiency and effectiveness of an internal investigation by ensuring that employees are adequately represented. If company counsel recognises a conflict of interest and the need for the employee to have separate representation, the corporation benefits if

47 See generally Matthew L. Jacobs, Julie S. Greenber, *Basic Principles of D&O Coverage and Recent Developments*, 741 PLI/Lit 29, *35 (2006).

the employee is co-operative. Therefore, the company may assess the employee's involvement and whether failure to pay individual counsel fees or to advance attorneys' fees will make the employee's co-operation less likely. While in some instances employees may be required to co-operate by subpoena, it is in the best interest of the corporation to work jointly with the employee to prepare its own defence and receive information in advance through a joint defence agreement.

In addition, regulators and prosecutors cannot take into account during an investigation whether a corporation is advancing or reimbursing attorneys' fees or providing counsel. Along the same lines, a prosecutor or regulatory body cannot request that a company refrain from taking such action. In 2008, the Department of Justice published the 'Filip Memo',[48] which laid out the principles of federal prosecution of business organisations. The guidelines, codified in the US Attorney's Manual (now called the Justice Manual), state that 'In evaluating cooperation, however, prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers, or directors under investigation or indictment.'[49]

Situations where indemnification may cease 14.6

Employees should be aware of the circumstances in which a company's obligations to indemnify may cease. As mentioned above in Section 14.5, a company's obligations to indemnify an employee may be contingent on, and circumvented by, any undertaking agreement between the parties. An undertaking agreement requires an employee to repay any advanced or covered costs in the event the costs were untimately not deemed indemnifiable. A company is generally released from its indemnification obligations for any violation of an undertaking agreement (substantive or procedural) and fraud or bad faith.

Failure to co-operate with investigation

See Chapter 10 on co-operating with authorities

In some instances, an employee's failure to co-operate with a company's investigation could absolve the company's obligation to cover individual costs. This can create a difficult decision for an individual employee regarding whether to co-operate where failure to do so will affect indemnification. Even if an employee does not want to co-operate with company counsel – internal or external – and submit to an interview or otherwise co-operate, he or she may still be called to produce testimony or information pursuant to a subpoena. Failure to initially co-operate may preclude an employee from securing indemnification for assumed costs. However, it is still often in the best interest of an employer to offer to indemnify employees who may initially seem unco-operative because in the event they are called to testify, it is still safer for the company if they are represented.

48 Memorandum from Deputy Attorney General Mark Filip to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations 8 August 2008), available at https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

49 USAM 9-28-730 Obstructing the Investigation.

14.7 Privilege concerns for employees

Privilege considerations become central during investigations. Because of the various permutations of attorney-client relationships with both internal and external counsel, it is important for employees to remember that they only enjoy protections over communications with individual counsel. If an employer requests an interview with an employee, employee counsel and company counsel, the communications and testimony at the interview are not privileged.

An employee and his or her counsel should note whether the company counsel issued a proper *Upjohn* warning and whether it was documented. If an inadequate *Upjohn* warning was given, an employee's individual counsel may attempt to prevent or limit disclosure of any statements made by the employee in an interview where individual counsel was not present.

In 2010, the Ninth Circuit in *US v. Graf* articulated a standard to determine whether a company employee holds a joint privilege with the employer company over communications with corporate counsel.[50] By adopting the Third Circuit's *Bevill* test to determine the privilege issue, the Ninth Circuit falls in line with the First, Second, Third and Tenth circuits on this issue. The *Bevill* standard holds that 'any privilege that exists as to a corporate officer's role and functions within a corporation belongs to the corporation, not the officer.'[51] The Court in *Bevill* extended the privilege to officers and employees in an individual, personal capacity only when the employee satisfies the following five-factor test: First, they must show that they approached counsel for the purpose of seeking legal advice. Second, they must show that when they approached counsel, they made it clear that they were seeking legal advice in their individual capacity rather than in their representative capacities. Third, they must demonstrate that the counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with counsel were confidential. And fifth, they must show that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company.[52] Notwithstanding the foregoing, an employee would be ill-advised to confide or speak candidly with company counsel given the subject nature of the standard. Whenever possible, an employee should make efforts to secure personal individual counsel.

See Chapter 7 on witness interviews in internal investigations and Chapter 16 on representing individuals in interviews

Finally, as a practical matter, employees should be aware that communications with other employees or colleagues regarding the investigation are not privileged regardless of whether the colleague is also involved in the investigation or represented by the same counsel. In addition, employees should attempt to communicate with individual counsel on personal and non-company devices to ensure that the privilege is protected.

See Chapter 35 on privilege

50 610 F.3d 1148 (9th Cir. 2010).

51 *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.* 805 F.2d 120 (3d Cir. 1986).

52 *US v. Graf*, at 8 (citing *Bevill,* 805 F.2d 120 (3d Cir. 1986)).

Appendix 1

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Milt's practice focuses on white-collar criminal and regulatory matters, employment law, litigation and advisory work representing corporations, and complex commercial litigation. He has litigated discrimination claims, Dodd-Frank and Sarbanes-Oxley retaliation claims, and SEC and IRS whistleblower claims on behalf of employees, and he has tried over 55 cases (both civil and criminal) to verdict. Before joining Walden Macht & Haran, Milt served as Deputy General Counsel and Chief Compliance Officer at Time Inc, where his responsibilities included compliance, the Foreign Corrupt Practices Act, OFAC, and Sarbanes-Oxley, as well as intellectual property, privacy, data security, and other cutting edge areas. At Time Inc, Milt actively litigated a variety of employment law matters on behalf of the company concerning race, age and gender discrimination, and independent contractor litigation. In 2013, Milt was appointed co-chair of the Moreland Commission to investigate public corruption. Earlier in his career, Milt served as an Assistant US Attorney in the US Attorney's Office (USAO) for the SDNY. His last assigned unit in the USAO was the Securities and Commodities Fraud Force. He was also an Assistant District Attorney in the Manhattan District Attorney's Office. Milt is a graduate of Amherst College and the University of Michigan Law School in Ann Arbor.

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Avni is an experienced litigator and trial attorney who has represented individuals and corporate clients in complex, sensitive and high-profile cases including in federal, state, and local criminal and regulatory matters. Her practice focuses on white-collar criminal defence, government investigations and regulatory enforcement, and complex litigation. At Walden Macht & Haran, Avni was part of the trial team who successfully defended a corporate client in a high-profile public corruption case in the Southern District of New York (SDNY). They won the only acquittal in the highly contested and publicised four-defendant trial. She also is part of the WMH team representing one of the most significant whistleblowers in sports history. Additionally, Avni was also on the leadership team of the independent monitor named by the US Department of Justice to oversee General Motors' compliance with its obligations under the deferred prosecution agreement (DPA) stemming from its recall of defective ignition switches. Before joining Walden Macht & Haran, Avni served as an Assistant District Attorney for five years in the Bronx County District Attorney's Office. In those five years, Avni tried over 15 felony and misdemeanour cases to verdict – five of them to jury verdict – on charges ranging from attempted murder to grand larceny. Avni is a graduate of Boston University School of Law and Northwestern University.

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