Outside Publication

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Subjects of securities and commodities enforcement actions often face high-stake, multi-front challenges that require coordinated and nuanced strategies and actions.

Those facing such a precarious situation may be confronted with criminal or civil charges brought by the U.S. Department of Justice, an enforcement action by the U.S. Securities and Exchange Commission or Commodity Futures Trading Commission, and even civil lawsuits by private plaintiffs. The underlying factual conduct may be identical in any of these proceedings, but dispositions in these different actions can span from lengthy prison sentences to injunctions on corporate office-holding to disgorgement and fines.

In this article, we propose certain considerations that may assist in increasing the likelihood of a successful outcome. Before outlining these considerations, however, it is important to highlight three issues present in securities or commodities proceedings: (1) because the government has immense power supported by vast resources, subjects of investigations must be wary of falling into the highly adversarial pattern of private litigation; (2) cases against the government are not unwinnable, but even where a client is intent on rejecting a proposed resolution, a scorched-earth campaign is usually ill-advised; and (3) any interaction with DOJ, SEC, or CFTC will have some personal element, and advocates should be cognizant that there is a relationship-management aspect to that contact.

Parallel proceedings involve many moving parts, but six factors are significant. First, one must be aware that civil and criminal investigators are in constant communication with each other both formally and informally. Second, one's decision to cooperate with an investigation is generally binary, and the choice must not be made haphazardly. Third, practitioners must be prepared to handle the fact that the scope of civil discovery for a defendant is broader than for a criminal defendant. Fourth, the DOJ, SEC, and CFTC may each require different statements or documents at different times, but the client's best interests will usually require counsel to streamline the flow of information. Fifth, a government attorney's professional background may influence their enforcement strategies and tactics. And sixth, parties should consider treating authorities differently if/when the interests of DOJ, SEC, and CFTC do, in fact, diverge.

Beware of Constant Communications Between Civil and Criminal Authorities. While there is formal information sharing among the DOJ, SEC, and CFTC, there is also significant informal interaction among the staffs of these offices, and data may flow freely between them on a daily basis. Consequently, it is almost impossible to ensure that information specially given to the SEC or CFTC will not end up on a DOJ attorney's mobile device. See Mary Jo White, SPEECH, "All-Encompassing Enforcement: The Robust Use of Civil and Criminal Actions to Police the Markets" (March 31, 2014), available at http://www.sec.gov/News/Speech/Detail/Speech/1370541342996. Further, where a potential defendant has been contacted by criminal but not civil authorities—or vice versa—it should be assumed that both sides are pursuing and exchanging leads. See, e.g., United States v. Kordel, 397 U.S. 1, 3 (1970) (noting litigation strategy discussions between FDA and DOJ attorneys); United States v. Stringer, 408 F. Supp. 2d 1083, 1085 (D. Or. 2006) (noting litigation strategy meetings between SEC and DOJ attorneys).

There is a caveat to this information-sharing network. Criminal Assistant U.S. Attorneys are restricted in divulging certain material to the SEC or CFTC—or even Civil AUSAs—like grand jury material and wiretap evidence. See Fed. R. Crim. P. 6(e) (restrictions on disclosure of grand jury materials); 18 U.S.C. §2516 (authorizing the collection of wiretap evidence in connection with only specifically enumerated criminal investigations); "Parallel Civil and Criminal Proceedings," 22 AM. CRIM. L. REV. 613, 618 (1984-1985). Under certain circumstances, the federal rules permit disclosure of grand jury materials, FED. R. CRIM. P. 6(e)(3), SEC v. Everest Mgmt., 87 F.R.D. 100 (S.D.N.Y. 1980) (seeking additional information in order to decide whether prerequisites for disclosure had been met), but this is not the default. Accordingly, the SEC/CFTC may be unaware of certain evidence in a parallel action, but practitioners should assume that a substantial amount of information is shared between the agencies.

Finally, in order to coordinate and jointly analyze evidence and information, criminal authorities often rely on the SEC and other civil agencies to take the lead in obtaining documents and testimony, particularly because that material may be shared with the criminal authorities. Thus, depending on the nature of the matter, one should not automatically assume a lack of criminal interest where subpoenas are from a civil investigative agency.

Make Cooperation Decisions Strategically. Once a person is told they are a subject of an investigation, they should consult their attorney to make the decision whether to cooperate with the investigation. The best practice is generally to either cooperate fully or not at all.

While cooperation gives potential defendants the opportunity to frame facts as the government discovers them, not just at the conclusion of the investigation, choosing to cooperate is a weighty decision. Cooperation is very broad, requiring disclosure of good and bad facts. It might encompass multiple interviews, sworn testimony against others, tutorials to government agents to explain financial products, undercover work, and/or document review. The DOJ and the SEC/CFTC all use significant incentives to encourage cooperation. Indeed, the SEC now frequently uses DOJ tools such as cooperation agreements, non-prosecution agreements, and deferred prosecution agreements. SECURITIES AND EXCHANGE COMM'N, PRESS RELEASE, "SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations" (Jan. 30, 2010), available at http://www.sec.gov/news/press/2010/2010-6.htm. While the benefits of cooperation in a given

case may be considerable, the costs of cooperation in another may be too high. The decision on whether to cooperate is a critical one that must be made at the outset.

We note that an individual under investigation should not attempt to debate the scope of their cooperation. First, those negotiations will often be fruitless. Second, they could backfire. For example, asking that the SEC or CFTC not attend a proffer session may achieve nothing—and can be harmful—as both agencies will likely be able to review the law enforcement agent's report generated in the session, which is subject to human error of the drafter in a way that could be detrimental to one's client. If the SEC or CFTC relies solely on the report, then the target loses the benefit of making an in-person statement to the enforcement attorneys. Third, negotiating the scope of cooperation will tend to aggravate the investigator, and may cause needless tension in the relationship. When one is in cooperation mode, angering the government can only undermine the ultimate result.

Consider the Non-Parallel Scope of Criminal and Civil Discovery. One practical effect of the communications mentioned above is that DOJ, SEC, and CFTC may coordinate, and thereby may limit, when items are disclosed to a defendant. Although it may be counter-intuitive, criminal discovery is narrower than civil discovery—requirements to divulge exculpatory evidence notwithstanding. Thus, when both civil and criminal actions are filed, criminal defendants might try to use civil discovery to learn about the parallel criminal case early on in the proceeding. For this reason, among others, DOJ may move to stay discovery in the civil action pending the criminal proceeding. Fed. R. Civ. P. 24(a); S.E.C. v. Chestman, 861 F.2d 49, 50 (2d Cir. 1988) (denying writ of mandamus to vacate a stay of civil discovery pending a criminal proceeding); SEC v. One or More Unknown Purchasers of Sec. of Global Indus., Ltd., No. 11 Civ. 6500(RA), 2014 WL 2158507 (S.D.N.Y. May 23, 2014) ("[I]t is well-established that the United States Attorney may intervene in a federal civil action to seek a stay of discovery when there is a parallel criminal proceeding, which is anticipated or already underway, that involves common questions of law or fact." (citing S.E.C. v. Downe, No. 92 Civ. 4092(PKL), 1993 WL 22126, at *11 (S.D.N.Y. Jan. 26, 1993)). See Salcedo v. Chicago, No. 09-CV-05354, 2010 WL 2721864, at *1 (N.D. Ill. July 8, 2010) (granting a stay of civil discovery pending resolution of a criminal trial); Chagolla v. Chicago, 529 F. Supp. 2d 941, 947 (N.D. Ill. 2008) (same) ("[T]he public has an interest in ensuring that the criminal process can proceed untainted by civil litigation."); Memorandum of Law in Support of the Government's Motion to Intervene and Partially Stay Discovery, In re Graphite Electrodes Antitrust Litig., 97-CV-4182 (E.D. Pa. March 3, 2000) (seeking a limited stay of civil proceedings pending an ongoing criminal trial "to economize judicial resources, limit the burden on [the defendant] in defending multiple actions, and prevent untimely disclosure of the Government's case while still allowing the plaintiffs to proceed with their action"), available at http://www.justice.gov/atr/case-document/governments-motion-intervene-and-partially-stay-discovery#N_1_. And because a criminal conviction may have collateral estoppel effect in a civil proceeding, it is in the SEC and CFTC's interest to consent—if not join—the motion, which each agency will often do.

But defendants can try to use the non-parallel scope of discovery to their advantage. For example, Javier Martin-Artajo of "London Whale" fame is currently pursuing a similar strategy: By secluding himself in Spain, which refuses to extradite him, he is able to remain above criminal prosecution while continuing to engage in civil discovery disputes. With some clever thinking, therefore, there is some room for attorneys and clients to strategize between the two discovery regimes.

Limit Client's Direct Interactions with the Government. At all times during an investigation and resulting proceeding, counsel should strategically limit the number of times their client provides the same information to authorities. The more times a defendant gives the same information, the greater the possibility of inconsistency. In trying to avoid the Wells process, for example, one might submit a white paper to the Commission. See generally Ronald S. Betman and Scott M. Ahmad, "Understanding and Navigating the Use of Pre-Wells Notice White Papers in Formal SEC Investigations," BANKING L. J. 444 (2014). Where a client makes the decision to submit a white paper, the client and their attorney should consider simultaneously providing the same presentation to other agencies targeting one's client.

Understand an Enforcer's Professional Background. As proof of the "human element" of government, consider that although DOJ, SEC, and CFTC have different jurisdictions, mandates, and enforcement tools, the current SEC Chairperson, SEC Enforcement Director, and CFTC Enforcement Director—Mary Jo White, Andrew Ceresny, and Aitan Goelman, respectively—are former SDNY prosecutors, and their respective agencies appear to be incorporating SDNY tactics and strategies.

Among such practices is the increased use of proffers, a widely-used DOJ mechanism. In these proceedings, a potential defendant is granted "queen-for-a-day" status where they speaks with the government under a certain level of protection. A law enforcement agent summarizes the colloquy in a report, which is kept by DOJ. The witness receives use, but not derivative use, immunity and the statements may be admissible in court only under limited circumstances. During a DOJ proffer session, the SEC and CFTC are often present and ask questions. (Even if they are not present, the SEC and CFTC may review—but may not take custody of—the law enforcement agent's report.) Proffers give counsel and client an opportunity to read the government—gauge the prosecutor's reaction to the story and glean information on the focus and scope of investigation. Indeed, a proffer session can be a very important opportunity for a defendant to convince the government of any mitigation factors.

Proffer sessions may be conducted in different ways and with different styles depending upon the government agency or office conducting it. An enterprising practitioner should be aware of these fine distinctions before having their client walk into the room with the government.

There are other examples of action by enforcement authorities that will be informed by the enforcer's professional background. The more one knows about such key pieces of intelligence, the more effective one will be in their strategy—in the same way that knowing one's judge is an essential practice in any litigation.

Prepare for Divergent Interests Between DOJ, SEC, and CFTC. Despite the increasing coordination between DOJ, SEC, and CFTC, the interests of the agencies may deviate at some point, and counsel must be attuned to those instances. For instance, parties that are sometimes viewed by the DOJ as victims of deception in financial crimes, such as outside auditors, board directors and other gatekeepers, may be the SEC's focus in an action alleging negligent or reckless failure to fulfill their oversight duties. MARY JO WHITE, SPEECH, ALL-ENCOMPASSING ENFORCEMENT (March 31, 2014), available at http://www.sec.gov/News/Speech/Detail/Speech/1370541342996. In a recent speech, SEC Chair White acknowledged that SEC complaints often include more parties than are charged criminally because "it is very important to proceed broadly against other participants in a scheme to ensure that they too are called to account." Id. In this situation, practitioners should factor in the

agency's distinct concerns in their strategic decisions. While recognizing the significant overlap between criminal and civil proceedings, counsel should be aware of the specific instances in which the interests of the SEC, CFTC, and DOJ do not align and prepare to address them.

Conclusion. With the current environment of information sharing, cooperation among agencies, and the strong human element behind every interaction with the DOJ, SEC, and CFTC, there are several flash-points for attorneys and clients alike. Although this article hits on some of the major areas of concern, there are many nuances to be considered. Nevertheless, the challenge in facing parallel enforcement actions is not insurmountable for those practitioners who tread carefully and consider the above factors.

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