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How to Effectively and Efficiently Respond to Parallel Investigations

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As commerce has become increasingly sophisticated, firms often conduct business under a constellation of legal regimes, bringing a single transaction under the legal purview of multiple governmental authorities varying by subject matter and geography. This makes parallel investigations – separate investigations being conducted by different state, federal or international government authorities into the same or a similar set of facts – more likely.

The most common iterations are competing state and federal investigations (for example, the New York Department of Financial Services (DFS) and the Department of Justice (DOJ)), civil and criminal, or multinational. Parallel investigations can materialize in several ways, sometimes originating simultaneously from multiple jurisdictions (often spurred by major events covered in the media such as plane crashes or oil spills), but are more typically referred from one agency to another as investigators discover aspects of their investigation that might be better suited to a different regulator. In each scenario, there are unique demands placed on a firm.

Responding effectively to parallel investigations can be a daunting and complex task. A principled game plan based on knowledge about how the respective regulators operate is essential to deciding how to respond appropriately to mitigate risk and litigation. This article will explore two recent settlement agreements that resolved multi-pronged parallel investigations arising out of sanctions violations and provide guidance to practitioners for how best to proceed if they find themselves responding to parallel investigations.

See "Piling On? Examining the Reality of Multi-Jurisdictional FCPA Resolutions" (Jul. 11, 2018).

Sanctions Violations Often Lead to Parallel Investigations

Over the last decade, OFAC has brought in on average roughly $500 million per year in civil enforcement penalties. In 2019, the number has already exceeded $1.2 billion. The United States has sanctions in place against at least twenty different countries including well-publicized targets like Russia and Iran as well as a host of smaller nations like Belarus, Zimbabwe and Cuba. The United States also imposes sanctions on individuals who have been designated as connected to certain conduct like narcotics trafficking or cybercrime. All sanctioned entities are publicized by OFAC.

Sanctions regimes have been breeding grounds for parallel investigations in recent years, in part because, when a firm runs afoul of a sanction, it is likely to be simultaneously violating multiple laws and regulations. Large settlements negotiated with Société Générale and UniCredit in the past year show the potential complexity of parallel investigations.

Société Générale

In 2018, Société Générale paid a total of $1.3 billion spread across five different regulating entities for failure to comply with sanctions against Cuba. Specifically, Société Générale processed billions of dollars of transactions using the U.S. financial system in connection with credit facilities in Cuba.

The negotiated settlements included the following investigative authorities:

1. The OFAC brought an action for violations of the Cuban Assets Control Regulations, 31 C.F.R. Part 515 (CACR).
2. The SDNY brought an action for violating federal laws including the Trading with the Enemy Act and the Cuban Asset Control Regulations.
3. The Manhattan District Attorney charged Société Générale with violating N.Y. Penal Law § 175.05 for falsifying business records in the second degree).
4. The Federal Reserve Board fined Société Générale $81.3 million for having inadequate compliance policies in place in violation of the International Banking Act (12 U.S.C. § 3101(7)).
5. The New York Department of Financial Services fined Société Générale $420 million for violating New York anti-money laundering and recordkeeping laws.

See "SocGen Reaches Historic Deal With France and U.S., Legg Mason Tags Along" (Jun. 27, 2018).

UniCredit Bank

In April 2019, UniCredit Bank paid out a total of $1.36 billion for violating U.S. sanctions on Iran, Libya and Cuba. Specifically, the bank had helped the state-owned Iranian shipping company IRISL evade sanctions and access the U.S. financial system.

The penalties were spread over the same five agencies:

1. The OFAC fined UniCredit $553,380,759 in relation to liability for violating sanctions relating to Weapons of Mass Destruction, 31 C.F.R. Part 544, as well as CFR Sanctions relating to Cuba, Myanmar, Sudan, Syria and Libya.
2. The DOJ's Money Laundering and Asset Recovery Section reached a deferred prosecution agreement with one UniCredit subsidiary and a guilty plea with another for violating the International Emergency Economic Powers Act, 50 U.S.C. § 1701(a). As part of the plea agreement, UniCredit agreed to forfeit $316,545,816 and paid a fine of $468,350,000.
3. The Manhattan District Attorney fined UniCredit $316 million in criminal forfeiture and pled guilty to charges of falsifying business records.
4. The Federal Reserve Board fined UniCredit $158 million for the bank's unsafe and unsound practices related to inadequate sanctions controls in violation of 12 U.S.C. § 3101(7).

5. The New York Department of Financial Services fined UniCredit $405 million for violating New York's Banking Law by conducting business in an unsafe and unsound manner and by failing to maintain an OFAC compliance program.

As reflected in both the Société Générale and UniCredit investigations, sanctions violations often hit on all of the possible grounds for parallel investigation. First, there were regulatory bodies at both the state and federal level because there are sanctions laws on the books at both levels. New York in particular has a robust sanctions regime because the state is home to so many financial institutions. DFS has jurisdiction over financial institutions via their office locations in New York. And the Manhattan District Attorney also has jurisdiction over any entity with operations in New York. The Federal Reserve has jurisdiction over all banking institutions. And then OFAC and the DOJ are able to enforce federal sanctions regulations.

Second, as evidenced across both examples, these types of cases inherently implicate exposure to criminal and civil liability and penalties. Both Société Générale and UniCredit Bank negotiated plea deals that admitted to criminal wrongdoing to run alongside their civil penalties.

See "Anti-Corruption and Trade Regulations: Identifying Common Elements and Streamlining Compliance Programs (Part One of Two)" (Jul. 9, 2014); and Part Two (Jul. 23, 2014).

Responding to Parallel Investigations

While there are a number of variables that will dictate the best path forward for a firm facing parallel investigations, one important decision axis will be the extent to which the investigative bodies are going to – or are likely to – collaborate.

Researching the Enforcers Involved

Perhaps the most important thing to do when facing parallel investigations is to gather as much information as possible about the enforcement agencies involved. Counsel should look to recent enforcement actions to understand enforcers' strategies and goals. Talking to colleagues that might have knowledge of how a particular regulatory body operates is also useful.

Additionally, counsel should keep in mind that investigations, whether parallel or not, are a two-way street that presents unique challenges to the investigators themselves, who will be sizing up the company and its counsel to determine how best to proceed. Taking the initiative so that you are not caught flat-footed will make all the difference.

See "What to Consider When Deciding Whether to Self-Disclose: An Interview With Steptoe's Lucinda Low" (Apr. 4, 2018).

To Share or Not to Share?

The first question is whether to disclose the existence of the other investigations to each investigator. For investigations into sanctions violations, the investigators are more likely to know about their parallel counterparts for a number of reasons. First, these are highly specific subject matter investigations with investigative authorities that are often working alongside each other with a history of collaboration. This means that there are more likely to be relationships across the entities, which enhance the likelihood of information flow between them. In such a situation, it is less risky to discuss the existence of a counterpart investigation.

On the other hand, where investigations are diverse by geography or subject matter, there are potential costs to divulging the existence of one investigation to the prosecutors of another. With smaller matters, the mere fact that another entity happens to be investigating a firm could signal to a regulator that there is more *there* there. And if investigators are prone to collaborate, there is a risk of opening another front in each of the existing investigations.

The best approach for counsel is to find out as much as possible about all avenues of investigation. Do the investigators have a history of working together? Are they known to compete with each other? Is one more aggressive? Does one regulator favor settlements? The more that is known about the investigators, the better chance a firm has of turning a crisis into an opportunity.

See the Anti-Corruption Report's two-part series on how to answer the question "There's a problem, now what?": "Philip Urofsky of Shearman Explains the Logistics of Self-Reporting" (Sep. 14, 2016); and "Richard Smith of Quinn Emanuel Discusses Framing Voluntary Disclosure to Minimize Cost and Maximize Credit" (Mar. 15, 2017).

Combining Responses

If there are factual overlaps between the parallel investigations, there may be advantages to consolidating responses to multiple regulators.

First, combining responses is more efficient. Especially with document productions, there are significant costs to collecting, reviewing and producing documents to two similar but separate document requests. If possible, counsel should attempt to find a way to narrow one of the document requests in order to make a single production to both entities. If that is not feasible, consider whether it might be more efficient to produce the broader of the two productions to both entities to avoid additional cost.

Second, consolidating responses can help control the information flow. This is especially true with witnesses, and why it might make sense to try and combine witness interviews if either or both investigators seek to speak to employees. No matter how peripheral the testimony or how confident the witness, there is always the possibility that a witness might relay a piece of information slightly differently from one conversation to the next. By consolidating interviews, counsel mitigates the risk of inconsistent statements being made to different authorities on similar topics. As with document productions, there are also benefits to narrowing the amount of time each investigator has with an interviewee.

At the same time, counsel should consider whether there might be differences among the investigators that would make it imprudent to let them both interview an employee at the same time. Does one investigator have some type of leverage that the other does not? Is there a possibility that one might be more hostile, which could rub off on the other investigator? Is one investigator more skillful at interviewing and more likely to extract sensitive information than another?

See "Internal Investigations and Criminal Discovery After the Yates Memo" (Apr. 6, 2016).

Negotiating Settlements

When the time comes to negotiate a settlement with one of the government bodies, there are several factors to consider. If one body is ready to settle while other investigations are ongoing, a firm should consider trying to wait to settle everything at the same time. Alternatively, it might be able to use one settlement as leverage in the other investigations. As always, it will be a fact specific inquiry. If the case in which the firm faces more exposure, whether civil or criminal, is coming to a close, that might empower it to be more aggressive in response to the counterpart investigation. Alternatively, it might be more inclined to settle even on less favorable terms if a second matter is unlikely to conclude any time soon.

The next consideration is how to deal with simultaneously negotiating a settlement amount with five different authorities, as described in the sanctions cases above. Being knowledgeable about the responsibilities of the investigators is critical. For example, the DOJ has guidelines that require prosecutors to at least make an effort to coordinate their investigations and limit over-punishing for the same or similar conduct. Knowing how and to what extent can be a valuable tool.

See "Strategies for Negotiating FCPA Settlements: An Interview With Laurence Urgenson, Mayer Brown Partner and Former DOJ Official" (Jul. 9, 2014).

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