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Government Investigations

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ENFORCEMENT AGENCIES AND CORPORATE LIABILITY

Government agencies

What government agencies are principally responsible for the enforcement of civil and criminal laws and regulations applicable to businesses?

Civil and criminal law enforcement in the United States is handled by both federal authorities and individual state government authorities. Federal authorities commonly handle the most significant civil and criminal enforcement actions against corporations, although state agencies handle significant cases as well. The primary federal criminal law enforcement agency is the Federal Bureau of Investigation (FBI), which develops cases typically prosecuted by the US Department of Justice (DOJ). Other significant federal agencies involved in corporate matters include but are not limited to the US Securities and Exchange Commission (SEC), which brings civil cases involving securities laws, the US Department of Treasury's Office of Foreign Assets Control and Offices of Inspector General for various agencies that regulate particular industries, such as healthcare.

Law stated - 31 May 2024

Scope of agency authority

What is the scope of each agency's enforcement authority? Can the agencies pursue actions against corporate employees as well as the company itself? Do they typically do this?

Agencies can pursue actions against corporations and individuals for matters within their jurisdictional authority. Federal authorities have in recent years emphasised the importance of holding individuals accountable for crimes, and they often bring actions against corporations as well as the employees and agents the authorities allege are responsible for misconduct.

Law stated - 31 May 2024

Simultaneous investigations

Can multiple government entities simultaneously investigate the same target business? Must they coordinate their investigations? May they share information obtained from the target and on what terms?

Multiple agencies, including federal and state agencies, may simultaneously investigate the same companies. For example, it is common for the FBI and DOJ to investigate a potential criminal securities law violation while the SEC investigates a potential civil violation involving the same conduct. Criminal law enforcement authorities generally may not share information obtained by a grand jury or through the surreptitious interception of communications. Agencies generally are not required to share investigation information with each other, although they often do for efficiency and to avoid compromising each other's investigations.

Law stated - 31 May 2024

Civil forums

In what forums can civil charges be brought? In what forums can criminal charges be brought?

Federal civil and criminal charges are brought in US district courts. Federal judges typically handle both criminal and civil matters. State charges are brought in state courts, which sometimes are separated into civil and criminal divisions. Some federal agencies also may pursue civil charges that are adjudicated administratively within the agency.

Law stated - 31 May 2024

Corporate criminal liability

Is there a legal concept of corporate criminal liability? How does the government prove that a corporation is criminally liable for the acts of its officers, directors or employees?

There is a legal concept of corporate criminal liability. Corporations generally may be held liable for actions of their agents within the scope of those agents' duties that were intended to benefit the company.

Law stated - 31 May 2024

Bringing charges

Must the government evaluate any particular factors in deciding whether to bring criminal charges against a corporation?

Authorities generally may pursue charges against corporations where there is probable cause to believe that the corporation committed a crime. The DOJ has outlined a [series of factors](#) that prosecutors should consider in determining whether to pursue charges against a corporation, although that guidance does not have the force of law. The factors include the pervasiveness of wrongdoing within the company, the company's history of misconduct, the company's timely and voluntary self-disclosure and the company's remediation efforts, among others.

Law stated - 31 May 2024

INITIATION OF AN INVESTIGATION

Investigation requirements

What requirements must be met before a government entity can commence a civil or criminal investigation?

The threshold for initiating an investigation is low. A government entity generally can initiate a civil or criminal investigation if there is reason to believe that a violation of law occurred.

Law stated - 31 May 2024

Triggering events

What events commonly trigger a government investigation? Do different enforcement entities have different triggering events?

A variety of events trigger government investigations. They include allegations made to government agencies by individuals, including allegations made anonymously. With corporations, investigations often begin following a company's self-report of misconduct, with the company advocating for leniency because of the self-report. Investigations can also be triggered by items in public securities filings, allegations in private civil litigation and events reported in news media.

Law stated - 31 May 2024

Whistle-blowers

What protections are whistle-blowers entitled to?

Various laws including the Dodd-Frank Wall Street Reform and Consumer Protection Act protect certain categories of whistle-blowers and may provide a private cause of action by whistle-blowers against employers for adverse employment actions. Many corporations have codes of conduct that strictly prohibit retaliation against anyone who reports in good faith a claim of misconduct.

Law stated - 31 May 2024

Investigation publicity

At what stage will a government entity typically publicly acknowledge an investigation? How may a business under investigation seek anonymity or otherwise protect its reputation?

Legal restrictions often prohibit government entities from publicly acknowledging investigations before a civil or criminal action is filed. Companies under investigation are typically aware of the investigation by that stage and have media statements prepared in anticipation of charges. Claims by a government agency of criminal or civil misconduct are generally public and accused companies may not remain anonymous.

Law stated - 31 May 2024

EVIDENCE GATHERING AND INVESTIGATIVE TECHNIQUES

Covert phase

Is there a covert phase of the investigation, before the target business is approached by the government? Approximately how long does that phase last?

There may be a covert phase of the investigation before the government approaches the business, and the length of that phase varies depending on the circumstances of the investigation. That period could range from weeks to months depending on the productivity of the covert activity and the government's ability to maintain its secrecy.

Law stated - 31 May 2024

Covert phase

What investigative techniques are used during the covert phase?

Covert investigative techniques in corporate matters may include individuals surreptitiously collecting company materials, meeting with the government and recording conversations with others. With court approval, the government may intercept in certain cases communications between parties without either party knowing about the interception.

Law stated - 31 May 2024

Investigation notification

After a target business becomes aware of the government's investigation, what steps should it take to develop its own understanding of the facts?

After learning of a government investigation, companies should take steps to preserve any potentially relevant data. Companies generally should conduct their own internal investigations, including reviewing company data and interviewing relevant company personnel, in order to develop their own understanding of the issues, position themselves to cooperate with the government when needed, stop any ongoing misconduct and prepare defences.

Law stated - 31 May 2024

Evidence and materials

Must the target business preserve documents, recorded communications and any other materials in connection with a government investigation? At what stage of the investigation does that duty arise?

Companies under investigation should take steps to preserve hard copy and electronic data that could be relevant to the investigation as soon as possible after learning of the investigation or the potential misconduct at issue. This often includes sending preservation notices to personnel who might have relevant materials and working with IT professionals to ensure that electronic data is not deleted.

Law stated - 31 May 2024

Providing evidence

During the course of an investigation, what materials – for example, documents, records, recorded communications – can the government entity require the target business to provide? What limitations do data protection and privacy laws impose and how are those limitations addressed?

A government entity with the power to issue subpoenas can generally compel a company to produce any hard copy or electronic records in its possession that are not subject to the attorney-client privilege or similar protection. Data protection and privacy laws generally do not limit the government's ability to collect historical data.

Law stated - 31 May 2024

Providing evidence

On what legal grounds can the target business oppose the government's demand for materials? Can corporate documents be privileged? Can advice from an in-house attorney be privileged?

Companies typically can shield materials from disclosure if they are protected by the attorney-client privilege or work product doctrine. The protections encompass communications and certain work product prepared by in-house counsel. The protections apply to corporate communications and materials in the same manner as they apply to individuals.

Law stated - 31 May 2024

Employee testimony

May the government compel testimony of employees of the target business? What rights against incrimination, if any, do employees have? If testimony cannot be compelled, what other means does the government typically use to obtain information from corporate employees?

The US Constitution provides that the government may not compel individuals to incriminate themselves. The government can compel testimony from individuals by securing a court order that compels testimony and provides the individual with immunity from prosecution on underlying crimes. By contrast, companies could compel individuals to participate in the companies' own investigations or face termination, and companies are generally free to share the information they gather with government agencies.

Law stated - 31 May 2024

Employee testimony

Under what circumstances should employees obtain their own legal counsel? Under what circumstances can they be represented by counsel for the target business?

Employees should consider retaining their own counsel when their own actions are under investigation, when they are at risk that the government might determine that they engaged in misconduct or if their interests are otherwise potentially adverse to the company's interests.

Law stated - 31 May 2024

Sharing information

Where the government is investigating multiple target businesses, may the targets share information to assist in their defence? Can shared materials remain privileged? What are the potential negative consequences of sharing information?

Companies with aligned interests generally may share information provided that they do not, and do not intend to, obstruct any investigations. Materials can remain privileged pursuant to joint defence agreements or the common interest doctrine, provided that specific factors are met. Potential negative consequences include increased risk of disclosure of sensitive information even when steps are taken to reduce that risk.

Law stated - 31 May 2024

Investor notification

At what stage must the target notify investors about the investigation? What should be considered in developing the content of those disclosures?

A company's obligation to notify investors can be based on securities laws in certain circumstances, contracts with investors or other legal and regulatory obligations. There is no single rule applying to all situations and companies should consult with counsel on these issues on a case by case basis.

Law stated - 31 May 2024

COOPERATION

Notification before investigation

Is there a mechanism by which a target business can cooperate with the investigation? Can a target notify the government of potential wrongdoing before a government investigation has started?

Government agencies strongly encourage companies to self-disclose misconduct and cooperate in investigations and they provide incentives for such cooperation that could include non-prosecution or reduced penalties depending on the circumstances.

Law stated - 31 May 2024

Voluntary disclosure programmes

Do the principal government enforcement entities have formal voluntary disclosure programmes that can qualify a business for amnesty or reduced sanctions?

Many government entities including departments within the Department of Justice have issued policies encouraging voluntary disclosure and outlining the potential benefits of such disclosure, although benefits continue to be evaluated on a case by case basis.

Law stated - 31 May 2024

Timing of cooperation

Can a target business commence cooperation at any stage of the investigation?

Yes, with the greatest benefit generally reserved for companies that self-disclose misconduct and cooperate immediately.

Law stated - 31 May 2024

Cooperation requirements

What is a target business generally required to do to fulfil its obligation to cooperate?

To reap the maximum benefits from their cooperation, companies are expected to provide the government with all material information about the misconduct, subject to privilege and work product protections, and cooperate with the government in its investigations and enforcement actions against responsible individuals.

Law stated - 31 May 2024

Employee requirements

When a target business is cooperating, what can it require of its employees? Can it pay attorneys' fees for its employees? Can the government entity consider whether a business is paying employees' (or former employees') attorneys' fees in evaluating a target's cooperation?

Companies generally may require employees to participate in the investigation including responding to the government's or company's questions as a condition of continued employment. Companies typically can pay employees' attorneys' fees but could have obligations in some situations to seek reimbursement if the employee is convicted of crimes harming the company. Government entities generally do not consider whether a business is paying an employee's legal fees in evaluating the company's cooperation.

Law stated - 31 May 2024

Why cooperate?

What considerations are relevant to an individual employee's decision whether to cooperate with a government investigation in this context?
What legal protections, if any, does an employee have?

Individuals who decline to participate in government or corporate internal investigations typically are subject to dismissal at the company's discretion.

Law stated - 31 May 2024

Privileged communications

How does cooperation affect the target business's ability to assert that certain documents and communications are privileged in other contexts, such as related civil litigation?

Waiver of privilege in a government investigation will typically waive privilege for the same subject matter in other proceedings including civil litigation. As a result, companies cooperating with government agencies typically balance carefully their efforts to provide the government with all relevant facts while maintaining privilege, and government agencies routinely respect companies' efforts to maintain privilege.

Law stated - 31 May 2024

RESOLUTION

Resolution mechanisms

What mechanisms are available to resolve a government investigation?

Authorities have used a broad spectrum of mechanisms to resolve criminal investigations, including declinations, non-prosecution agreements, deferred prosecution agreements and plea agreements. Civil investigations may be resolved with declinations, administrative actions or legal settlements.

Law stated - 31 May 2024

Admission of wrongdoing

Is an admission of wrongdoing by the target business required? Can that admission be used against the target in other contexts, such as related civil litigation?

Admissions of wrongdoing are typically required to resolve criminal actions, and those admissions generally may be used against a company in other proceedings. Government

agencies may seek admissions of wrongdoing in civil resolutions, but that is often subject to negotiation.

Law stated - 31 May 2024

Civil penalties

What civil penalties can be imposed on businesses?

Civil penalties can include monetary penalties, disgorgement, injunctive relief and, in some cases, imposition of a corporate integrity agreement or similar mechanism for monitoring remediation and future conduct.

Law stated - 31 May 2024

Criminal penalties

What criminal penalties can be imposed on businesses?

Criminal penalties can include fines, disgorgement, injunctive relief and, in some cases, imposition of an independent corporate monitor for a period of time.

Law stated - 31 May 2024

Sentencing regime

What is the applicable sentencing regime for businesses?

Sentencing is generally discretionary, although restitution is often mandatory in criminal prosecutions. US judges are required to consult the US Sentencing Guidelines in determining sentences, although the Guidelines do not prescribe mandatory sentences.

Law stated - 31 May 2024

Future participation

What does an admission of wrongdoing mean for the business's future participation in particular ventures or industries?

Admissions of misconduct or criminal convictions could limit companies' participation in certain industries, including their ability to enter into government contracts and government programmes, including government-funded healthcare programmes. Such collateral consequences need to be evaluated on an individual basis depending on the company, its industry, and applicable regulations and contract provisions.

Law stated - 31 May 2024

UPDATE AND TRENDS

Key developments of the past year

Are there any emerging trends or hot topics that may affect government investigations in your jurisdiction in the foreseeable future?

The Department of Justice has announced that it is developing a whistle-blower rewards programme that would provide payment for individuals who report corporate misconduct to the government, subject to certain criteria. Some government agencies, including the Securities and Exchange Commission, already have such programmes in place. Such a programme could have a significant impact on corporate investigations and enforcement.

Law stated - 31 May 2024