



Parallel Civil and Criminal Investigations: A Primer

See the full Investigations Toolkit at bakerbotts.com.

In today's complex regulatory climate, companies – already facing greater scrutiny than ever – must be prepared that oversight or an enforcement action by a civil regulator can sometimes morph into something more: referral to the criminal authorities. Simultaneous civil and criminal investigations – referred to in the white-collar space as “parallel investigations” – are now more common than ever. Courts have long upheld the propriety of parallel investigations. See, e.g., *United States v. Kordel*, 397 U.S. 1, 10 (1970) (“It would stultify enforcement of federal law to require a government agency . . . invariably to choose either to forego recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the outcome of a criminal trial”). Indeed, in many cases, the criminal authorities first surface long after the civil investigative process is underway.

1. PARALLEL INVESTIGATIONS ARE NOT WITHOUT LIMITS

- Criminal authorities must act in good faith and with proper procedures in order to use evidence obtained by a civil regulator during the course of its investigation.
- Companies wishing to object to a prosecutor's use of evidence collected in a civil action have the burden of establishing the criminal authorities acted in bad faith.
- Whether the Government has engaged in “bad faith” is a fact specific inquiry; bad faith can be shown, *inter alia*, where the Government brings a civil action solely for the purposes of securing evidence for its criminal prosecution. Affirmatively concealing the existence of a criminal investigation may also establish bad faith.
- In some jurisdictions, where a company seeks discovery by way of motion on the issue of bad faith, a “substantial preliminary showing” is required. Moving papers, therefore, must contain sufficiently specific and definite allegations warranting a court to grant the discovery application.

2. NEGOTIATING A GLOBAL RESOLUTION

- Companies entangled in parallel investigations, for both legal and business reasons, may desire to negotiate a global resolution that will resolve all matters at or near the same time, potentially warding off indictment or the filing of a civil lawsuit.

- Negotiating a global resolution requires counsel to obtain buy-in from decision makers at each stakeholder involved, both criminal and civil. Counsel must be nimble, carefully balancing timing concerns and policy considerations that may differ between the criminal authorities and the civil regulators.
- When achieved, global resolutions give companies closure, capping liability and allowing companies to strategically pave the “go-forward” path.
- From a business perspective, global resolutions also help companies manage the “messaging,” enabling companies to avoid the fall-out that ordinarily follows from multi-day, piecemeal press releases announcing enforcement action from different governmental agencies.

3. STAYING THE CIVIL PROCEEDING

- Companies already under criminal indictment and sued civilly by a regulator face different challenges. While a global resolution can still ultimately be achieved, a company may consider, where appropriate, requesting a stay in the civil proceeding.
- The decision to grant a stay rests in the sound discretion of the trial court. Factors that a court considers include whether the company will be substantially harmed absent a stay; whether the regulator will be burdened by the delay; and whether public policy weighs in favor of a stay.
- A motion to stay a civil proceeding may be particularly warranted where a company’s officers and directors are also under criminal indictment. Although companies do not enjoy a Fifth Amendment right against self-incrimination, officers and directors do. Where a company’s officers and directors intend to assert their Fifth Amendment rights, courts have granted a company’s motion to stay, concluding the civil discovery process and therefore the company’s ability to mount a defense will be impeded as a result of the pendency of the parallel criminal case.

KEY REMINDERS

- Companies subject to a civil investigation by a regulator who are even remotely concerned that the investigation could lead to a criminal referral should from the outset seek counsel adept at handling matters both before the civil regulator and the criminal authorities.
- While the Courts have recognized the propriety of parallel criminal and civil investigations, prosecutors and regulatory attorneys who choose to coordinate with one another must do so in good faith.
- Retaining counsel trained at identifying when the criminal authorities may have “crossed the line” and abused the civil discovery process is just one of the ways counsel can help companies navigate parallel investigations.
- Whether a global resolution should be sought or whether a stay in the civil proceeding should be requested, strategic decisions, such as these, require careful consideration as parallel investigations unfold.

This material is for general informational purposes and is not intended as legal advice. The transmission and receipt of information contained in this document do not form or constitute a lawyer-client relationship. This material may constitute attorney advertising in some jurisdictions.

© Baker Botts L.L.P. 2020. All rights reserved.