

**SIFMA C&L ANNUAL SEMINAR
ORLANDO, FLORIDA**

**HANDLING A REGULATORY INVESTIGATION:
In House and Outside Counsel Perspectives
March 17, 2020**

**Andrew Stemmer
Director & Senior Counsel, Litigation & Regulatory
Investigations
Deutsche Bank AG**

**Marc P. Berger
Director, New York Regional Office
U.S. Securities and Exchange Commission**

**Katherine Goldstein
Milbank LLP**

**Fraser L. Hunter Jr.
WilmerHale LLP**

**Christopher K. Williams
Senior Legal Counsel
Fidelity Investments**

- I. Introduction – 2019 saw the continuation of trends that have come to define investigations of financial institutions since the recession, including a focus on cases impacting retail investors and on cyber-related cases. In light of the fact that the current administration is in office for at least another year, one should not expect dramatic changes in the focus of the Enforcement Division in the coming year. Regulators and prosecutors pursued significant fines and other relief in enforcement actions and settlements with financial institutions, which continue to operate under the commonly held belief that it is impossible or unwise to litigate against the government. Cooperation, voluntary self-reporting, and remediation remain essential tools to mitigate damage to a company that has or will become a target of regulators and prosecutors. One positive trend to look for in the coming year is an increased focus on reducing the duration of investigations, but it remains to be seen whether the Commission is able to achieve meaningful progress in this regard.
- II. In the current environment, it remains essential that defense counsel make sound choices in conducting internal investigations and responding to regulatory inquiries. These choices must be guided by the SEC’s *Enforcement Manual* and *The Principles of Federal Prosecution of Business Organizations* promulgated by the DOJ, which set out the factors guiding the SEC’s or DOJ’s analysis of whether to charge a company:
- the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime (*see* USAM 9-28.400); (*see also* SEC Enforcement Manual § 2.6.1);
 - the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management (*see* USAM 9-28.500);
 - the corporation’s history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it (*see* USAM 9-28.600);
 - the corporation’s willingness to cooperate in the investigation of its agents (*see* USAM 9-28.700); (*see also* SEC Enforcement Manual § 6.1.2);
 - the existence and effectiveness of the corporation’s preexisting compliance program (*see* USAM 9-28.800); (*see also* SEC Enforcement Manual § 6.1.2);
 - the corporation’s timely and voluntary disclosure of wrongdoing (*see* USAM 9-28.900); (*see also* SEC Enforcement Manual § 6.1.2);
 - the corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies (*see* USAM 9-28.1000); (*see also* SEC Enforcement Manual § 6.1.2);

- collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution (*see* USAM 9-28.1100); (*see also* SEC Enforcement Manual § 2.6.1);
- the adequacy of remedies such as civil or regulatory enforcement actions (*see* USAM 9-28.1200); and
- the adequacy of the prosecution of individuals responsible for the corporation's malfeasance (*see* USAM 9-28.1300).

III. To address the issues raised by these factors, defense counsel must come to an understanding of the facts as quickly as possible. Without a complete understanding of the facts, counsel will be unable to assess the company's potential exposure, the benefits and risks of cooperation, and remedial measures that the company could undertake while the investigation proceeds.

A. Counsel should first undertake a thorough internal investigation, and complete it as quickly as possible with minimal disruption to the client's business.

1. Take immediate steps to identify and preserve relevant evidence.
2. Understand the client's organizational structure, business lines, transactions, and culture that may have contributed to problems. Plan to gather information accordingly and prioritize information that is readily obtainable and informative on key questions.
3. Avoid conflicts with the government over the investigative process, document collections, and scheduling matters.
4. The potential for a criminal referral in many cases should be evaluated at every stage.
 - a. Lower-ranking SEC staff can informally refer matters to DOJ without the need for Commission approval.

B. Counsel and the client should also undertake a review of the company's existing compliance program and evaluate potential remedial measures addressing issues uncovered through the investigation. The existence and effectiveness of a company's compliance program continue to be important factors guiding the DOJ and SEC in determining whether to pursue charges.

1. In April 2019, the Criminal Division of the Department of Justice released updated guidance to DOJ prosecutors on how to assess corporate compliance programs when conducting an investigation, in making charging decisions, and in negotiating resolutions. The guidance emphasizes the DOJ's focus on compliance programs, requiring

companies under investigation to carefully evaluate, test, and potentially upgrade their programs before the investigation is over. The updated guidance is restructured around three “fundamental questions”:

- i. Is the corporation’s compliance program well designed?
- ii. Is the program being applied earnestly and in good faith? In other words, is the program being implemented effectively?
- iii. Does the corporation’s compliance program work in practice?

DOJ Criminal Division, “Evaluation of Corporate Compliance Programs” (Apr. 2019), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

2. The updated guidance includes twelve topics and sample questions that the DOJ considers relevant in evaluating a corporate compliance program including: policies and procedures, training, reporting mechanisms and investigations, third-party due diligence, tone at the top, compliance independence and resources, incentives and disciplinary measures, and periodic testing and review.
 3. While a handful of cases against compliance professionals have been pursued, the SEC has also acknowledged that enforcement actions against compliance officers may result in a “chilling effect” that drives qualified professionals from the industry, and has suggested that such actions should not be pursued “simply because we disagree, in hindsight,” with compliance officers’ judgment. See Speech, Commissioner Hester M. Peirce, Costumes, Candy, and Compliance: Remarks at the National Membership Conference of the National Society of Compliance Professionals (Oct. 30, 2018), https://www.sec.gov/news/speech/speech-peirce-103018#_ftn21.
 4. The prevailing message from the guidance is that companies must take ownership of their programs, adequately resource them, properly tailor and integrate them into their business, and regularly update and enhance them. Compliance personnel should document the information they relied on and their rationale in making decisions that may be scrutinized later in time.
- C. The scope and effectiveness of a Company’s remediation also affects post-resolution measures, such as whether the government will impose an independent compliance monitorship.
1. In October 2018, Assistant Attorney General Brian Benczkowski announced guidance for the Criminal Division attorneys to consider in evaluating the potential benefits of a compliance monitorship as part of a resolution of a corporate investigation. These factors include:

- a. “[W]hether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems”;
- b. “[W]hether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management”;
- c. “[W]hether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems”; and
- d. “[W]hether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future.”

See Memorandum from Brian A. Benczkowski, Selection of Monitors in Criminal Division Matters (Oct. 11, 2018), <https://www.justice.gov/criminal-fraud/file/1100366/download>.

IV. Recent SEC Initiatives.

- A. This year, as in prior years under this administration, the SEC’s Enforcement Division continued to focus on cases impacting retail investors and on cyber-related issues.
 1. In the latter half of 2019, the SEC’s Cyber Unit brought multiple enforcement actions in the cryptocurrency space, in large part centered on initial coin offerings (“ICOs”).¹
 - a. In September, the SEC settled an action against blockchain technology company Block.one for conducting an unregistered initial coin offering of digital tokens (ICO) that raised several billion dollars over approximately one year. The company failed to register the ICO as a securities offering and did not otherwise seek an exemption from registration requirements, in violation of the registration provisions of the federal securities laws. Without admitting or denying the SEC’s findings, the company agreed to pay a \$24 million civil penalty and to a cease-and-desist order. SEC Press Release, SEC Orders Blockchain Company to Pay \$24 Million Penalty for Unregistered ICO (Sept. 30, 2019), <https://www.sec.gov/news/press-release/2019-202>.

¹ For a list of the SEC’s cyber-related enforcement actions, see Cyber Enforcement Actions, <https://www.sec.gov/spotlight/cybersecurity-enforcement-actions>.

- b. In December, the SEC filed a complaint in SDNY against a digital-asset entrepreneur and his company, UnitedData, Inc. d/b/a Shopin, for allegedly defrauding investors in an ICO that raised more than \$42 million from hundreds of investors. The complaint alleges that the founder conducted a fraudulent unregistered securities offering, making misrepresentations to investors and failing to create a functional platform for online shopping profiles as promised would be done with funds raised in the ICO. The founder also allegedly misappropriated funds from the ICO for his own personal use. SEC Press Release, SEC Charges Founder, Digital-Asset Issuer with Fraudulent ICO (Dec. 11, 2019), <https://www.sec.gov/news/press-release/2019-259>.
 - c. Note that, despite the Commission’s continued activity in the cryptocurrency space, Commissioner Hester M. Peirce has been critical of the Commission’s approach to crypto-related issues, and has advocated for clarifying regulation rather than a “parade of enforcement actions” to provide guidance to the market. Commissioner Peirce advocated for a “non-exclusive safe harbor period within which a token network could blossom without the full weight of the securities laws crushing it before it becomes functional.” Commissioner Hester M. Peirce, Broken Windows: Remarks Before the 51st Annual Institute on Securities Regulation (Nov. 4, 2019), <https://www.sec.gov/news/speech/peirce-broken-windows-51st-annual-institute-securities-regulation>.
2. The SEC continued its surge in public company enforcement actions in 2019. The SEC filed 95 new actions against public companies and subsidiaries in 2019, more than a 30 percent increase over 2018. As part of the SEC’s stated focus on retail investors, more than half of new actions against public companies and subsidiaries targeted Investment Advisers/Investment Companies or Broker Dealers. Many of these actions were part of the Share Class Selection Disclosure Initiative—an initiative premised on self-reporting. *See* Cornerstone Research, SEC Enforcement Activity: Public Companies and Subsidiaries, Fiscal Year 2019 Update, <https://www.cornerstone.com/Publications/Reports/SEC-Enforcement-Activity-FY-2019-Update>.
- a. The SEC awarded \$260,000 to whistleblowers, themselves harmed investors, who jointly submitted a tip alleging a scheme targeting retail investors that led to an enforcement action. SEC Press Release, SEC Awards More Than \$1.8 Million to Whistleblower (Aug. 29, 2019), <https://www.sec.gov/news/press-release/2019-165>.
 - b. In September 2019, the SEC brought settled charges against three Raymond James entities for charging excessive fees and commissions on retail accounts. The SEC’s order alleged that the

firm (i) did not perform reviews of advisory accounts that had no trading activity for at least one year, resulting in unsuitable advisory fees being charged to these accounts; and (ii) misapplied pricing data to certain unit investment trusts (“UITs”) in advisory accounts, resulting in excess fees charged on UITs. The SEC’s order also alleged with respect to UITs that the firm made unsuitable recommendations to sell UITs prior to maturity (and to then purchase new UITs), resulting in excess commissions being charged to retail customers. Without admitting or denying the findings, the firm agreed to pay approximately \$12 million in disgorgement to retail investors, and also agreed to a \$3 million penalty. The SEC’s order noted that it considered remedial efforts and cooperation undertaken by the firm. SEC Press Release, Raymond James Agrees to Pay \$15 Million for Improperly Charging Retail Investors (Sept. 17, 2019), <https://www.sec.gov/news/press-release/2019-178>.

- V. Issues to address at the outset of an inquiry.
 - A. Larger firms need a centralized process to know when an inquiry has been commenced by any regulator.
 - B. Counsel must take all regulatory inquiries seriously from the outset.
 - 1. SROs also expect cooperation; cooperation may minimize the possibility of a referral to the SEC.
 - 2. If the SEC staff believes that the recipients of its informal requests are not complying seriously and expeditiously, it will seek a formal order of investigation in order to issue subpoenas.
 - C. Retaining external counsel or accountants.
 - 1. Do you go outside or keep it inside?
 - a. Outside counsel can provide a measure of objectivity, and, potentially, credibility with the Staff.
 - b. The investigation may be so broad and burdensome that outside counsel will be needed. If so, bringing them in earlier allows them to contribute fully.
 - 2. Unless inside counsel are implicated in the facts under investigation, they should take an active role in managing investigations and directing strategy. Normally, inside counsel should be visible to the regulators and should be fully informed as to all issues so that they are in a position to make strategic judgments and evaluate the performance of outside counsel.

3. Consider, if appropriate, the retention of forensic accountants experienced with SEC matters.
 - a. Such accountants should be retained pursuant to a *Kovel* letter in order to avoid a waiver of the protection of the attorney-client and work product privileges. *See United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).
- D. Defense lawyers must identify the controlling issues as quickly as possible.
 1. What potential securities law violations are implicated by the facts?
 2. What is the regulator's view of the facts?
 3. Who are the critical witnesses and how will they testify?
 - a. Determine whether former employees and/or whistleblowers may be the likely source of the investigation. If so, be sure to warn the client not to take steps to retaliate.
 - i. The Sarbanes-Oxley Act of 2002 prohibits retaliation against employees who provide information or otherwise assist in a securities investigation.
 - ii. Retaliation can also be interpreted as an effort to frustrate the Staff's inquiry, and inevitably reflects poorly on a firm's overall credibility and image.
 - iii. In addition, if a company's internal investigation appears to be principally aimed at identifying the whistleblower it will backfire.
 4. What does the documentary evidence tend to show about the knowledge and role of the client?
 - a. Obtain and review all relevant public filings, press releases, analyst presentations, and other public materials.
 - b. Who, if anyone, should have been on notice of potential problems? What relevant information did or did not flow through the internal channels of communication required by Sarbanes-Oxley (*e.g.*, systems for communicating material information to the CEO or CFO)? Which members of senior management did or did not receive that information?
 5. Has a material violation occurred?

- a. In Sarbanes-Oxley, Congress directed the SEC to develop standards for attorneys “appearing and practicing before the Commission in any way in the representation of issuers,” including “up the ladder” reporting rules. Specifically, an attorney must:
 - i. report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof to the chief legal counsel or the CEO; and
 - ii. if that individual does not appropriately respond to the evidence (including by adopting appropriate remedial measures or sanctions), report the evidence either to the audit committee, or to another board committee comprised solely of outside directors, or to the board as a whole.
- 6. Is there any risk of an ongoing or future violation? If so, a firm must make sure it is eliminated through remedial steps immediately.
- E. Counsel should closely supervise document collection, review, and productions.
 - 1. Early on, counsel must take steps to understand the client’s policies and practices with respect to the distribution and retention of documents.
 - 2. Procedures should be established to ensure that those in possession of responsive documents do not alter or destroy them.
 - a. Document destruction or alteration, always a serious matter, carries enhanced penalties.
 - i. Litigation hold notices or document preservation orders, including to IT and records departments and managers, should be issued and counsel should review the client’s document retention policy. The preservation order should apply to the full range of company documents and records, whether in hard copy or in electronic format, and whether they are on company servers or on employees’ cell phones, tablets, laptops or home computers. Counsel should ensure that any automatic document destruction such as e-mail deletions is overridden on the client’s IT system.
 - b. Quite apart from the criminal law implications of missing or altered documents, problems with documents can have a profound impact on counsel’s credibility with the regulator.

3. All documents should be reviewed for privilege as well as responsiveness prior to production.
 - a. Producing any privileged document may constitute a broader subject matter waiver and, even if there is confidence that the regulator will not make such an argument, it is possible that third parties may do so.
 - b. The SEC, in some cases, has taken the position that even inadvertent production waives an otherwise applicable privilege. If there is a waiver, consider taking prompt action to prevent a broader subject matter waiver and request the return of the privileged material immediately.
 4. Where appropriate, request confidential treatment for the documents that are produced to a regulator.
- F. Examine the firm's internal controls.
1. The securities laws require enhanced internal controls and channels of communication within the company, which should be examined during the course of the investigation.
 - a. The CEO and CFO (who must certify the accuracy of quarterly and annual financial reports) are responsible for designing and regularly assessing effective internal controls to ensure that material information is made known to them.
 - b. The Audit Committee must establish procedures for handling complaints received by the issuer regarding accounting and auditing matters, and provide for an anonymous system of receiving complaints from employees.
 2. Internal controls are important during an investigation in three respects:
 - a. First, the Staff will often make an examination of the firm's internal controls an important part of its inquiry.
 - i. Regulators may inquire about the operation of such controls, ask you to explain any breakdowns, and request that you take corrective action to address deficiencies.
 - b. Second, fact-gathering: Internal systems for collecting and addressing material information within the company may be a source of facts relevant to the investigation.

- i. Internal audit reports are often used as “road maps” for regulators’ investigations.
 - ii. Of course, to the extent that the firm’s legal staff was involved in the audit (as opposed to the firm’s compliance or internal audit staff), the firm may be able to rely on the attorney-client and/or attorney work-product privileges.
 - c. Third, remediation: To the extent that internal controls or reporting procedures should have captured relevant information but failed to do so, implement changes to those systems as appropriate.
 - i. Any significant breakdowns and/or corrective measures should be communicated to the CEO and CFO so that they may fulfill their duty to certify the effectiveness of the controls.
- G. Document production and scheduling issues must be addressed candidly with the regulators; delays must be explained.
 - 1. In some, but not all, instances, the regulator will be flexible about the timeframe and scope of the requests because such requests are usually drafted broadly at the outset of an investigation.
 - a. Unless delays are explained candidly, regulators will be less flexible in granting extensions and may become suspicious.
 - b. The client should never be blamed for document problems.
- H. In many cases, counsel should discuss the substance of the investigation with regulators at the outset and regularly during the course of the investigation to establish and maintain credibility.
 - 1. Consider meeting with the staff upon receiving an initial request.
 - 2. Every communication with the regulator provides counsel with an opportunity to present the client’s version of the facts and to elicit information from the regulator regarding the focus of the investigation.
- I. Consider whether to bring a matter to the attention of a regulator proactively or to make a factual presentation early in the inquiry. In considering this approach, you should ask yourself the following questions:
 - 1. Are the regulator’s suspicions so unfounded that early termination is a real possibility? Or do they have theories that can only be proved/disproved through testimony in an investigation?

2. If early termination is not realistic, will a proactive defense convince the regulator to limit the investigation to the extent necessary to corroborate counsel's presentation?
3. Do you know all relevant facts? If relevant facts and problems are not fully known at the outset, your presentation obviously could create, rather than resolve, issues.
4. How important is cooperation credit to the likely ultimate outcome?
 - a. The SEC, the CFTC and the DOJ have all taken steps recently to reinforce the notion that complete cooperation credit will only be available if the company self-reports.
 - b. DOJ has taken steps to make voluntary self-reporting more attractive to companies. In March 2018, senior DOJ officials announced that a 2017 policy incentivizing self-reporting in Foreign Corrupt Practices Act cases would be expanded as nonbinding guidance in corporate criminal cases outside the FCPA context. *See* Letter from Benjamin D. Singer to Alexander J. Willscher and Joel S. Green (Feb. 28, 2018), <https://www.justice.gov/criminal-fraud/file/1039791/download>.
 - c. The DOJ released further revisions to the FCPA corporate enforcement policy on March 8, 2019. The original FCPA policy required companies seeking cooperation credit to “deconflict,” or defer, witness interviews and other internal investigative steps upon request and in deference to the government’s investigation. Such requests were to be made for a limited period of time and narrowly tailored to a legitimate investigative purpose. The DOJ amended its policy to state that it “will not take any steps to affirmatively direct a company’s internal investigation efforts” and emphasized that it will only request deconfliction “where appropriate.” Justice Manual § 9-47.120 (2019), <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120>.
 - d. Note that courts have recently held that summaries of witness interviews offered to regulators as part of cooperation may constitute a waiver of the work product privilege. *See, e.g.*, Order on Defendants’ Motion to Compel Production from Non-Party Law Firm, *SEC v. Herrera*, Case No. 17-20301 (S.D. Fla. Dec. 5, 2017); *see also SEC v. Roberts*, 254 F.R.D. 371, 377 (N.D. Cal. 2008) (“[T]o the extent that Howrey orally disclosed to the government factual information contained in [interview notes and

memoranda], Howrey has waived the attorney-client and work product privileges with respect to that information.”).

- i. Following these decisions, counsel should consider taking measures to protect the work product privilege while maintaining a cooperative posture with the government. These measures may include:
 - (a) Reaching an agreement with the government that the disclosure of information obtained from witness interview memoranda, or other potentially privileged materials, will not be treated as a waiver of the privilege;
 - (b) Focusing oral summaries of potentially privileged materials on purely factual information or high-level conclusions and mental impressions;
 - (c) Drafting separate speaking notes for government discussions that summarize rather than quote privileged materials; and
 - (d) Documenting what was, and what was not, disclosed in discussions with the government.

J. The effect of *United States v. Connolly* on best practices in investigations, including cooperation and preservation of attorney client privilege and work product protection must be considered at the outset.

1. On May 2, 2019, Judge Colleen McMahon issued an opinion addressing under what circumstances the government will be deemed to have outsourced its investigative function to company counsel such that, for constitutional purposes, company counsel’s investigative activity is fairly attributable to the government. *See United States v. Connolly*, No. 16 Cr. 0370 (CM), 2019 WL 2120523 (S.D.N.Y. May 2, 2019).

a. Judge McMahon stated that she was “deeply troubled” by the government in effect “outsourcing” its investigation to the law firm for company, which was seeking to cooperate. She concluded that the company’s lawyers appeared to have done “everything that the Government could, should, and would have done had the Government been doing its own work” and that the internal investigation was therefore fairly attributable to the government. As a result, Judge McMahon held that the defendant’s statements to the law firm conducting the investigation on behalf the defendant’s corporate employer were effectively compelled statements to the government (under the line of cases beginning with *Garrity v. New Jersey*, 385 U.S. 493 (1967)).

2. The opinion is a warning that government lawyers have to be careful about delegating core investigative functions to outside counsel, lest they risk litigation over the question whether the internal investigation will be considered government action in which compelled statements, such as those procured during internal investigations from company employees, cannot be used against the person who was compelled to speak and could potentially taint the entire investigation under a *Kastigar* theory. By outsourcing the investigation, government agencies risk that courts may hold the interviews to have been compelled. If a court finds that the interviews were fairly attributed to the government and compelled, certain witness statements may be useable by government agencies. In the most extreme instances, cases could be dismissed if they are derivatively based on compelled statements.
3. The opinion also raises significant issues for companies seeking to obtain cooperation credit while managing an internal investigation. The company under investigation will want to avoid being viewed as an arm of the government and forced to turn over internal documents over which it would otherwise claim attorney client privilege or attorney work product protection.

K. Factors unique to the different regulators.

1. Consider the scope of an SRO's authority.
 - a. Following Exchange Act directives, FINRA and various Exchanges have adopted broad rules enforcing the securities laws as well as ethical standards, such as FINRA Rule 2010 enforcing the amorphous term "just and equitable principles of trade."
 - b. While SROs lack subpoena power, failure by a member firm or its employees to cooperate during an SRO investigation may give rise to serious and independent sanctions.
 - i. Counsel should evaluate whether the relevant witnesses to whom the SRO would likely turn are subject to the jurisdiction of the SRO.
2. SROs typically do not recognize a witness's right to assert the Fifth Amendment privilege against self-incrimination during investigations or subsequent disciplinary proceedings.
3. Most state enforcement investigations are private. However, state regulators do sometimes exercise their discretion to conduct public investigations, and state attorney generals have used press releases and leaks as a law enforcement tool and a means for political advancement.

4. State investigations often lack the formal procedures common to SEC and SRO investigations.

VI. Issues to address during the course of an inquiry.

A. Dealing with problematic documents. During the course of the inquiry, you may find a document that appears inculpatory. In such event, you need to consider whether to simply produce the document along with all others or to highlight and explain it. In making this decision, you should consider the following:

1. How likely is it that the regulator will identify the document as “problematic” if it were produced in the normal course of production without any special highlighting? It is safer to assume that the document will be identified.
2. How good is your explanation if you decide highlighted and explain it? Will it withstand scrutiny?
3. If you highlight the document, will it help the staff focus on the right issues and accelerate conclusion of the investigation? Will it enhance the client’s credibility with the Staff both in this and future investigations?
4. If you have taken a cooperative posture with the staff, the failure to highlight and deal with problematic documents can be a fatal blow to counsel’s and the company’s credibility. Regulators tend to view cooperation as an all-or-nothing proposition.

B. Interviews – employees of the client with knowledge of the matter being investigated should be interviewed as quickly as possible.

1. Support staff and administrative personnel should not be overlooked especially since regulators often focus on these more “detached” employees.
2. *Upjohn* warnings should be provided to all employees before their interviews. Counsel should communicate to the employees that:
 - a. Counsel represents the company only and not the employees personally.
 - b. Counsel is collecting facts for the purpose of providing legal advice to the company.
 - c. The communication is protected by attorney-client privilege, which belongs exclusively to the company.
 - d. The company may choose to waive the privilege and disclose the communication to a third party, including the government.

- e. Employees should keep the communication and the fact of an internal inquiry confidential.
 - 3. Failure to provide *Upjohn* warnings could result in an attorney-client relationship being formed between counsel and the employees, which would disrupt the company's ability to control the dissemination of what was discussed during the interviews.
 - 4. Counsel should examine the history of the individuals and entities involved.
 - a. Review any relevant regulatory history or internal discipline.
 - b. Pay special attention to any prior testimony.
 - c. Ensure that there is no retaliation against whistle-blowers.
 - 5. Those outside the company with potentially relevant information, such as auditors and outside counsel, should, if possible, also be interviewed.
- C. Assess reporting ramifications.
- 1. Public filings or statements.
 - a. Are any pending disclosure documents or registration statements affected by the investigation? Is there a duty to amend any outstanding disclosure statements?
 - b. Annual report must include an assessment of internal control, and quarterly and annual reports must note any significant changes in controls. Assess whether the investigation will affect these reports.
 - 2. Internal reporting.
 - a. The CEO, CFO, or any other certifying officers should be aware of relevant information that affects their certifications as to the accuracy of the financial reports.
 - b. Disclosures to audit committee and auditors.
 - i. Auditors and audit committee must be informed by CEO/CFO of *any* fraud – regardless of materiality – involving management or other employees with a significant role in the company's internal controls.
 - ii. The company must disclose to the audit committee and its auditors all "significant deficiencies" in the design or

operation of internal controls that could adversely affect the issuer's ability to process and report financial data.

D. Controlling rumors about the investigation.

1. SEC and SRO investigations are supposed to be confidential, and maintaining that confidentiality is in the client's best interests for, among others, the following reasons:
 - a. Rumors of an investigation can cause concern among employees, investors, and business partners.
 - b. Unsupervised conversations can lead to a waiver of the attorney-client privilege.
 - c. Non-privileged discussions in the company regarding the investigation inevitably create the need for testimony from additional and otherwise irrelevant witnesses, lead to more protracted examination by regulators during testimony, and may affect a witness's credibility.
2. To help prevent and limit the impact of rumors, counsel should instruct all employees who know of the investigation that it should be treated as confidential and should not be discussed with anyone other than counsel (or at counsel's direction). Limit the distribution of relevant information and documents among employees to those who "need to know."
3. In the event of a press inquiry, counsel should take the following steps:
 - a. Notify the client, and do not speak on behalf of the client without authorization.
 - b. Identify one company spokesperson who should be fully briefed as to all relevant facts and issues.
 - c. If there is a substantial risk of a press inquiry, counsel and communications experts should draft a press release and/or talking points in advance to prepare the client for a potential inquiry.

E. Consider resolution strategies throughout the investigation.

1. Through prompt and meaningful self-policing, self-reporting, remediation, cooperation, and internal discipline, a company potentially may avoid protracted and costly enforcement proceedings, negotiate reduced charges and lighter sanctions, and possibly even obtain a declination to charge the company from the regulator.

2. In addition to the seriousness of the offense, the Commission will evaluate the following critical criteria in making charging decisions:
 - a. The Commission will evaluate the manner in which the misconduct was discovered (*e.g.*, if it was discovered through a regular and systematic internal audit or by accident), and the manner in which the company responded to the discovery (*e.g.*, how the company dealt with those persons that were found to be responsible, disclosure to the government and investors, etc.).
 - b. It will evaluate the corporate environment in which the violations occurred and the degree to which the company engages in “self-policing.”
 - c. It will evaluate the remedial measures that are taken by the company to prevent future misconduct.
 - d. It will sometimes consider the company’s financial circumstances and potential collateral consequences from the filing of charges.
 - e. And, finally, the Commission will consider the company’s cooperation with the staff (including, for example, prompt self-reporting and the sharing with the staff of the results of any internal inquiries).
3. The DOJ has also continued to emphasize individual accountability in determining the appropriate resolutions of corporate investigations.
 - a. In a September 2015 memorandum, Deputy Attorney General Sally Yates announced that, in order to qualify for any cooperation credit, corporations must provide to DOJ “all relevant facts relating to the individuals responsible for the misconduct.” *See* Memorandum from Sally Q. Yates, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download> (emphasis added).
 - b. The “Yates Memorandum” has had an uncertain impact on corporate investigations since that time, and in a November 2018 speech, Deputy Attorney General Rod Rosenstein clarified DOJ’s policy so that a corporation may be eligible for cooperation credit if it identifies to DOJ those individuals the company believes are “substantially involved” in misconduct. This clarification allows DOJ to afford cooperation credit to companies that make good faith efforts to identify relevant individuals, even if the company is unable to identify all such individuals or all relevant facts concerning those individuals. *See* Speech, Rod J. Rosenstein, Remarks at the American Conference Institute’s 35th International

Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>.

4. “Piling On.”

- a. Corporate securities investigations often involve multiple regulators with overlapping jurisdiction. Counsel should take opportunities to foster coordination among investigating agencies.
- b. While it is rare, a regulator can sometimes be convinced to defer or terminate its inquiry pending the outcome of an already existing investigation by another regulator into the same matter.
- c. In May 2018, the DOJ announced a new policy discouraging “piling on,” with four main components:
 - i. First, DOJ should not “employ the threat of criminal prosecution solely to persuade a company to pay a larger settlement in a civil case”;
 - ii. Second, different components within the DOJ must “coordinate with one another, and achieve an overall equitable result,” which may include “crediting and apportionment of financial penalties . . . and other means of avoiding disproportionate punishment”;
 - iii. Third, DOJ attorneys should coordinate with other agencies investigating the same misconduct; and
 - iv. Finally, DOJ attorneys should assess four factors in considering whether “multiple penalties serve the interests of justice in a particular case,” including:
 - (i) “the egregiousness of the wrongdoing”;
 - (ii) “statutory mandates regarding penalties”;
 - (iii) “the risk of delay in finalizing a resolution”;
 - (iv) “the adequacy and timeliness of a company’s disclosures and cooperation.”

See Speech, Rod J. Rosenstein, Remarks to the New York City Bar White Collar Crime Institute (May 9, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar>.

F. Testimony.

1. The key to successful testimony is effective preparation. Proper preparation means thinking through the regulator's case, anticipating the substantive areas likely to be covered in an interview or deposition, and reviewing the witness's proposed answers to ensure that the client understands the facts and the issues.
2. Counsel must carefully consider the witness's version of the facts, and all relevant defenses, before the witness testifies. It is important to:
 - a. Reflect on the facts and develop themes that relate those facts effectively.
 - b. Develop and use testimony to help shape the staff's thinking - the witness's statements, if candid and sincere, can be more effective than counsel's arguments.
3. Joint representation of multiple witnesses may provide important strategic and economic benefits to the client.
 - a. To keep down expenses and to facilitate the sharing of information, it can be helpful for counsel to represent as many witnesses as possible, but only after an *Upjohn* interview and a determination that no conflict of interest exists.
 - b. Typically, the SEC and FINRA will not allow company counsel to attend witness testimony unless they also represent the witness. Joint representation may be appropriate, even among parties with differing interests, as long as: 1) their interests are not adverse; 2) they understand any potential conflicts and provide informed consent; 3) joint representation will not inhibit the company's ability to make full factual disclosures to the regulator; and 4) joint representation will not undermine company counsel's credibility with the regulators.
 - i. However, counsel must consider whether joint representation will create a negative impression that the company and witnesses are "circling the wagons"; *i.e.* taking steps to conform their version of the facts.
 - ii. Because the key to permissible joint representation is informed consent, the lawyer seeking to represent multiple clients must ensure, preferably in writing, that the consenting clients are aware of the implications of the joint representation. The New York City Bar Association's Committee of Professional Ethics recently issued a formal opinion to the effect that even when a joint representation

does not involve a conflict of interest between the joint clients that would require the lawyer to obtain the clients' "informed consent" to the joint representation, the lawyer must nevertheless explain the implications of the joint representation to the extent "reasonably necessary to permit the client[s] to make informed decisions regarding the representation." See Formal Opinion 2017-7, Disclosures to Joint Clients When the Representation Does Not Involve a Conflict of Interest (Dec. 12, 2017).

- iii. The lawyer must periodically reassess conflicts issues as new facts develop in an investigation.
 - (a) A joint representation may not continue if clients become adverse.

G. Joint defense agreements should be explored when joint representation is not appropriate. Joint defense agreements typically allow multiple parties to share confidential information and coordinate strategy and can facilitate a firm's ability to obtain facts during an internal investigation. Generally, for a confidential communication to be protected under a joint defense privilege, the communication must have been made in the course of and to further a joint defense effort, and the privilege must not have been waived. See *United States v. Krug*, 868 F.3d 82, 86 (2d Cir. 2017) (quoting *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)). While the agreement need not be in writing, there are some risks to an oral agreement. Indeed, a recent decision in the Southern District of New York refused to recognize the existence of such an agreement that had been struck orally, notwithstanding the numerous references to it among counsel. See *SEC v. Rashid*, No. 17-cv-8223 (PKC), 2018 WL 6573451 (S.D.N.Y. Dec. 13, 2018).

- 1. There are, however, risks involved and a company should consider the restraints placed on it by such an agreement. For example:
 - a. A company that seeks to cooperate with regulators and provide information concerning individual wrongdoers may face restrictions on the information it can share if such information was obtained pursuant to the joint defense agreement.
 - i. Of course, all information that the company developed itself, independent of any joint defense agreement, can be freely shared if it chooses to do so. Accordingly, those facts should be gathered by company counsel after *Upjohn* warnings and before any decision to represent individual employees.

- a. The Commission can draw an adverse inference from an individual's assertion of the privilege in deciding whether to proceed and may also ask a court to do the same in subsequent enforcement proceedings. *See e.g., SEC v. Herman*, No. 00 Civ. 5575(PKC)(MHD), 2004 WL 964104 (S.D.N.Y. May 5, 2004).
- b. As a result, witnesses called to testify before the SEC or a self-regulatory organization may face a difficult decision. If they testify, they risk incriminating themselves. If they refuse to cooperate, they could be sanctioned, fined, expelled or fired for failing to comply with organization or company rules.

VII. The Statute of Limitations

- A. In *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) the Supreme Court held that 28 U.S.C. § 2462, which establishes a general five-year statute of limitations for government civil penalty proceedings, applies to the imposition of disgorgement in SEC proceedings. As a result, the SEC and other government agencies are now unable to seek any kind of monetary remedy for conduct that occurred more than five years before the initiation of enforcement proceedings.
 1. Additionally, in a footnote to the *Kokesh* decision, the Court emphasized that its decision was limited to the applicability of the five-year statute of limitations, and not to the larger issue of whether the SEC actually has the authority to obtain disgorgement in enforcement proceedings in federal court. There is in fact no statute expressly authorizing the SEC to obtain disgorgement in federal enforcement actions, unlike in administrative proceedings. Historically, federal courts have ordered disgorgement as an equitable remedy, and the Second Circuit has continued to do so in upholding disgorgement awards post-*Kokesh*. In November 2019, the Supreme Court granted certiorari in *Liu v. SEC*, a Ninth Circuit case in which the appellant has argued that in light of the decision in *Kokesh* that disgorgement is a penalty, and there is no statutory authority for the SEC to seek disgorgement as a penalty, the SEC lacks authority to seek disgorgement. The Ninth Circuit affirmed the district court's disgorgement award, but the issue will now be front and center before the Supreme Court.
 2. Legislatively, Senators Mark Warner (D-Va) and John Kennedy (R-La) introduced a bipartisan bill in March 2019 designed to provide explicit statutory authority for the SEC to obtain disgorgement, subject to the 5-year statute of limitations. So far, the bill has not advanced.

VIII. Representing Supervisors

- A. Administrative proceedings instituted by the SEC staff against regulated entities and their associated persons often include charges for failing to reasonably supervise employees that violate the federal securities laws.
1. Determining whether an individual can be considered a supervisor will generally turn on the facts and circumstances of the particular case. A manager may be presumptively a supervisor with respect to those employees whom he or she has the authority and the responsibility to hire, fire, reward and punish.
 2. However, the Exchange Act does not presume that a broker-dealer's compliance or legal personnel are supervisors solely by virtue of their compliance or legal functions. Rather, the question is whether they have supervisory authority over business units or other personnel outside the compliance and legal departments.
 3. The SEC will consider whether the legal/compliance professional at a broker-dealer (i) is designated as a supervisor; (ii) has been given or assumed supervisory authority; (iii) has the power to affect another's conduct (*i.e.*, hiring/firing power); (iv) could have prevented the violation, among other factors.
 4. Compliance professionals can also be charged with supervisory failure when they had clear responsibility to implement compliance programs or policies and wholly failed to carry out that responsibility.
- B. Whenever the conduct of an employee is called into question, counsel should evaluate the potential liability of those individuals who supervised, or had the responsibility and authority to supervise, the conduct of the employee in question. Counsel should consider:
1. Whether there were any red flags raised which would have reasonably called the employee's conduct to the attention of his supervisors? If not, should there have been procedures in place that would have identified the conduct?
 2. If red flags were raised, what actions were taken by the employee's supervisors in response to those red flags?
 - a. A company should take steps to ensure that indications of a problem are taken seriously, adequately investigated, and addressed as soon as possible.
 - i. Supervisors must inquire, get help if necessary, resolve the problem, and assess the need for an increase or change in the level of supervision.

- ii. A supervisor who is unable to resolve a compliance issue on his or her own must consult with superiors. If a superior undertakes responsibility for the matter, the supervisor must stay informed about the matter and must take any further action required until the matter is resolved.
 - b. Were the supervisor's actions reasonably designed, under the circumstances, to properly identify and remedy any improper conduct?
- C. Issues to consider in representing individual supervisors.
 - 1. How clear was it that the individual had authority and responsibility to supervise?
 - 2. Explain – especially in testimony – the context in which the individual supervisor ordinarily does his/her job, so that the regulator understands the supervisor's workload.

IX. The Wells Submission Process.

- A. It is generally the policy of the SEC staff and of the SROs to offer those against whom it intends to recommend an enforcement action the opportunity to submit a Wells submission and to present their defenses. Notification by the SEC or an SRO of this intended recommendation is delivered in a non-public Wells notice.
 - 1. Historically, companies rarely publicly disclosure of their receipt of a Wells notice, and the SDNY held in 2012 that there is no duty for companies to do so. *See Richman v. Goldman Sachs Grp. Inc.*, 868 F. Supp. 2d 261 (S.D.N.Y. 2012). In recent years, however, more companies have elected to disclose the receipt of a Wells notice.
- B. Potential benefits of making a Wells submission:
 - 1. Reported statistics reflect that making a Wells submission may, in fact, have a significant influence on the SEC's decision whether to take enforcement action.
 - 2. With respect to primary violations, or in cases where the staff's case is strong, the Wells submission can mitigate the staff's case and lay the foundation for negotiating an acceptable settlement.
- C. Potential disadvantages to making a Wells submission:
 - 1. It may provide an in-depth analysis with respect to the client's defenses;
 - 2. The SEC takes the position that statements in a Wells submission can be used against the defendant in subsequent proceedings under Federal Rule

of Evidence 801(d)(2), either as a statement against interest or for purposes of impeachment;

3. They are not protected from discovery by third parties in subsequent civil litigation.
4. They may be provided to criminal authorities if there is a criminal referral;
5. They can be costly to prepare and not worth the expense if it appears likely that an acceptable settlement can be negotiated.

X. Concluding an investigation.

- A. SEC regulations give the staff discretion to give notice of the termination of an investigation.
 1. The Division of Enforcement will often give notice to anyone named in the caption of an investigation or anyone asked to submit a Wells, if no enforcement action is sought or approved.
 2. Absent extraordinary circumstances (*e.g.*, the client is about to accept a sensitive new position or is running for political office), counsel and their clients should resist the temptation to seek a notice of termination when there is doubt about whether the investigation is over. Doing so could simply refocus the Staff on what may be an otherwise languishing investigation that may have faded away.
- B. Under Dodd-Frank, the SEC is required either to file an action or conclude an investigation within 180 days of providing a Wells notice (124 STAT. 1867), although the D.C. Circuit has held that this time limit creates an internal timing directive rather than a jurisdictional bar to an action. *Montford and Co., Inc. v. SEC.*, 793 F.3d 76 (D.C. Cir. 2015).
- C. Upon conclusion of an investigation with no further action, FINRA usually provides the subject of the investigation with a written statement noting that no further action is warranted.
- D. If an SRO's enforcement staff declines to close an investigation without any further action, counsel should explore the possibility of resolution through informal disciplinary action.
 1. This typically involves the SRO sending a non-public letter to the client citing the misconduct or deficiency, and sometimes directing the client to take remedial actions.
 2. Because SROs will sometimes issue such letters without the benefit of counsel's input, counsel should anticipate this and seek to discuss its substance and tone prior to issuance.

- E. If the investigation goes forward, counsel should be aware of the extent of the SEC's enforcement powers and other possible consequences.
1. The SEC has expansive powers, including:
 - a. The ability, within its cease-and-desist authority, to bar an individual who violates section 10(b) of the '34 Act or section 17(a)(1) of the '33 Act (or rules thereunder) from serving as the officer or director of a public company. 116 STAT. 809-810. In federal court the standard for the court's decision to make the decision to bar has been lowered from "substantial unfitness" to simply "unfitness." *See* Section 21(d)(2) of the Securities Exchange Act, 15 U.S.C. § 78u (d) (2); 116 STAT. 809-810.
 - b. Also in federal court, the SEC may seek, and a court may grant, "any equitable relief that may be appropriate or necessary for the benefit of investors." *See* Section 21(d)(5) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u (d)(5).
 - c. If an issuer is about to make an extraordinary payment to any officer, director, employee, or agent, the SEC has authority to request a TRO to escrow the payments for up to 90 days; if no securities violation is charged during that time, the funds are released. Otherwise, the order remains in effect until the conclusion of legal proceedings. *See* Section 1103 of the Sarbanes-Oxley Act. 116 STAT. 807-808.
 - d. Dodd-Frank expanded the SEC's document collection powers, including the ability to compel production of certain work papers from foreign accounting firms and foreign affiliates of domestic accounting firms. Privileged information can also be shared between the SEC and other SROs without waiving the applicable privileges.
 - e. Dodd-Frank restored the SEC's ability to impose industry-wide non-retroactive "collateral bars," which prohibit securities professionals found to have violated any aspect of the securities laws from associating with any regulated entity.
 2. Penalties for securities fraud and related offenses.
 - a. Maximum penalties for willful violations of the Exchange Act: \$5 million and 20 years imprisonment for an individual, and \$25 million for an entity.
 - b. Section 807 of Sarbanes-Oxley also added the crime of securities fraud to chapter 63 of Title 18 of the United States Code with a prison term of up to 25 years.

- c. Maximum prison term of 20 years for mail and wire fraud.
 - d. A CEO or CFO who “willfully” certifies a financial report knowing it does not comply with the statutory requirements can be fined up to \$5 million and receive up to 20 years in prison.
 - e. In the event of an accounting restatement due to misconduct, the CEO and CFO may have to forfeit bonus and incentive-based compensation received during the year following the first issuance of the information being restated, along with any profits from the sale of the company’s securities.
- F. The decision whether to settle or litigate with the SEC requires a considered evaluation of several factors:
- 1. The likelihood of success on the merits;
 - 2. The question of forum: While Administrative Law Judges (“ALJs”) have been traditionally less hospitable to respondents, they have, in recent years, showed an increased willingness to disagree with the Division of Enforcement on questions of liability as well as sanctions.
 - a. In its decision in *Lucia v. SEC*, 138 S. Ct. 2044, 2048 (2018), the Supreme Court held that SEC ALJs, who were historically been appointed by SEC staff, are “Officers of the United States” and, hence, under the Appointments Clause, can be appointed only by the President or by the SEC itself. The Court further ruled that any litigant who has made a “timely challenge” to the validity of an ALJ’s appointment is entitled to a new hearing before a different, properly appointed ALJ or the SEC itself.
 - b. In addition to possibly reopening past cases, the Court’s opinion leaves open certain important issues that will have to be addressed in pending and future cases, including: i) whether the SEC’s 2017 order ratifying the prior appointments of its ALJs is sufficient to satisfy the Constitution, and ii) whether the “for-cause” removal protections afforded by statute to ALJs are constitutional.
 - c. On the enforcement front, during the year following *Lucia* the Division of Enforcement has reduced the number of actions brought as administrative cases. *See* Peter Rasmussen, *Analysis: Lack of Removal Power Could Threaten SEC ALJ Regime*, Bloomberg Law (Oct. 7, 2019) at <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-lack-of-removal-power-could-threaten-sec-alj-regime>.

3. The costs associated with litigation
 - a. The process can be a drawn-out, financially draining, and require tremendous amount of time and energy that otherwise could be dedicated to the business.
 - b. A litigation can generate negative publicity, and the SEC's allegations are usually harsher in litigated matters than they are in settled ones.
 - c. By neither admitting nor denying the allegations in a settled complaint, the client is not collaterally estopped from denying the underlying allegations in a future civil litigation.
 - i. In the last few years the SEC has insisted in certain cases that a firm or individual admit certain facts, which can create collateral estoppel in a future proceeding (although the "neither admit nor deny" formulation has remained the predominant settlement formulation).
 - ii. As a corollary to not being required to admit to any of the SEC's allegations, the SEC has also historically had a policy prohibiting settling parties from denying the allegations (referred to as a "gag rule"). In January of this year the Cato Institute filed a lawsuit challenging the "gag rule" as a violation of a defendant's right to free speech under the First Amendment. As the lawsuit progresses, it has so far had no impact on the SEC's continued practice of settling actions of a "neither admit nor deny" basis.
 - d. A finding of a violation in an SEC action may result in further action by SROs (as well as state regulators) against those individuals employed in the securities industry.
4. Is the client willing to accept the terms of a settlement?
 - a. What sanctions will be acceptable to the regulator?
 - b. What collateral consequences will the settlement terms have on the activities of the client?
 - i. Issuers and underwriters that are subject to an injunction or a C&D Order will, absent relief, lose their right to rely on a number of offering exemptions. Moreover, registered entities will have to evaluate the impact of an injunction or C&D Order under applicable SRO rules, state Blue Sky laws, ERISA, and any applicable insurance and banking regimes.

- ii. For individuals, an injunction can provide the basis for a suspension or bar from the securities industry; it also results in an automatic disqualification from serving as an officer, director, or investment advisor of an investment company.
 - iii. Lawyers, accountants, and other professionals can be barred from practicing before the SEC, with potential ramifications with respect to corresponding state licenses.
 - iv. Settlement with one regulator does not resolve uncertainty regarding the client's fate with another regulator. Settlement with the SEC does not preclude state or federal criminal prosecutions.
 - (a) Global settlements with all relevant regulators are sometimes difficult to achieve but could be sought where appropriate.
 - (b) Obtaining a global settlement may not be the best strategic approach in certain situations, however: for example, in cross-border investigations, or in other types of investigations in which it may be beneficial to resolve the demands of one particular regulator before subsequently dealing with the remaining ones.
- G. When entering into a settlement, there are basic issues that ought to be addressed regarding the settlement language.
1. Counsel can sometimes convince the SEC staff, in a settled complaint, to provide a more "neutral" (or less pejorative) description of the facts.
 2. With respect to injunctive actions by the SEC, the settlement should, where possible, resolve all collateral effects of the injunction within the SEC's jurisdiction.
 - a. For example, issuers should be particularly attentive to the fact that a settlement in which the issuer is charged with violating the antifraud provisions of the federal securities laws, or which enjoins an issuer from committing any future violations of the antifraud provisions of the federal securities laws, will result, absent a waiver from the SEC, in that issuer being barred for three years from relying upon the safe harbor for forward-looking statements.
 - b. Issuers and underwriters will, absent relief, forfeit their right to rely on certain offering exemptions.

- c. Registrants be aware of and discuss with the SEC the potential ramifications of an injunction, including the impact that it could have on their SRO memberships and their federal/state licenses.
 3. When settling administrative proceedings instituted by the SEC staff, counsel may be able to succeed in inserting a “Tager” footnote to indicate that the respondent was not aware of any wrongdoing.
 - a. Section 15(b) of the Exchange Act, the statutory predicate for imposing suspensions and bars from participation in the securities industry on the basis of, inter alia, making false or misleading statements in reports filed with the Commission, requires that the Commission find that the violation was willful—a requirement that is satisfied if a respondent is merely shown to have intentionally committed the underlying acts which constitute the violation.
 4. In settlements with SROs, counsel should make sure the settlement document clearly states that the client has entered into the settlement without admitting or denying any facts, conclusions, or allegations, and solely for the purpose of settling the SRO proceeding.
- H. Publicity associated with settled SEC enforcement actions.
 1. There will be publicity. The client should understand that the SEC will issue a public statement and that all SEC statements will include such publicity.
 2. Counsel can request the opportunity to review the litigation release describing the action prior to public dissemination. Although the staff will not usually be willing to negotiate language, they will sometimes read it to counsel so that counsel can assure accuracy and consistency with the settlement documents.
 - a. The SEC has been known to go beyond the settlement documents and include in its press release language that was negotiated out of those documents, so reviewing the language is very important.
 3. Counsel should take steps to assure that the client will know when an action is expected to be commenced and a litigation release disseminated by the SEC or SRO.
 4. The firm should appoint a spokesperson and develop a response.
 5. When settling with the SEC, the company must not make any contemporaneous statements that could be interpreted as a denial of the staff’s allegations; the staff will view this as a violation of the settlement’s terms and may take steps to vacate it. Or, the staff may insist that your client make a public retraction.