

GIR KNOW-HOW SECURITIES & RELATED INVESTIGATIONS

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# USA

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## Regulatory environment

### 1 What are your country's primary securities or related law enforcement authorities?

The primary enforcement authorities for securities and related law in the United States exist at both the federal and state level.

At the federal level, securities and related laws are enforced by the Securities and Exchange Commission (the SEC), Commodities Future Trading Commission (the CFTC), and Department of Justice (DOJ). The SEC is the nation's primary securities law enforcement authority. The SEC is organised into five separate divisions, with the Division of Enforcement responsible for investigating potential securities law violations, making recommendations on whether to proceed with enforcement actions, and prosecuting them on behalf of the SEC. The CFTC is responsible for oversight of commodities markets, certain options contracts and other derivatives. Like the SEC, the CFTC's Enforcement Division is responsible for investigating and prosecuting violations of the securities laws within its jurisdiction. Neither the SEC nor the CFTC can prosecute criminal violations of securities laws or related laws. The DOJ investigates and prosecutes criminal violations of securities laws, including securities fraud, violations of the Foreign Corrupt Practices Act (the FCPA), and insider trading.

In addition to the federal securities laws and regulators, each state has states securities laws, known as blue sky laws, that regulate the offer and sale of securities within that state. States regulate and enforce their blue-sky laws through their own securities law regulators.

In addition to government law enforcement authorities, self-regulatory organisations (SROs), such as the Financial Industry Regulatory Authority, National Futures Authority, stock exchanges, and the Public Company Accounting Oversight Board enforce certain securities laws and regulations and have the authority to refer securities violations to government regulators and to sanction their members. Sanctions imposed by SROs can include fines, suspensions and expulsion.

### 2 What are the principal violations or legal issues that the securities or related law enforcement authorities investigate?

Some of the most commonly investigated issues include:

- fraud, such as insider trading, market manipulation, theft of client assets, deceptive statements and other deceptive conduct;
- unregistered securities offerings, which can include unregistered sales of digital assets;
- inadequate or misleading disclosures in securities offerings, public company filings, proxy statements, and information provided to clients by broker-dealers and investment advisers;
- accounting violations, internal financial controls violations, and financial reporting violations;
- books and records violations by broker-dealers and investment advisers;
- compliance policy and supervisory policy violations (registered broker-dealers and investment advisers are required to have and enforce such written policies);
- foreign corruption and bribery;
- lying to auditors; and
- SRO standards of conduct.

### 3 If there is more than one authority involved in a securities or related investigation, how is jurisdiction allocated? What is the interplay between the securities regulator and the public prosecutor?

Federal and state authorities have concurrent jurisdiction to enforce their own securities laws. Within the federal system, with limited exception, the jurisdiction of the SEC and CFTC do not overlap, although agencies do coordinate on investigations that involve cross-jurisdictional issues. DOJ has sole authority to prosecute criminal violations of securities laws, although other authorities may refer criminal matters to DOJ. Both the SEC and CFTC have authority to initiate administrative and civil enforcement proceedings for violations of the securities laws that they promulgate and enforce.

When multiple law enforcement authorities investigate and prosecute individuals or entities for similar conduct, it is known as a "parallel proceeding". Although agencies investigating the same conduct can generally share information with each other, the DOJ is prohibited from sharing grand jury material with other agencies. In addition, the DOJ can seek to stay civil enforcement proceedings initiated by the SEC and CFTC to protect a criminal investigation.

#### **4 Do the securities or related law enforcement authorities have investigatory powers? Can they bring administrative, civil or criminal proceedings?**

Yes.

The SEC and CFTC's Enforcement Divisions investigate possible violations of federal securities laws. If enforcement staff determines that a securities law is violated, the agencies may prosecute those violations by initiating administrative proceedings or civil proceedings in federal district court. Only the DOJ can investigate and prosecute federal criminal violations of securities laws. These criminal actions are brought in federal district court.

State authorities can also initiate criminal, civil or administrative proceedings.

SROs also have wide authority to investigate members' violations of their rules. Although SROs' rules vary, generally, if the SRO enforcement division determines a violation has occurred, it can bring an administrative action before a hearing officer, an independent division within the SRO, which determines if a violation has occurred and the appropriate sanction. Those decisions are subject to review by the SEC.

#### **5 Are regulatory or criminal securities and related investigations public? Under what circumstances?**

Generally, regulatory and criminal investigations are not made public by the investigating agency.

Typically, an investigation only becomes public after the investigation has concluded and a public proceeding is commenced. In many cases, a resolution of the case is announced at the same time as the announcement of the proceeding. For regulatory agencies such as the SEC or CFTC, investigations generally become known when the agency begins an administrative or federal court action, possible with a related settlement. Similarly, the DOJ's investigation will become public when the DOJ files its charging document (grand jury indictment or criminal complaint) and, if applicable, it is unsealed. Enforcement authorities will often issue a public press release announcing the initiation or resolution of an enforcement matter. In the case of an SRO, its investigation generally becomes public after the SRO's enforcement staff issues a complaint setting forth the alleged securities laws violations.

Although enforcement authorities typically maintain the confidentiality of an investigation until an action is brought, entities under investigation may choose to publicly disclose that they are under investigation.

#### **6 Are regulatory or criminal securities and related investigations targeted at the company or the individuals involved, or both?**

Both.

Civil and criminal securities investigations and prosecutions may be directed at companies and the individuals potentially involved in the conduct. Increasingly, there is a focus on individuals responsible for the violations of a company.

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## **Investigation procedure**

#### **7 How do the securities and related law enforcement authorities typically begin an investigation?**

Government investigations may be initiated based on information from a variety of sources, including, whistle-blower tips or complaints, news reports, a company's investors, a company's competitors, media reports, a complaint in a private lawsuit, a cooperating witness in an unrelated matter, self-reported conduct by the company, a referral from another governmental agency or SRO, a company's auditors, the results of a company's regulatory examination, or surveillance of market and trading data. Increasingly, agencies such as the SEC are using data analytics to identify potential violations based on information filed by regulated entities and public companies.

When the SEC or CFTC believes that there is a possible violation of the securities laws, the agency will begin an informal investigation. During this informal investigatory period, the agency's staff engages in an information-gathering process in which it can request documents or information on a voluntary basis. If that information supports the existence of a possible securities law violation, enforcement staff will request that the agency (or senior personnel) issue an order authorising the staff to conduct a formal investigation. If granted, this order authorises the issuance of subpoenas to compel production of documents and testimony.

The DOJ may also begin its investigation with an informal request for voluntary production of documents or information. Alternatively, the DOJ may also issue formal grand jury subpoenas to compel the production of information or testimony to facilitate its investigation.

SROs typically initiate their investigation through staff requests for information from member firms. Under SRO rules, members must provide information requested by the SRO. Failure to do so can result in expulsion from membership.

## **8 What level of suspicion of wrongdoing is required for the securities or related law enforcement authorities to begin an investigation?**

Generally, the threshold for opening an investigation is low. For example, the SEC does not need to determine that the violative conduct involves a “security” before initiating an informal investigation. The SEC and CFTC can initiate an informal investigation if enforcement staff determines that it has sufficiently credible information that may lead to an enforcement action. Agencies generally will not, however, authorise a formal investigation unless they determine that there is a likely violation of federal securities laws that merits the expenditure of agency resources. In some cases, however, the passage of time without a conclusion as to whether a violation is likely may result in a decision to convert of an ongoing informal investigation into a formal investigation. DOJ attorneys typically have broad discretion to manage their own investigations.

Like regulatory agencies, an SRO’s enforcement staff will determine whether to initiate an investigation based on information received from a variety of sources, including complaint, review of trading information received from members and results of regulatory examinations. Enforcement staff have broad discretion to determine whether the evidence justifies initiating an action before a hearing officer.

## **9 May the securities or related law enforcement authorities conduct dawn raids? Does this depend on the nature and seriousness of the allegations?**

No.

The US Constitution’s Fourth Amendment prohibits law-enforcement raids, searches or seizures without a warrant or probable cause to believe that exigent circumstances exist. To obtain a warrant, federal law enforcement authorities must go before a federal court and show probable cause of unlawful conduct. Nothing, however, prohibits law enforcement investigators from appearing unannounced and asking for the voluntary provision of information.

## **10 Must the findings of a company's internal review be reported to the securities or related law enforcement authorities? When and under what circumstances?**

Generally, no, although there are exceptions for companies that are US government contractors.

One law that requires a company to self-report a potential securities law violation is section 10A of the Exchange Act. That provision requires a company’s audit firm to report to a company’s management and audit committee or board certain violative conduct that it discovers in the course of its audit. If the audit firm determines that the issuer’s board has not taken appropriate remedial actions and that failure will cause the auditor to depart from its standard report, then the auditor must report that conclusion to the company’s board of directors. A company whose board receives that letter, called a 10A letter, must report receipt of the letter to the SEC. If the company does not report to the SEC, then the auditor must do so or resign from the engagement.

## **11 Are whistleblowers a frequent source of information for securities and related investigations?**

Whistle-blowers are a frequent source of information for securities investigations. Both the SEC and CFTC have established whistleblower programmes that provide substantial financial incentives for whistleblowers to report violations of securities laws. Since 2010, the SEC’s enforcement actions based on whistleblower tips have resulted in over \$2.5 billion in ordered financial remedies. In 2020 alone, the SEC issued approximately \$175 million in whistleblower awards, and the CFTC issued approximately \$20 million in whistleblower awards.

## **12 Describe the typical phases of a securities or related investigation in your country.**

An investigation’s life cycle has several phases some of which can overlap: (i) initiation; (ii) fact gathering; (iii) proposed enforcement recommendation and response (iv) final enforcement decision; (v) settlement or litigation; and (vi) resolution.

An investigation is triggered after the agency receives information that a securities law violation has occurred.

After the agency receives information about the potential securities violation, the agency begins the fact-gathering process. During this phase, the agency may issue subpoenas or requests for voluntary provision of documents, information, or testimony. Using the information it has gathered, the staff of the agency concludes its investigation and makes an initial determination of whether to recommend an enforcement action. The parties may also engage in settlement discussions before or after any response to the proposed charges. If the staff recommend an enforcement action, the agency must approve the action and determine whether to bring the action in federal court or an administrative proceeding.

### **13 What are the mechanisms by which a securities or related law enforcement authority may cooperate and coordinate with authorities outside your jurisdiction?**

Through the Multilateral Memorandum of Understanding (MMoU), the SEC and CFTC have agreed to cooperate and share information with foreign law enforcement authorities for enforcement, supervisory, and other purposes. The 121 signatories to the MMoU agree to allow other parties to use shared information in enforcement proceedings, provide the information to SROs and criminal authorities, and maintain the confidentiality of shared information. In 2019, the CFTC and SEC entered into the Enhanced MMoU with nine other international financial regulators. The Enhanced MMoU authorises signatories to obtain testimony and telephone and internet service providers' records in other parties' jurisdictions.

The DOJ can request or obtain evidence from a foreign jurisdiction pursuant to voluntary requests, executive agreements, mutual legal assistance treaties (MLATs), letters rogatory or the Hague Evidence Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. The DOJ can also assist state enforcement authorities with extraterritorial requests.

### **14 Will a securities or related law enforcement authority take into account findings by a law enforcement authority outside your jurisdiction in the course of its investigation?**

US law enforcement authorities may consider foreign judgments or law enforcement authorities' findings. Furthermore, foreign judgments or findings may have evidentiary value in the US if the person against whom the judgment or findings were made had notice and an opportunity to be heard. Specifically, these findings may impact elements of a US violation; they may also serve as a basis to disqualify a regulated person or entity from acting as a broker dealer, investment adviser or an associated person of such an entity. Broker dealers, investment advisers and those individuals associate with them are required to report certain actions and findings by non-US law enforcement authorities.

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## **Document production**

### **15 What can the securities and related law enforcement authorities require to be produced as part of an investigation? Do the powers of a regulator differ from those of the public prosecutor?**

As part of an investigation, securities and related law enforcement authorities, through their subpoena power, can require a company or individual to produce virtually any potentially relevant document, regardless of how stored. Document is typically defined very broadly to capture virtually any type of hard copy or electronically stored information that can include, among other hard to capture data, text messages and voicemails. One exception to this broad right to seek documents relates to documents subject to the attorney-client privilege or protected under the work product doctrine.

The DOJ may also obtain search warrants that entitle them to seize a broader range of information consistent with legal standards applicable to search warrants. Unlike civil law enforcement authorities such as the SEC, the DOJ can seize an entire computer or mobile device pursuant to a properly issued warrant. The DOJ is then free to review the entire contents of the devices, again subject to the protection of the attorney-client privilege and work product doctrine. The DOJ addresses privilege issues by using a "taint team" to first review the contents of the seized device to segregate privileged information. The balance of the information is then made available to those involved with the actual criminal investigation.

### **16 Will a litigation hold or will other instruction to preserve documentation need to be issued? When?**

There is a duty to preserve evidence when litigation becomes reasonably foreseeable. What that means is open to interpretation and different US courts interpret the requirement differently. In practice, companies and individuals should act to preserve all potentially relevant evidence with litigation or document holds as soon as an informal information request or a subpoena is received. They must make reasonable efforts to preserve hard copy documents and electronically stored information, including suspending applicable document retention policies and auto-delete functions.

## **17 Can the securities and related law enforcement authorities request the production of materials protected by attorney-client privilege or work-product doctrine? Can the securities and related law enforcement authorities use protected materials if it obtains them from third parties?**

While securities and related law enforcement authorities are entitled to request the production of such information, they cannot compel production of attorney-client privileged information or information protected by the work product doctrine. The SEC and the DOJ take different approaches on this issue. The SEC has established a procedure for requesting that a party waive its privilege or work product protection. In contrast, DOJ official policy precludes requesting a waiver of the privilege although a party may voluntarily choose to waive. Both the SEC and DOJ will consider a decision to waive when evaluating cooperation credit.

Once exception to the general rule that the authorities may not compel a waiver arises when a party asserts that they relied on the advice of counsel as part of their defence to enforcement claims. In that circumstance, the government will seek to obtain the substance of the legal advice on which the party relies.

## **18 How is confidential information or commercially sensitive information treated by the securities and related law enforcement authorities?**

Securities and related law enforcement authorities will maintain the confidentiality of information provided to them during the course of an investigation but companies and individuals should request confidential treatment of that information under the Freedom of Information Act (FOIA) following procedures specified for making such requests. Different law enforcement agencies have different processes for requesting confidentiality that parties should follow when making requests for protection. Some states have similar laws that permit requests for confidential treatment of commercially sensitive information.

Confidentiality is not absolute. The SEC, for example, is allowed by law to share information it gathers in investigations with other law enforcement agencies, for example, the DOJ. In addition, under FOIA, members of the public can request access to information obtained by the SEC, including information for which confidential treatment was requested, although such requests may not be granted and the party providing the information will have a chance to object to any disclosure.

## **19 Can the target of a document request exercise a right not to produce?**

A corporation or individual may exercise a right not to produce documents if the document request seeks information on a voluntary basis. When a corporation receives a subpoena, it generally cannot exercise a right not to produce, although can challenge the scope of an overbroad subpoena and seek a court order narrowing its terms or even quashing the subpoena. An individual can also challenge the scope of a subpoena or seek to quash it. In addition, an individual can exercise a right not to produce documents by asserting his or her rights under the Fifth Amendment to the US Constitution under the “act of production doctrine”. The act of production doctrine allows individuals, and certain businesses (such as sole proprietorships), to refuse to produce documents where the actual act of producing the documents would tend to incriminate the individual, separate from the content of the documents. The act of production doctrine is complex, however, and there are certain limits that could require production of certain types of documents.

## **20 Do any data privacy, bank secrecy or other laws restrict the production of materials to a securities or related law enforcement authority in your jurisdiction? An authority outside your jurisdiction? May the company under investigation provide personal or bank customer data on a voluntary basis?**

While the US does not have a single data protection regime, various data privacy, bank secrecy and other state and federal laws may restrict the production of materials, regardless of whether the company under investigation wishes to provide them on a voluntary basis. For instance, certain privacy rules under the Health Insurance Portability and Accountability Act (HIPAA) only permit disclosure of protected health information (PHI) by “covered entities” to the government pursuant to a HIPAA subpoena, and only in certain circumstances. Similarly, the Right to Financial Privacy Act recognises that financial institution customers can expect a certain degree of financial privacy protection from government scrutiny, and prohibits disclosure of financial records (in most circumstances) without authorisation, a subpoena or a search warrant. Moreover, many companies in the US may also be subject to the European Union’s General Data Protection Regulation (GDPR) given the extraterritorial reach of the legislation and often need to comply with its restrictions even if the data being sought is stored on servers in the US. As such, practitioners should ensure they consider all applicable laws impacting a company’s ability to produce materials to a regulator prior to making the production.

## **21 Are there any data privacy, bank secrecy or other laws that restrict where documents or other communications may be stored or reviewed for the investigation?**

While there are no general restrictions on where documents or communications may be stored or reviewed for investigative purposes, certain privacy or other laws may place restrictions on how such sensitive personal information must be handled. DOJ policy states that PHI must be securely maintained, with access to such information limited to only those with a need to review it, and the information destroyed or returned to the producing party as soon as the need for the information has ended. Information provided by financial institutions to FinCen via suspicious activity reports (SAR) can be used by the SEC to identify individuals in violation of federal securities laws, but the SEC must separately store the documents and take care to protect the sensitive information within them. Similarly, access to personal information that is subject to GDPR protections must be limited and may require additional safeguards to protect the information and ensure it is not being used beyond the purpose for which it was collected.

## **22 Are the securities and related law enforcement authorities able to obtain documents from outside the country?**

Typically, the SEC, DOJ and other US regulators will ask a party to assist in obtaining information located outside of the US on a voluntary basis. Regulators may also issue subpoenas to compel the production of documents within the party's custody and control, even if the data is located outside of the US – by sending a subpoena to a US parent company for information regarding one of its wholly owned foreign subsidiaries.

As noted in question 13, the SEC, CFTC and DOJ can also request or obtain evidence from their counterparts in foreign jurisdictions through a variety of channels. The newly passed Anti-Money Laundering Act of 2020 also expanded regulators' ability to serve subpoenas on foreign banks that maintain correspondent accounts in the US to obtain records of the correspondent account, or any account at the foreign bank, including those maintained outside of the US, that are the subject of an investigation into criminal violations, civil forfeiture actions, certain Bank Secrecy Act violations or certain Treasury administrative investigations.

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## **Witness interviews**

### **23 Will the securities and related law enforcement authorities conduct witness interviews? If so, will the interviews be on the record? Will the interviews be made public?**

Securities and other law enforcement authorities often conduct witness interviews as part of their investigative processes. When the interviews are voluntary, the SEC and CFTC may not require the witness to testify under oath on the record although a witness may choose to do so voluntarily. The DOJ also conducts voluntary witness interviews. During voluntary interviews, witnesses are free to decline to answer questions and may also end the interview at any time.

Once the SEC or CFTC have started a formal investigation, the staff of those agencies can issue subpoenas to compel witness testimony. Subpoenaed testimony will take place on the record and under oath. Even when the SEC or CFTC staff has authority to subpoena testimony, it may choose to conduct witness interviews off-the-record for strategic reasons. In criminal matters, the DOJ can compel testimony through grand jury subpoenas.

The SEC, CFTC, DOJ and related law enforcement authorities generally do not make the fact of witness interviews public. The witness, however, is generally free to disclose the fact that he or she was interviewed. In addition, companies may choose to disclose the existence of a government investigation, including that the government has taken testimony.

The substance of the interviews conducted by these government authorities does not generally become public. After the SEC or CFTC brings an enforcement proceeding, the company or individual sued will receive access to on-the-record witness statements either through a voluntary disclosure by the SEC staff or through the discovery process. The DOJ will provide the person or entity charged with certain witness statements and testimony consistent with the discovery rules that govern criminal proceedings. If the matter proceeds to trial, the content of witness interviews may become public if they are introduced into evidence.

### **24 Can witnesses exercise a right not to testify? Will any adverse inference be drawn if they do so?**

Any individual, even if subpoenaed to testify, can assert his or her Fifth Amendment rights under the US Constitution and decline to answer questions posed by securities and related law enforcement authorities.



In civil cases, an adverse inference can be drawn against an individual who asserted his or her Fifth Amendment rights although the court or jury can decide not to draw any such inference. In a criminal case, no inference can be drawn against a witness who asserts his or her Fifth Amendment constitutional right not to testify.

## 25 Do witnesses receive separate counsel? Who provides counsel for witnesses?

While witnesses are entitled to have separate counsel in an investigation, there is no general requirement to provide counsel to a witness other than in criminal cases where the witness is charged with a criminal offence and unable to afford counsel. Some companies have by-laws or governance rules that require the company to provide counsel for employees who are witnesses in investigations. This is often the case for officers and directors of companies. The costs of such representation may be covered by D&O insurance.

Whether a witness chooses to obtain separate counsel can depend on whether his or her interests are aligned with the interest of other witnesses or the company involved in the investigation. Where interests are aligned, it is not unusual for counsel to represent more than one witness, provided that there is appropriate disclosure to each of the jointly represented individuals and legal ethics rules are satisfied on potential conflicts of interest. Jointly represented witnesses and their counsel should anticipate that the lawyers for the government will ask questions to confirm that the witness understands the issues with multi-party representation. In at least one matter, the SEC successfully had counsel removed from representing multiple parties due to conflict issues.

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## Advocacy

### 26 Can the target of a securities or related investigation challenge the investigation in court while the investigation is ongoing?

Other than potentially challenging the scope of a subpoena issued in an investigation, in most instances – particularly in the civil context – the person or entity subject to investigation must wait until charges are actually brought before mounting a challenge to the government’s investigation in court. Challenges to administrative subpoenas issued by agencies such as the SEC rarely succeed because of the breadth of the agency’s civil investigative powers.

In a criminal context, however, a subpoena issued by a grand jury (a group of citizens empowered to investigate potential criminal conduct based on evidence presented by the state and determine whether probable cause exists for charges to be brought) may be challenged on certain limited grounds such as procedural deficiencies, unreasonably intrusive or oppressive requests, requests for information subject to the attorney-client privilege or requests that would violate the target’s privilege against self-incrimination. In practice, these challenges may serve to limit the information sought by the government, but do not serve to dismiss the investigation entirely.

### 27 What opportunity will there be to respond to a securities or related law enforcement authority’s theories or allegations prior to the authority bringing charges?

Parties under investigation will typically have numerous opportunities – both formally and informally – to respond to the regulator’s theories or allegations prior to charges being brought. The initial stage of the regulator’s investigation is a fact-finding exercise, and SEC or DOJ staff may ask to meet with, interview, or even take voluntary testimony from certain individuals who are viewed as having relevant information or potentially having violated securities or related laws. They may also ask to meet with counsel to address specific questions they have regarding certain facts or circumstances during this stage, or, as the regulator gets closer to making a decision as to whether or not to bring charges, permit counsel to present arguments as to why charges are not appropriate. Counsel can also proactively seek to meet with the investigators at any stage of the investigation to present information in an effort to respond to the issue in the investigation and persuade the regulators that there are no violations.

Defence counsel may also request an opportunity to provide an attorney proffer or a client proffer. In an attorney proffer, defence counsel meets with the government and presents what their client might hypothetically state if made available for an interview. Attorney proffers may be useful as they can provide defence counsel with an opportunity to assess the government’s reaction to the defence’s theory of the case while limiting the risks to the client should the matter proceed. In a client proffer, the client (or client representative) would agree to meet with the regulator and answer questions, pursuant to a proffer agreement that provides some protections against the government’s use of the client’s statements in later proceedings. In DOJ cases, a client proffer is often a prerequisite to the government’s willingness to resolve a matter via a cooperation agreement, non-prosecution agreement or deferred prosecution agreement.



Sometimes, prior to formally notifying a party that the SEC believes it has sufficient evidence to bring charges (known as a “Wells Notice”), the staff may invite a party under investigation to submit a “white paper” or engage in “pre-Wells” meetings to narrow the anticipated legal theories of liability and test the likely defences to the staff’s theories. A white paper submission or a pre-Wells meeting may prevent a Wells Notice if the defence counsel presents strong legal arguments, new facts or compelling analysis demonstrating defects in the staff’s preliminary theories.

At some point, the SEC staff may determine that they have sufficient evidence to recommend formal charges against a party and will formally notify the party under investigation of their intent through the issuance of a Wells Notice. During the Wells process, SEC staff are often more forthcoming about their view of the facts and their theories of the case and defence counsel may submit formal responses to the Wells Notice. defence counsel will also typically have at least one opportunity for a Wells meeting in which they can present the defence’s view of the case to senior staff. The staff may modify or drop the charges it included in the Wells notice and Commission may decline to pursue some or all of the charges that the staff preliminarily recommended against a party based on the evidence presented and arguments made during the Wells process.

## **28 What form does the advocacy with a securities or related law enforcement authority typically take?**

As outlined in question 27, advocacy can occur in many forms, whether via informal discussions by phone or written submissions or presentations. Advocacy should begin from the first point of contact with the regulator – from working to narrow the scope of the documents requested to presenting defence counsel’s view of the facts and circumstances at issue via proffers and/or Wells submissions.

## **29 Are statements or advocacy positions taken by an investigated party during the investigation process deemed admissions and binding in future proceedings? Would such statements be made public?**

An investigated party should always be aware that statements made by it makes to a government regulator may be admitted and used against it in future proceedings. The extent to which such statements are admissible, however, will vary based on the content and subject matter of the statement. White papers and responses to Wells Notices submitted to the SEC will be admissible in future proceedings and discoverable by third parties. While statements made during the course of plea negotiations or settlement discussions are usually inadmissible in court, certain statements may be admissible in a later proceeding as a prior statement or an opposing party’s statement.

As noted in question 23, statements provided to the SEC and other regulators during an investigation typically do not become public except in limited circumstances. This may include disclosure if the statements are introduced as evidence in later court proceedings or if a third party seeks to obtain the statements by submitting an FOIA request. However, parties under investigation typically request that any documents or information provided to the government be treated as confidential and exempt from disclosure pursuant to certain FOIA exemptions. By requesting such treatment, the investigated party will usually have an opportunity to challenge the request for disclosure.

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## **Timing**

### **30 What is the limitation period for charges for securities and related violations?**

Under the Dodd–Frank Act, the statute of limitations for criminal prosecutions of the federal securities laws is six years. For civil enforcement matters, the statute of limitations is five years. However, the recently enacted National Defense Authorization Act established a default five-year statute of limitations period for disgorgement claims, and a 10-year statute of limitations if the disgorgement claim involves conduct that violates certain antifraud provisions of the securities laws. The National Defense Authorization Act also established a 10-year statute of limitations for “any equitable remedy”, including injunctions, bars, suspensions and cease-and-desist orders, starting from the last date on which a violation that gave rise to the remedy occurred. No showing of intent or knowledge of wrongdoing is required. These statutes of limitations impact future actions and proceedings, as well as actions and proceedings that were pending at the time National Defense Authorization Act was passed.

### **31 When does the limitation period begin to run?**

Generally, the limitation period begins to run once the misconduct occurs. For claims involving conspiracy, the limitation period begins to run upon completion of the last overt act in furtherance of the conspiracy.

### 32 What can suspend the running of the limitation period? Can the securities and related law enforcement authorities request a tolling agreement?

The running of the statute of limitations can be tolled in certain circumstances. Regulators may ask that investigated parties enter into an agreement to suspend the running of the limitation period pending their investigation, particularly if they believe that a limitations period might run out during the course of an investigation. Common law in the jurisdictions at issue may also toll the statute of limitations. For instance, equitable tolling is a common law doctrine that may be sought in a civil action that permits a court to extend a statute of limitations in certain instances to prevent inequity, even if the limitations period might have otherwise expired. Equitable tolling is, however, an extraordinary remedy that generally requires a showing that the government (or other litigant) was diligently pursuing the matter and some extraordinary circumstances stood in its way.

Courts are split as to whether equitable tolling may be applied in criminal actions. The DOJ may, however, request a court order to suspend a statute of limitations pending its pursuit of evidence located abroad. The statute of limitations will also be tolled should the defendant be fleeing from justice.

There are other circumstances under which the running of the statute of limitations can be suspended including fraudulent concealment by the defendant of the violative conduct, the existence of a continuing violation and a fugitive defendant.

### 33 How long does a securities or related investigation typically take?

There is no prescriptive period for a securities investigation. Numerous variables can impact the length of an investigation including the scope and complexity of the issues involved, whether the issues involve alleged misconduct in other jurisdictions, the regulator's ability to collect and review evidence in a timely manner, the cooperation of the parties under investigation, and the capacity of the regulatory staff conducting the investigation. In its 2020 Annual Report, the SEC stated that on average it takes 21.6 months to complete an investigation and bring charges, except in financial fraud and issuer disclosure cases where the average time is 34 months.

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## Resolution

### 34 What is the process for closing an investigation if the investigation does not reveal a violation of securities or related laws? Will the securities or related law enforcement authorities provide written confirmation that the investigation is closed without action?

In the context of SEC investigations, the enforcement division will close investigations as soon as it becomes apparent that no enforcement action will be commenced and will send a written termination notice informing the investigated party. In the context of DOJ investigations, the process for closing investigations depends on the office handling the investigation and the nature of the matter. As for other federal agencies, SROs and state-based attorney general or regulatory agencies, practices will depend on the policy of the authority.

### 35 How will the resolution or settlement process be initiated?

In the context of SEC investigations, enforcement division staff have discretion to engage in settlement discussions and will typically do so in connection with the Wells process, although any tentative settlement agreement will require authorisation by a majority of the Commission. In the context of DOJ investigations, settlement discussions may be conducted by the office handling the investigation, but the office with authority to approve a settlement agreement will depend on the nature and amount of the claim, as set forth in DOJ regulations. As for other federal agencies, SROs and state-based attorney general or regulatory agencies, the process will vary depending on the authority's structure and internal policies.

### 36 Who decides whether to proceed with charges and what charges to select?

At the SEC, charging decisions are made by the Commission after evaluating recommendations from the Division of Enforcement. If the enforcement staff recommends an action, it prepares an "action" memorandum for Commission review. The action memorandum sets forth the proposed charges, the basis for those charges and the recommended action. The action memo is first provided to other relevant divisions of the Commission for input and then presented to the Commission. After the memo is presented to the Commission, the Commission will meet with the staff to discuss the recommendation and vote to approve or reject the recommendation. A majority vote by a quorum of commissioners is required to approve the recommendation.

DOJ's approval requirements depend on the nature of the case, the amount in dispute, and what DOJ office originated the action. In matters originated at the main office in Washington, DC, action is evaluated and approved by a DOJ component unit, based on the subject-matter of the action. In matters originated at local United States Attorneys' Offices (USAO), the authority is context dependent. For criminal enforcement actions, the USAO has plenary authority, subject to narrow exceptions for sensitive matters such as cases involving national security or foreign governments. For civil enforcement actions, the USAO has authority for actions concerning no more than \$10 million in value and is also subject to a broader set of subject-matter restrictions. When an action is outside of the USAO's authority, it must seek approval from the relevant DOJ component unit in Washington.

For other enforcement authorities, approval requirements will vary depending on the authority's structure and internal policies.

### **37 What factors would a securities or related law enforcement authority consider in selecting charges and the severity of any penalty or fine?**

The Exchange Act specifies certain levels of penalties for certain types of conduct, including insider trading. The more severe the conduct, the higher the minimum penalty. The penalty tier will depend on whether the conduct involved fraud and whether it involved substantial losses or created a risk of substantial losses.

Separately, federal agencies, state agencies and SROs have internal guidelines to help staff evaluate charges and penalties, which vary by entity. These guidelines typically direct staff to consider factors such as: (i) the nature and seriousness of the offense, (ii) deterrent effect, (iii) the defendant's culpability in connection with the offense, (iv) the defendant's history of misconduct, (v) the defendant's willingness to cooperate with authorities, (vi) the defendant's personal circumstances, (vii) the interests of victims, (viii) collateral consequences from the action, (ix) agency enforcement priorities, and (x) whether other authorities would be better suited to bring the action. Agencies that are also substantive market regulators, such as the SEC and CFTC, will be particularly sensitive to factors such as the impact on systemic market integrity and investor protection.

### **38 What remedies can the securities or related law enforcement authorities consider? How are penalties calculated?**

Remedies vary by enforcement authority and the nature of charges brought, and can include civil monetary penalties, equitable remedies, criminal monetary penalties and imprisonment. For example, the SEC can impose (i) civil monetary penalties over \$1 million per violation depending on the nature of illegal conduct, (ii) undertaking and conduct-based injunctions, (iii) officer and director bars against individual defendants, (iii) revocation of registration and/or licences, and (iv) disgorgement of illegal profits. The DOJ can invoke a broad array of civil and criminal remedies, including the ability to bring civil causes of action for certain criminal violations that involve or affect federally insured financial institutions and agencies, which can amount to over \$5 million per violation, and in criminal cases, restitution and penalties of up to twice the monetary gain from the offence.

### **39 Do illegal profits have to be disgorged, and if so, how are they determined?**

Pursuant to US Supreme Court decision, *Liu v. SEC*, 140 S. Ct. 1936 (2020), disgorgement remedies are calculated based on the net profits from the illegal activity. Legitimate business expenses are to be deducted from any receipts of the illegal profits, unless the entire business enterprise is based on illegal activity.

### **40 Can criminal charges be brought against companies in your jurisdiction for violations of securities and related laws?**

Criminal prosecution of companies is available under both federal and state laws. The DOJ is responsible for prosecuting criminal violations of federal securities and related fraud laws. State laws against securities fraud, known as "blue sky" laws, also commonly provide for criminal penalties. Companies may also be prosecuted for the actions of employees when the illegal conduct was motivated at least in part to benefit the company.

### **41 Will the securities and related law enforcement authorities provide a reduced penalty for cooperation? What standard will the authorities use when taking into account any cooperation?**

Yes, securities and related law enforcement authorities will typically provide cooperation credit, although the precise standard used will vary depending on the internal policies of the authority. In general, however, authorities will consider (i) the timeliness

of the assistance; (ii) whether the assistance was voluntary; (iii) the nature and extent of the assistance; (iv) the strength of the company's compliance programmes; (v) the thoroughness of the company's internal investigation; and (vi) remedial steps taken by the company in response to identifying the misconduct, such as appropriately disciplining employees responsible for the misconduct and implementing reforms to reduce future risk of misconduct.

#### **42 Are deferred prosecution agreements or non-prosecution agreements permitted?**

Yes, both are permitted and the SEC and DOJ use such agreements. Under a deferred prosecution agreement (DPA), the government will file charges against the defendant, but will agree to defer prosecution and dismiss the charges if the defendant complies with the terms of the DPA, which typically require the defendant cooperate with the authorities and to take certain remedial measures over a period of time. By contrast, a non-prosecution agreement (NPA) is an agreement in which the government agrees not to file charges in exchange for the defendant's compliance with the terms of the NPA. The government will also require the defendant to agree to a statement of facts and to waive certain trial-related rights, such as the federal Speedy Trial Act applicable to criminal cases, which requires federal criminal trials to commence within 70 days after the date charges are filed.

#### **43 Will a court need to approve the settlement agreement with a securities or related law enforcement authority?**

Whether court approval is required depends on the circumstances of the case. In federal criminal matters, court approval is not required. In fact, the United States Court of Appeals for the District of Columbia recently confirmed that federal courts have no authority whatsoever over the government's charging decisions, including a decision to terminate prosecution after charges have been filed. *In re Flynn*, 973 F.3d 74 (D.C. Cir. 2020). In federal civil litigation, courts will need to approve settlement agreements to ensure that the settlement is fair, reasonable, and in the public interest. This review is, however, is very deferential in nature. In the context of federal administrative proceedings, court approval is not required, but as part of the settlement agreement, agencies may initiate a civil enforcement action and have the defendant enter into a consent decree, so that the defendant's compliance with the settlement agreement can be enforced via a federal court's contempt authority. In addition, SEC administrative actions are settled after approval by the Commission; no court approval is necessary.

#### **44 If a settlement occurs, will an admission to certain facts or wrongdoing be required?**

In certain circumstances, yes. Admissions of facts or wrongdoing are commonly required by federal and state criminal authorities. The SEC, on the other hand, has historically allowed the settling party to "neither admit nor deny" wrongdoing, although it may require admissions in certain circumstances.

#### **45 Can the findings or decisions of the securities or related law enforcement authorities be administratively appealed? Appealed to a court?**

In federal administrative enforcement actions, which are heard by administrative law judges employed by the enforcement authority, there is a right of appeal to the commission (or agency head, as applicable), whose decision can then be appealed to a federal court of appeals. In federal criminal or civil enforcement actions that occur in a federal district court, there is a right of appeal to a federal court of appeals. There can also be appellate rights for SROs. For example, FINRA decisions can be appealed to the SEC, which in turn can be appealed to a federal court of appeals.

#### **46 If a decision can be administratively or judicially appealed, what are the consequences of an adverse decision on appeal? What are the consequences of a positive decision on appeal?**

The appellate court can affirm or reverse the decision of lower court. When a decision is affirmed, the trial court decision remains in place and, if possible, the appellant may then take a subsequent appeal to a higher court. When a decision is reversed, the outcome depends on the facts and circumstances of the case. The appellate court may direct the trial court or the administrative agency to enter a certain result or to conduct further proceedings consistent with the appellate opinion.

## Collateral consequences

### 47 What are some of the collateral consequences of a resolution or settlement with a securities or related law enforcement authority?

Collateral consequences from a resolution or settlement are complex. The potential consequences will vary depending on a number of factors, including whether the resolution or settlement (i) is effectuated through a court or an administrative proceeding, (ii) involves violations based on intentional or reckless conduct, (iii) recites that the conduct was wilful, and (iv) includes admissions. Resolutions and settlement of these types of matters can also impact ongoing private litigation related to the same issues or have collateral consequences under state law. In addition, regulated individuals and entities can also face collateral consequences based on sanctions imposed by non-US securities or related law enforcement authorities as part of a resolution or settlement of that matter. Accountants and other licensed professionals, for example, may face collateral consequences from state licensing authorities.

Among the collateral consequences that can be imposed on someone who is found to have violated the securities (or other related) laws or who settles such claims even on a neither admit nor deny basis are debarment from government contracts, statutory disqualification from working in the securities industry or advising investment companies, and disclosure requirements. The resolution or settlement can also impact affiliates of the settling party. In addition, public companies who themselves violate or have subsidiaries who violate certain securities laws face the loss of benefits from certain securities laws exemptions unless the company receives a waiver. Also, certain violations can trigger a 10-year bad actor disqualification from the ability to take advantage of certain private placement exemptions from registration, unless a waiver is granted. There is a process for obtaining such waivers and under a 2019 change in policy, those seeking to settle with the SEC can submit the settlement and collateral consequence waiver requests simultaneously, which can help provide certainty and lead to a comprehensive settlement more quickly. The requests will, however, be considered separately and a settlement offer cannot be conditioned on the grant of a waiver.

### 48 What are some of the collateral consequences of a conviction or the imposition of liability by a court?

The collateral consequences could include all of those referenced in the previous question and may be more severe. Certain collateral consequences arise only if there is a court finding of liability as would be the case in a conviction or a judicial determination of liability. In addition, an actual conviction or judicial finding could enable a private plaintiff to prevent the convicted party (or the party against whom the findings were made) from disputing issues in a subsequent litigation as discussed in the next question.

### 49 Can private securities or related legal claims proceed parallel to investigations by securities and related law enforcement authorities?

Yes, although either the law enforcement authority or the defendant in the enforcement case can seek to stay the action. Generally, courts are more likely to stay a private action if the government makes the request although where a defendant is facing criminal prosecution some courts have stayed a civil action pending resolution of the criminal matter. That is not always the case, however. The government will often seek to stay a private litigation to prevent its witnesses from having to testify in civil discovery.

### 50 What effect will findings by an authority in another jurisdiction have in private proceedings?

In certain circumstances, findings by an authority in another jurisdiction can impact a private proceeding by preventing the party against whom the findings were made from challenging those findings. There are legal limits on when that might occur, including, for example, a requirement that the issues presented in the government proceeding were identical to those in the private proceeding and there was a full and fair opportunity to litigate the issues in the government proceeding.

In cases where the government has required the settling party to make admissions as part of the settlement, those admissions can be used against the settling party in private litigation.

Finally, even a settlement made without admitting or denying the government's claims may make private plaintiff's more interested in pursuing a complaint based on what the government has asserted.

**51 Can private plaintiffs obtain access to the files or documents the securities or related law enforcement authorities collected during the investigation?**

Yes, at least in part. Private plaintiffs can obtain access to such files or documents in a couple of ways. First, if the private case is filed and proceeds to the discovery stage, the private plaintiffs can subpoena all documents produced by the defendant to the SEC or other related law enforcement authority. Second, the private plaintiff can seek to obtain records directly for the government agency through a FOIA request. A FOIA request will not, however, enable a private plaintiff to obtain grand jury materials from the government.



**Deborah R. Meshulam**  
DLA Piper

Deborah Meshulam is one of the leaders of DLA Piper's Securities Enforcement practice. She has more than two decades of experience defending and trying the full range of cases arising from allegations of securities law violations, including FCPA and accounting fraud claims, and related breaches of fiduciary duty. She conducts cross-border internal and independent investigations for multinational corporations and regularly advises clients on compliance matters and litigation avoidance. She also counsels clients on a wide range of corporate governance and regulatory matters. She has written on securities law and compliance issues and is a frequent speaker at professional programs on these topics. Deborah has been repeatedly recognized by legal industry publications including most recently by the Legal 500 for her work in Securities Litigation-Defense and Who's Who Legal Investigations: 2020 as a Global Leader in investigations. She is a past recipient of the Burton Award for Legal Achievement, run in alliance with the Law Library of Congress. She is also recognized as a Washington DC Super Lawyer in Securities Litigation.

Prior to joining DLA Piper, Ms. Meshulam served for seven years as Assistant Chief Litigation Counsel for the Securities and Exchange Commission's Division of Enforcement, a senior level position. As lead trial counsel, she prosecuted securities enforcement cases, including jury trials, involving complex financial fraud, accounting, corruption, market manipulation, insider trading, sales practice fraud, Ponzi schemes and public offering fraud and disclosure issues.

At DLA Piper, Ms. Meshulam represents and has successfully defended individual and corporate clients in SEC and Department of Justice (DOJ) investigations relating to claims of securities law and FCPA violations. She counsels clients on compliance, regulatory and corporate governance matters, including issues relating to auditor independence requirements. She also counsels clients on Sarbanes-Oxley and Dodd Frank whistleblower matters. Ms. Meshulam regularly conducts investigations on behalf of multinational companies or their audit committees, often relating to FCPA questions, accounting issues, alleged securities law violations and employee misconduct. She also represents

clients in investigations conducted by Congress, state securities authorities, the Public Company Accounting Oversight Board (PCAOB), FINRA and Exchanges.

In her investigations practice, Ms. Meshulam leads and conducts investigations, including cross border investigations, involving a variety of industries and sectors including financial services, defense, energy, consumer, real estate, and healthcare. She has conducted and led investigations involving market manipulation claims, FCPA allegations and accounting fraud claims in China, India, Kazakhstan and Kuwait as well as in Europe. Ms. Meshulam has obtained SEC no-action and DOJ declination decisions in several such matters. In one of her recent matters, she persuaded the SEC to close an accounting fraud investigation against a global corporation with no action. In another recent matter she successfully resolved an SEC investigation involving complex financial products and a number of affiliated financial services companies.

Ms. Meshulam's regulatory counselling practice includes advising clients on a wide range of corporate governance and regulatory matters, including financial reporting and disclosure issues, design and implementation of compliance programs under the securities laws and the FCPA as well as issues faced by brokers/dealers, investment advisers and other regulated entities. She also represents clients in rulemaking proceedings and in SEC inquiries from the Divisions of Corporate Finance and Trading and Markets, the Office of Chief Accountant and the Office of Compliance Inspections and Examinations.

She is an Audit Committee Member of the non-profit organization, Global Fund to End Modern Slavery.





**Katrina A. Hausfeld**  
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Katie Hausfeld focuses her practice on corporate investigations and compliance, white-collar criminal matters and complex civil litigation.

Katie regularly advises both US and multinational companies in connection with investigations and enforcement actions conducted by the US Department of Justice, the US Securities and Exchange Commission, and other enforcement agencies. She also assists her clients in designing and implementing risk-based compliance programs that meet the ever-evolving expectations of regulatory and enforcement agencies, including compliance with the Foreign Corrupt Practices Act (FCPA) and other anti-corruption regulations. These enterprise-wide programs include conducting risk assessments, drafting codes of conduct and ethics, drafting corporate policies and creating and implementing training programs. In addition, Katie performs anti-corruption compliance due diligence for acquisitions, joint ventures and other transactions. Katie is also a Certified Anti-Money Laundering Specialist.

As part of her litigation practice, Katie represents her clients in a variety of complex commercial litigation disputes in both federal and state courts and before the American Arbitration Association and the Financial Industry Regulatory Authority.



**Noah Schottenstein**  
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Noah Schottenstein is a former Trial Attorney with the US Department of Justice and a former Assistant United States Attorney for the Western District of Texas. He is an experienced litigator who has represented the United States in over 25 different federal trial and appellate courts. He has also worked with senior government officials at all stages of enforcement matters, from investigations through trials, appeals, and at the US Supreme Court.

Noah started his legal career through the DOJ Honors Program in Washington DC. While there, Noah worked on the Mortgage Fraud Task Force, the US\$25 billion National Mortgage Settlement, the National Mortgage Settlement Oversight Committee, SIGTARP oversight, and other investigations and litigation involving financial fraud, public integrity, and consumer protection matters of national importance. In handling these matters, Noah was routinely called upon to advise senior DOJ officials, supervise nationwide litigation efforts, and coordinate with representatives from other federal agencies, including the Federal Trade Commission and the Consumer Financial Protection Bureau.

As an Assistant United States Attorney, Noah was responsible for investigating and litigating matters including healthcare fraud under the False Claims Act, Anti-Kickback Statute, and Stark Law; regulatory enforcement actions; and lawsuits filed against the government under the Federal Tort Claims Act and the Administrative Procedure Act.

Noah also has significant experience with restructuring matters. While at the DOJ, he represented the interests of the United States and various federal agencies in bankruptcy litigation. In private practice, he has primarily represented energy sector clients, including upstream, midstream, oilfield services, and generation companies.



## **Elan Gershoni**

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Elan Gershoni represents clients in complex commercial, securities, consumer financial and protection litigation, white collar and enforcement defense, bankruptcy disputes, receiverships, internal and government investigations, and compliance mandates. Elan represents clients across industries, including health-care, financial services, technology, real estate, and industrials.

Elan has first and second chair trial experience representing fiduciaries, corporations, executives, boards, funds, and financial institutions in proceedings before Federal and state courts throughout the country. In addition to private adversaries, Elan's matters

frequently involve federal and state law enforcement agencies and regulators including the Department of Justice, the Securities and Exchange Commission, and the Federal Trade Commission.

In addition to his business dispute practice, Elan's experience includes litigating claims relating to the Foreign Corrupt Practices Act, OFAC sanctions, the False Claims Act, the Anti-Kickback Statute, the SEC and Exchange Acts, the FTC Act, the Fair Debt Collection Practices Act, and various other anti-fraud and anti-bribery, foreclosure, and consumer protection laws. Elan also regularly represents clients in judgment enforcement and collection matters.



DLA Piper is a global law firm with lawyers in the Americas, Asia-Pacific, Europe and the Middle East, positioning us to help companies with their legal needs around the world. Our clients range from multinational, Global 1000 and Fortune 500 enterprises to emerging companies developing industry-leading technologies. They include more than half of the Fortune 250 and nearly half of the FTSE 350 or their subsidiaries. We also advise governments and public sector bodies around the world. Our global investigations practice has handled some of the highest-profile investigations in the world. With lawyers on the ground in more than 30 countries, DLA Piper clients benefit from multidisciplinary, multi-jurisdictional teams that are quickly and cost-effectively staffed to address every type of corporate, regulatory and internal investigation. Our lawyers regularly conduct criminal, regulatory and internal investigations, defend clients in court when necessary, and develop or help develop proactive compliance programmes and conduct internal audits.

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