

GOVERNMENT AFFAIRS

DEPARTMENT OF JUSTICE USE OF PARALLEL PROCEEDINGS

by Kerry B. Harvey

Corporations and individuals engaged in a heavily regulated industry, particularly those doing business with the federal government, stand a good chance of being called upon to provide information related to a government investigation. Healthcare providers, government contractors and financial institutions immediately come to mind. The initial contact may come in a number of forms; a visit from an agent, a call from an Assistant United States Attorney ("AUSA") or something more formal such as a Civil Investigative Demand, an administrative subpoena, or, more ominously, a grand jury subpoena. Regardless of the form, the inquiry is likely more than a fishing expedition. By the time the government makes contact, its representatives have a fixed purpose and know a great deal about the subject of the inquiry.

The government may inform the subject, through one means or another, that the inquiries are related to a civil or administrative matter. If so, the subject may very well breathe a sigh of relief thinking, "At least it's not criminal." This may well be a false sense of security. Indeed, one should assume at least the possibility of a criminal investigation until there is conclusive evidence to the contrary. The proper response to a potential criminal investigation differs significantly from that to a matter entirely civil in nature. Failure to recognize the possibility of a concurrent criminal investigation can lead to an unfortunate and unnecessary result.

Civil and criminal investigations that proceed simultaneously and cooperatively are becoming standard operating procedure for the government. Moreover, it is increasingly common that civil AUSAs will take the lead in the investigation while their prosecutorial colleagues remain in the background, unknown to the subject of the inquiry.

Over the last few years, the Department of Justice and its partners have emphasized the use of "parallel proceedings." A number of legal developments and policy changes have encouraged this technique, creating complex choices for those on the receiving end of a governmental inquiry. The use of parallel proceedings is not new, but has become increasingly common. Historically, criminal investigations took priority. Criminal and civil investigations were more likely to proceed *in seriatim*. Often, the criminal investigation proceeded to its conclusion, with a referral to the civil division only if insufficient evidence to support an indictment was found. The referral often occurred years after the conduct in question, rendering civil enforcement unlikely. Not so long ago, a business or individual receiving a request for information from the "civil side" might have a degree of confidence that there was no active criminal investigation. The increased use of parallel proceedings has significantly altered that calculation.

Department of Justice policies nominally encouraged the use of parallel proceedings through cooperation between the criminal and

civil divisions of United States Attorneys' offices from at least 1997¹. Although not without legal pitfalls, courts have explicitly endorsed the government's use of parallel proceedings². Perhaps in response to the financial crisis of 2008-2009, Attorney General Holder issued a memorandum to the Department of Justice in 2012 *mandating* cooperation between criminal and civil DOJ attorneys.³ In 2015, Deputy Attorney General Yates issued a memorandum to DOJ employees which emphasized holding individuals accountable for corporate wrongdoing⁴. The much discussed Yates Memorandum outlined six steps to be implemented by DOJ investigators in order to serve this goal. One of those required that "criminal and civil attorneys handling corporate investigations should be in routine communication with one another."

Other developments have made it more likely that a Department of Justice investigation will be both civil and criminal and that this two-pronged attack will proceed simultaneously. Corporate misconduct has occupied a higher Department of Justice priority in recent years. Department of Justice lawyers are trained in the effective use of parallel proceedings at the National Advocacy Center and it has become a component of regularly held orientation sessions for new Assistant United States Attorneys, whether civil or criminal.

Since the liberalizing amendments of 2009⁵, False Claims Act suits filed by whistleblowers or directly by the Department of Justice are on the increase, as are recoveries. The Department of Justice recovered more than \$4.7 billion from False Claims Act cases in fiscal year 2016, with \$2.5 billion of that sum coming from the healthcare industry⁶. The rich recoveries available in False Claims Act cases encourage a growing number of whistleblower suits. Moreover, the U.S. Attorney community has made a concerted effort to enhance this area of their respective practices over the last several years. Sophisticated False Claims Act practices are no longer the exclusive domain of only the largest U.S. Attorney's offices. The Department of Justice has devoted considerable resources to building False Claims Act practices in even the smallest U.S. Attorney's offices. Traditionally, civil cases spun off from criminal investigations. Today, the opposite is often true. Aggressive AUSAs who are pursuing civil litigation increasingly discover conduct deemed worthy of prosecution, and bring in their criminal division colleagues.

AUSAs today are more likely to allow the civil investigation to take the lead. The increased use of Civil Investigative Demands ("CID") has served as a catalyst for this trend. Until 2010, CIDs could only be issued by the United States Attorney General through a cumbersome, time-consuming process. The restriction was relaxed by Congress, and the Attorney General delegated authority to issue CIDs to each of the 93 U.S. Attorneys.

CIDs are similar to subpoenas, but can be issued before litigation is commenced. CIDs can compel the production of documents or sworn testimony. A great advantage of CIDs, from the government's perspective, is that the results can be freely shared between those conducting the civil and criminal investigation. In contrast, material

obtained through the use of grand jury subpoenas is often restricted. Typically, a federal prosecutor may not share information learned in the grand jury with his civil counterparts. Accordingly, AUSAs collaborating on a joint civil/criminal investigation may choose to lead with CIDs, leaving the prosecutors in the background.

There are important practical ramifications inherent in this trend. A subject who receives a CID, an administrative subpoena, or a call from a civil Assistant United States Attorney, should not assume that there is no criminal investigation about which to worry. Indeed, the opposite is true.

The subject of a governmental inquiry, apparently civil in nature, should proceed with caution and presume that a criminal investigation, if not currently ongoing, may be launched as a consequence of information gathered in the civil matter. The subject organization should initiate a comprehensive internal investigation in order to understand the risks. Close attention should be paid to the benefits and liabilities of invoking the Fifth Amendment privilege. The legal team employed to assist the organization with the inquiry should include attorneys knowledgeable in white-collar criminal defense, as well as subject matter experts for the industry in question.

Appropriate caution when confronted with a request for information from the government will lead to better results.

¹ Memorandum from the Attorney General to United States Attorneys, July 28, 1997

² U.S. vs. Kordel, 397 U.S. 1 (1970); U.S. vs. Stringer, 535 f3d 929 (9th Cir. 2008)

³ Memorandum from the Attorney General to United States Attorneys, January 30, 2012

⁴ Memorandum from the Deputy Attorney General to Department of Justice components and United States Attorneys, September 9, 2015

⁵ Fraud Enforcement and Recovery Act of 2009, P.L. 111-21

⁶ Department of Justice Press Release, December 14, 2016

⁷ Department of Justice Civil Division Directive no. 1-15

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