When Multiple Regulators Are at the Door: Strategies for Managing Parallel Proceedings by Government Agencies in Today's Competitive Regulatory Environment

By Charles E. Harris, II and Julie H. Firestone

In recent years, there has been a conspicuous surge in "parallel proceedings," which involve concurrent civil, criminal, administrative or regulatory proceedings by government agencies arising out of a single set of transactions. This trend is not surprising given the recent rise in the government regulation of business and financial communities in the United States following the financial crisis and the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). In fact, Title X of Dodd-Frank, or the Consumer Financial Protection Act (the "Act"), which grants primary authority to the Consumer Financial Protection Bureau ("CFPB") to enforce federal consumer financial laws, seemingly promotes such parallel proceedings. The Act prescribes that the CFPB coordinate enforcement actions with federal and state regulators and that these agencies be given leave to intervene into civil actions brought by the CFPB. Also, in accordance with the Act, the CFPB has entered into memoranda of understating with the Department of Justice ("DOJ"), Federal Trade Commission ("FTC"), federal prudential regulators and state regulators that set forth the guidelines for the coordination and cooperation between these agencies in investigations and enforcement actions.

The CFPB, conforming to these principles, collaborated with several regulators in recent parallel proceedings. In one of the latest, it teamed up with two federal prudential regulators, the Federal Deposit Insurance Corporation ("FDIC") and the Office of the Comptroller of the Currency ("OCC"), and the Utah Department of Financial Institutions. In separate consent orders, the credit card issuer targeted by the agencies agreed to refund roughly $144.5 million to 585,000 customers for allegedly engaging in deceptive marketing practices and to pay $9.6

million in civil penalties to the CFPB, $3.6 million to the FDIC and $3 million to the OCC. As shown below, such sizeable payments to resolve these proceedings have become commonplace.

The steady stream of parallel proceedings will likely continue, considering, among other things, the sizeable civil penalties in these proceedings and the often-intense competition among regulators to collect fines and penalties for their respective agencies. In light of this current regulatory environment, this article will discuss strategies for managing parallel proceedings. Specifically, the article will suggest strategies for managing parallel proceedings at their early stages and for reaching global settlements that reduce costs and minimize exposure to later actions. The article will also briefly discuss strategies for preserving the attorney-client, work product and other privileges in parallel proceedings.

Some Initial Steps in Managing Parallel Proceedings

Corporations will inevitably face the predicament at some point in every parallel proceeding of having to respond to the demands of one regulator in a way that will not jeopardize their position with others. This dilemma, in fact, permeates nearly every undertaking in these proceedings, whether it be collecting requested information, disclosing information to regulators or structuring global resolutions. Careful planning and management at the early stages can help to minimize these issues. In particular, the following initial steps, which are discussed at length below, are essential:

- preserving relevant information or material that may become relevant.
- developing a collection and disclosure strategy for requested information.
- requesting that regulators coordinate separate but related investigations.
- determining which regulator has primary jurisdiction or responsibility.

Preservation of Relevant Information. It is settled in most jurisdictions that a party has a duty to preserve any material that it "knows or should know" is relevant to a present or future action. Parallel proceedings can make complying with this obligation challenging because, many times, what becomes a parallel proceeding begins with a single subpoena, document request or request for interview from one agency, and others pile on with subsequent related requests that seek more expansive material. The information requested by regulators is often varied despite whether the proceeding began with a single request or multiple requests from different agencies. Corporations must, at a minimum, issue and enforce proper litigation holds to meet their preservation obligations. The scope of the hold should be broad enough to preserve information sought by the request (or requests) at hand and, importantly, any additional information a corporation reasonably foresees might be sought by other regulators. Corporations might consider employing practices designed to predict when a request may escalate into a parallel proceeding—for example, when the focus of an inquiry falls under the jurisdiction of multiple regulators or could subject the entity to civil liability as well as criminal prosecution.

Collection and Disclosure. Internal coordination in gathering information requested in parallel proceedings and responding to the regulators at once certainly conserves time and resources. As discussed below, however, it may not always be the best strategy to produce one set of materials or one written response to all regulators. As for collection, entities must closely review requests submitted by different agencies to decide if they seek related information. Related requests may be propounded by regulators at different times and are sometimes even submitted to different departments within a corporation. Thus, corporations should consider requiring that all government requests be sent to and reviewed by a single person, or small group of people, presumably in the legal department, to ensure that the same person or group with

institutional knowledge about prior requests would be reviewing new ones for relatedness. Once an entity determines that government inquires are related, it must establish a collection protocol that accounts for the scope and relevant period of the requests.

There are few instances where coordinating the collection of requested material internally would not be wise, but that is not necessarily true when responding to inquiries in parallel proceedings, especially where agencies propound very different requests. In this instance, providing all collected material or written responses to each regulator might disclose information to certain of them that was not requested and generate interest in a subject that a particular regulator had not considered. Also, some regulators might prefer a more targeted approach and consider a broad production nonresponsive. On the other hand, it may be sensible to provide one set of materials to reduce the odds of providing inconsistent information, and some regulators may want to review the entire collection. Besides, this may be the only option if one regulator is directing a proceeding or regulators have submitted coordinated requests.

An observer suggested that, as an alternative to producing the "universe of all requested materials" to each regulator, in proper situations, corporations might organize a data room that would be available to each agency. Gary DiBianco, et al., *Parallel Proceedings Complicate Crisis Management—Tradeoffs Inevitable*, Executive Counsel (March/April 2007). This approach offers some unique advantages. Information can be restricted to certain regulators, but made available to others. Also, by reviewing data room analytics, corporations can ascertain which materials are important to certain regulators and which regulators are most engaged in the investigation. And, of course, the corporation may "avoid handing over extraneous information that could expand an inquiry and simultaneously build [goodwill] by not flooding regulators with irrelevant information." *Id.*

Request the Regulators Coordinate. There are clear directives from legislative and executive branches, and agency heads, to coordinate related civil and criminal proceedings. As noted above, the Act requires that the CFPB coordinate investigations and enforcement actions with other agencies. *See*, *e.g.*, 12 U.S.C. § 5515 (2014). In November 2009, President Obama created the Financial Fraud Enforcement Task Force, which is led by the DOJ and includes officials from more than 20 federal, state and local agencies, to coordinate in investigating and prosecuting significant financial crimes and other violations relating to the financial crisis. Exec. Order No. 13,519, 74 F.R. 60123 (2009), *reprinted at* 28 U.S.C. § 509. Also, in March 2010, the United States Attorney's Office for the Southern District of New York ("SDNY") established a new unit under its civil division to "focus entirely on affirmative litigation in pursuit of complex frauds" in coordination with its criminal division. Mark Hamblett, *U.S. Attorney Forms Civil Unit to Prosecute Complex Frauds*, N.Y.L.J. (Mar. 31, 2010).

The question that arises is: should entities inform agencies engaged in related proceedings about each other and encourage them to coordinate even when the agencies are not required by rule to combine their efforts? While there is generally no obligation to inform one regulator of another's action, doing so can be advantageous because: (i) informing regulators about each other may promote credibility and goodwill with them, which is especially important when an industry-specific regulator is involved; (ii) coordination usually reduces costs for a corporation as well as the government; and (iii) having regulators coordinate can help to achieve consistency in the agencies' requests. There is a risk that encouraging regulators to coordinate could cause certain regulators to "pile on," and become more aggressive than they otherwise would have been in their individual proceedings. But overall, it is probably a good practice to

advise the regulators of each other's actions and ask them to coordinate. Indeed, a corporation may only have to respond to one main actor, rather than face "death by a thousand cuts."

Regulator With Primary Responsibility. Corporations should attempt to confirm at the outset of a parallel proceeding which regulator has primary authority over the action. This is an important factor in managing these proceedings because the agency with primary authority is the one an entity should be most concerned about accommodating. The principal agency is often dictated by which agency has primary authority over the subject matter in the proceeding. For example, the Act states that the CFPB "shall have primary authority to enforce th[e] Federal consumer financial law with respect to" large banks, savings associations and credit unions. 12 U.S.C. § 5515(a),(c)(1). Thus, one would expect to see the CFPB direct any investigations against these entities involving violations of banking laws designed to protect consumers. This apparently occurred in the parallel proceeding against the credit card issuer (and large bank) discussed above as well as in similar actions against three other large credit card issuers, which are mentioned below. That being said, the CFPB and DOJ, pursuant to their memorandum of understanding, recently led a joint investigation of a large bank and its affiliate for allegedly charging higher interest rates on automobile loans to minorities, even though the action opened with a CFPB examination.

The primary regulator may be decided based simply on which agency was the first to pursue an entity or which agency is the most engaged in a proceeding, in instances where the focus of the proceeding does not clearly fall within one agency's jurisdiction and no rule provides that an agency has primary authority. Further, where parallel proceedings involve both civil and criminal inquiries, it may only be appropriate for the criminal regulator to guide the

proceeding, and to maybe even stay the civil portion, so that a corporation does not imperil its Fifth Amendment privilege against self incrimination or other constitutional protections.

Strategies for Reaching an Effective Global Resolution in a Parallel Proceeding

One of the most intractable issues that arises in parallel proceedings is reaching a global or coordinated resolution with regulators so as to reduce the likelihood of future proceedings by other regulators or private litigation. A global resolution provides the subjects of investigations, as well as the government, with the clear advantage of ending all proceedings at once, avoiding duplication of resources, permitting the coordination of remedies and allowing for the integrated announcement of a global resolution. A global resolution also addresses many of the dilemmas faced by corporations when a parallel proceeding involves a criminal investigation. For instance, because Federal Rule of Evidence 408 and many analogous state evidentiary rules do not prohibit the introduction in a criminal action of statements made to regulators in negotiating the resolution of a civil proceeding, it is difficult to resolve the parallel civil proceeding without jeopardizing the entity's position in the criminal investigation. Settling the civil and criminal proceedings at the same time assuages this concern. In addition, a global settlement may allow a corporation to avoid pleading guilty to criminal charges, which could provide conclusive evidence of liability in a later civil or administrative proceeding.

Reaching a global settlement can be complicated though since each authority invariably has its own interests, and the interests of the various regulators may not coalesce. One agency may be willing to resolve the proceeding based on a more limited factual understanding, so that it can extract a civil penalty quickly, while another may want a more detailed factual background to confirm the proper amount of the civil penalty. Or, where a criminal investigation is involved, it is likely that criminal authorities, such as the DOJ, will insist on a relatively full investigation

before agreeing to resolve a criminal proceeding. But regulators have successfully resolved their differences to attain some of the highest penalties in history over the past couple of years:

- In January 2014, the Department of Treasury Financial Crimes Enforcement Network ("FinCEN"), the OCC and SDNY concluded a coordinated investigation of a national bank for allegedly failing to report suspicious transactions arising out of Bernard L. Madoff's fraudulent investment scheme. The bank agreed to forfeit ***$1.7 billion*** in assets to the SDNY to be contributed to the recovery fund for Mr. Madoff's victims. The bank was also assessed ***$461 million*** in civil penalties by FinCEN, which was satisfied by the forfeiture to the SDNY, and it was ordered to pay ***$350 million*** in fines to the OCC. The combined collection amount was ***$2.05 billion***.

- In December 2013, the Department of the Treasury's Office of Foreign Assets Control ("OFAC"), the Board of Governors of the Federal Reserve System (the "Federal Reserve") and the New York State Department of Financial Services ("NYDFS") concluded regulatory actions against a UK bank and its affiliates for alleged violations of United States sanctions. The bank agreed to pay a total of ***$100 million*** in monetary sanctions: ***$50 million*** to the Federal Reserve, ***$50 million*** to the NYDFS and ***$33 million*** to the OFAC, which was satisfied by the payment to the Federal Reserve.

- In December 2012, regulators announced a coordinated settlement with a foreign bank and its affiliates to resolve allegations that the bank's inadequate compliance measures led to violations of United States sanctions. The combined amount of the penalties was ***$1.9 billion***. The bank agreed to pay ***$1.256 billion*** in disgorgement to the DOJ, ***$375 million*** in civil penalties to the OFAC, which was satisfied by the payment to the DOJ, a ***$500 million*** civil penalty to the OCC, and a ***$165 million*** civil penalty to the Federal Reserve. The New York County District Attorney's Office ("NYDAO") and the UK Financial Services Authority also participated in the investigation, and each apparently entered into separate settlements with the bank.

There has, however, been one recent instance where an agency with ostensibly different interests than other regulators investigating an entity essentially forced the entity into settlement with it ahead of the other regulators. The regulators involved in this probe regarding alleged violations of United States sanctions by a foreign bank were the NYDFS, which initiated the investigation; the OFAC; the Federal Reserve; the DOJ; and the NYDAO. In August 2012, the bank agreed to pay ***$340 million*** in civil penalties to the NYDFS amid the agency's threats to revoke its banking license. Other authorities continued the investigation and, in December 2012, the bank entered into a settlement with them, agreeing to pay ***$100 million*** in penalties to the

Federal Reserve, forfeit ***$227 million*** to the DOJ and pay ***$135 million*** in penalties to the OFAC, which was satisfied by the DOJ payment. All told, the bank paid ***$667 million***.

These situations are not always avoidable, particularly when a regulator is threatening actions that will considerably restrict a corporation's operations, and that corporation has little leverage to combat the pressure. That being said, we offer some strategies that counsel may consider to reduce the risk that a client is pressured to enter into a single settlement with one regulator and decrease the chances of later investigations and civil litigation:

- ***Encourage regulators to coordinate:*** It is evident that, when regulators communicate, coordinate and cooperate with one another in a parallel proceeding, they are more likely to resolve the proceeding in a coordinated fashion. Acknowledging the importance of coordinated settlements, several authorities, such as the Environmental Protection Agency and the United States Attorney's Office, require that their civil and criminal attorneys coordinate in resolving intra-agency parallel proceedings. *E.g.*, Environmental Protection Agency Memorandum, *Coordinated Settlement of Parallel Proceedings: Interim Policy and Procedures* (Jun. 9, 1997); United States Attorneys' Manual, Title 1, Chapter 1-12.00, *Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings* (updated Feb. 2013). Moreover, most of the memoranda of understanding between the CFPB and other regulators expressly provide that the agencies must coordinate in resolving parallel proceedings. *E.g.*, Memorandum of Understanding Between CFPB and FTC (Jan. 20, 2012).

- ***Encourage regulators to engage all agencies that have regulatory authority over the subject matter in the parallel proceeding:*** It seems counterintuitive, but having all regulators that have a stake in the subject matter of a parallel proceeding involved in the action decreases the chance that another regulator will commence a subsequent investigation regarding that same subject matter after the parallel proceeding is resolved with other regulators.

- ***Provide all or part of any monetary award to affected individuals:*** Ensuring that affected individuals are compensated in resolving a parallel proceeding could foreclose later private class actions based on the underlying misconduct, even though consent orders generally have no preclusive effect. This is because class plaintiffs often seek the same redress provided for in the consent orders. For example, over the past two years, the CFPB agreed to consent orders with several credit card issuers, requiring that they pay hundreds of millions of dollars in restitution to consumers for allegedly illegal credit card practices. There have apparently been no class actions filed based on this alleged misconduct, and the only published decisions regarding any related private litigation involve putative derivative shareholder lawsuits, which were dismissed.

- ***Do not admit liability:*** If possible, parallel proceedings should be resolved without an admission of liability in the consent order. If an admission is required as a term of settling a parallel proceeding, it should be as narrow as possible.

- ***Limit factual representations and written submissions:*** Any statements made during the course of settlement discussions and written submissions outlining factual positions must be evaluated and carefully tailored to avoid making damaging admissions that can be discovered or used in later criminal proceedings or private litigation.

As an aside, corporations might also consider tax treatment in structuring a global resolution; in particular, the characterization of a settlement payment could be critical. Settlement payments are generally considered tax deductible whereas fines and similar penalties paid to the government for violations of the law are not. *See* Robert W. Wood, *Tax Deductions for Damages Payments: What, Me Worry?*, Tax Analysts (2006) (discussing section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f)). Whether a payment is deductible or not should be considered as part of the overall resolution strategy since this could significantly affect the true cost of a global resolution.

Preserving Attorney-Client Privilege in Parallel Proceedings

Waiver of attorney-client privilege and other privileges is an important matter to consider when handling a parallel proceeding. On the one hand, regulators may encourage privilege waivers by offering attractive incentives, such as cooperation credit. On the other, entities should think carefully about waiving privilege, because there is a good chance that the waiver will ***not*** be limited to the parallel proceedings; rather, the material at issue may be used in private civil litigation or in an action brought by another regulator. The implications for future litigation are potentially tremendous, as the same conduct that exposes an entity to possible criminal or regulatory actions may also expose it to other forms of liability. While some agencies, such as the CFPB, have adopted rules protecting against waiver when information is turned over in a regulatory proceeding, *e.g.*, 12 C.F.R. § 1070.48, corporations should still proceed carefully.

There are many reasons why an entity may wish to consider waiving attorney-client or work product privileges. In an effort to foreclose an investigation, the entity may choose to conduct its own internal investigation into the facts underlying an incident or practice and then voluntarily release the results of that investigation to the government. A corporation may also be incentivized to waive the privilege by certain government policies that offer cooperation credit in exchange for the waiver of privilege. While recent policy statements from the DOJ, the SEC and other authorities make clear that privilege waivers are not required if entities seek to qualify for cooperation credit, *see* Dep't of Justice "Principles of Federal Prosecution of Business Organizations" (last visited Feb. 25, 2014) ("DOJ Guidelines"); Wolowitz, et al., *Dealing with Parallel Actions, in Securities Investigations: Internal, Civil and Criminal* § 15:4.4[C] (2d ed. 2010), nothing prevents an entity from voluntarily agreeing to waive privilege in order to earn extra cooperation credit, and they often do so. Waiver may, in turn, improve the chances that a corporation will qualify for favorable dispositions, such as non-prosecution or a deferred prosecution agreement.

Then again, the costs of waiving privilege in a parallel proceeding may be significant—opposing parties may be able to obtain important and damaging information that would normally be protected from disclosure. Most courts have held that a privilege waiver as to a regulator is not limited, meaning that the privilege will be deemed waived in all other proceedings. The First, Second, Third, Fourth, Sixth, Tenth and D.C. Circuits have all refused to adopt a rule limiting attorney-client privilege waivers to the SEC. *United States v. Thompson*, 562 F.3d 387, 390 (D.C. Cir. 2009); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997); *Genentech v. United States Int'l Trade Comm'n*, 122 F.3d 1409, 1417 (Fed. Cir. 1997); *In re*

Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993); *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1431 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988); *In re Initial Public Offering Sec. Litig.*, 249 F.R.D. 457, 466-67 (S.D.N.Y. 2008); *In re Syncor ERISA Litig.*, 229 F.R.D. 636, 645-49 (C.D. Cal. 2005). Only the Eighth Circuit has accepted a limited or selective waiver of attorney-client privilege, and only the Fourth Circuit has accepted a limited or selective waiver of work product protection (and only for opinion work product). *Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1978); *In re Martin Marietta Corp.*, 856 F.2d 619. The First, Third, Sixth, Eighth and Tenth Circuits have rejected a limited or selective waiver rule for work product, *In re Qwest Comm'ns Int'l*, 450 F.3d 1179, 1192 (10th Cir. 2006); *In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 302; *Mass. Inst. Tech.*, 129 F.3d at 686; *Westinghouse Elec. Corp.*, 951 F.2d at 1431; *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846-47 (8th Cir. 1988), while the Second and D.C. Circuits have left open the possibility of such a waiver. *In re Steinhardt Partners*, 9 F.3d at 236; *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1372-75 (D.C. Cir. 1984). Corporations should assume that they will not be able to completely eliminate the risk that the materials will eventually wind up in the hands of private plaintiffs. Commentators have gone so far as to state that, "[i]n essence, disclosures to government agencies equip private litigants with a virtual roadmap to assist them in their lawsuit." Douglas R. Richmond, *The Case Against Selective Waiver of the Attorney Client Privilege and Work Product Immunity*, 30 Am. J. Trial. Advoc. 253, 262 (2006).

There has been some action in recent years to limit the damaging effects of privilege waivers in investigations. As already discussed, such agencies as the DOJ and the SEC have recently changed their policies with respect to privilege waivers. Additionally, Congress has

taken legislative action to ameliorate the effects of privilege waivers. For example, the Financial Services Regulatory Act of 2006 specifies that the disclosure of information by certain covered entities to federal, state or foreign banking agencies acting in the their supervisory or regulatory process is not a waiver of privilege to any other person or entity. 12 U.S.C. § 1828(x); 12 U.S.C. § 1785(j).

Recent additions to the Federal Rules of Evidence also provide a mechanism for protecting against disclosure in certain instances. Rule 502(a) states that:

> When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional, (2) the disclosed and undisclosed communications or information concerns the same subject matter; and (3) they ought in fairness to be considered together.

Rule 502(b) provides some protection against inadvertent disclosure:

> When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

Subsection (d) of Rule 502 provides further protection, stating that a court may order that the privilege is not waived by disclosure connected with litigation pending before it, "in which event the disclosure is also not a waiver in any other federal or state proceeding." Finally, Rule 502(e) provides that "[a]n agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order." The Rules Advisory Committee considered "a rule that would allow persons and entities to cooperate with government agencies without waiving all privileges as to other parties in subsequent litigation." Letter from Lee Rosenthal to Senators Patrick J. Leahy and Arlen Specter (Sept. 26, 2007). However, the provision proved to be "very controversial," and the Committee ultimately

determined that it would not propose its adoption. *Id.* While Rule 502 is certainly not an absolute protection, it does provide some limited safe haven in certain situations.

Given the potential costs, certain safeguards are warranted before privilege is waived:

- privileged communications and other material should not be included when releasing the results of an internal investigation to the government unless the legal advice given at the time of the events in question is relevant and the entity is pursuing an advice of counsel or similar defense.

- if possible, the facts communicated to regulators should be delivered either orally or in memoranda strictly limited to the facts learned in the investigation.

- the attorney's mental impressions, conclusions and strategy should not be disclosed.

- an entity should not simply turn over all materials wholesale, as this risks the appearance of a relinquishment of privilege.

- if an entity wishes to withhold certain materials as privileged, counsel should express concern to the agency about the effect of the disclosure on the privilege. Counsel may also want to seek a confidentiality agreement with the agency or an agreement to use the materials only for a limited purpose.

- any release of the results of an internal investigation should be pursuant to a written agreement that the receiving government authority will not treat receipt of the report as a waiver of privilege; while such an agreement will likely not be binding on courts or third parties in most jurisdictions, *see* Fed. R. Evid. 502(e), such agreements can be helpful in establishing intent and in balancing the equities when the entity is faced with the argument that release of the report constitutes a waiver.

- documents should be delivered with an express reservation of the privilege even in the absence of an agreement.

- take care to document a corporation's reasons for cooperating, as policy concerns may weigh against a finding of waiver if the disclosures were made for the "right" reasons.

Special attention should also be paid in other specialized scenarios. For example, when the actions involve a cross-border dispute, care must be paid to understanding the rules on privilege and waiver in each applicable jurisdiction. Needless to say, other countries may have rules regarding privilege and waiver that differ dramatically from those of the United States. Additionally, defending a parallel proceeding may often require the retention of an outside

expert, a forensic accountant or a public relations firm. In such cases, corporations should be careful to avoid any inadvertent waiver of privilege.

Faced with the difficult choice of whether or not to cooperate and waive privilege, most entities agree to conduct their own internal investigation and release the results, in some form, to the government. But the costs of this waiver may be significant, and serious consideration should be given to the decision.

Conclusion

In-house and outside counsel should encourage their corporate clients to prepare a strategy for managing parallel proceedings, considering the proliferation of these proceedings in the current intense regulatory environment. This strategy should focus on handling the issues described above that generally arise early in these proceedings and for addressing the many issues that surface throughout these actions. Specifically, the strategy should be designed to achieve a global resolution that ensures finality and to preserve privileges when disclosing materials to regulators and negotiating the resolution. Skillful handling of these issues while moving the strategy forward during a parallel proceeding is key to assuring that corporations achieve the best possible resolution, while minimizing total costs and limiting distractions.[1]

[1] *Charles E. Harris, II, who is based in Chicago, Illinois, is a partner in Mayer Brown LLP's Litigation & Dispute Resolution Group, and Julie H. Firestone is a shareholder in the Business Litigation Section and Financial Markets Group of Briggs and Morgan's Minneapolis office.*