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Parallel Federal Investigations: Has Anything Changed?

Two courts have recently issued sanctions against the government for what they found to be deceptive concealment of the involvement of Department of Justice prosecutors in regulatory investigations: *United States v. Stringer,* 408 F. Supp. 2d 1083 (D. Or. 2005) (appeal pending); *United States v. Scrushy*, 261 F. Supp. 2d 1298 (N.D. Ala. 2003).

In *Stringer* – the more illustrative of the two – the SEC issued a deposition subpoena providing its routine advice on Form 1622 that disclosure was required, refusal to testify could lead to a mandatory court order, and the substance of the deposition could be subject to such routine uses as sharing with federal criminal authorities. When Stringer's attorney asked SEC counsel at his deposition whether the Commission was acting in conjunction with the U.S. Attorneys Office or the Department of Justice, SEC counsel gave the standard reply that the agency does not respond to such questions. As the court later learned, the SEC and USAO were very actively working together, including in their cooperation locating the deposition in a district where a perjury charge could be conveniently prosecuted. Stringer was later indicted on dozens of counts of securities fraud. The court's sanction for refusal to disclose the USAO's role was dismissal of the indictment and suppression of the deposition testimony. In *Scrushy*, the sanction was lifting the asset freeze on the defendant's assets, prior to the trial in which he was acquitted on multiple counts of securities fraud.

While the debate generated by the district courts' decisions in *Stringer* and *Scrushy* suggests a refreshing judicial willingness to protect against Justice Department manipulation of regulatory proceedings, the fundamental question remains whether those decisions have changed the risks of providing documents, interviews or testimony to regulatory investigators where there is potential exposure to criminal sanctions. Not surprisingly, the SEC intends to continue its practice of warning of possible sharing with other agencies while refusing to advise what those agencies may be doing. Its practice is consistent with federal securities statutes which expressly permit cooperation with the Justice Department. *15 U.S.C. 78u(d)(1)*.

Thus, despite the admonitions in *Stringer* and *Scrushy* that that the government does not play fair when it avoids a question whether the agency is cooperating with a criminal investigation, it remains the prudent course for any respondent to a regulatory demand for materials and information to assume that its production will be fair game for any government agency that might be interested.

This is not to suggest that a company should merely collect the material, submit to depositions, and then hope for the best. Indeed, it is often the best course to assume that prosecutors may be interested in the matter: Contact them, advise them that the company or individual is represented by counsel, and offer to discuss the issues. Doing so provides important intelligence about the height of the risks and tends to elevate discussions to a level beyond aggressive regulators.