

**Considering Parallel Investigations**

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## I. The Development of Parallel Investigations

As commerce becomes increasingly sophisticated and global trade develops, so too does enforcement and regulation. Thus, parallel investigations are becoming increasingly common in this modern era, posing unique challenges for individuals, corporations, and the attorneys who represent them.

In general, “parallel investigations” refers to separate investigations conducted simultaneously or successively by different teams, departments, agencies, or even branches of government regarding the same set of operative facts and circumstances. The most common types of parallel investigations are competing state and federal investigations or civil and criminal proceedings. For example, the Securities and Exchange Commission (“SEC”) and the Department of Justice (“DOJ”) may simultaneously investigate and prosecute violations of securities laws, pursuing both civil and criminal penalties. Or a health care practitioner may be under investigation for civil wrongdoing and violations of state law but also for criminal wrongdoing under applicable state or federal law. It is important to remember that parallel investigations do not always proceed concurrently. In fact, in many circumstances, one investigation spurs another when authorities or investigators uncover additional information.

Major events, often covered in the media, are another way parallel investigations may develop. In recent weeks, media coverage appears to have spurred what may be the beginning of several parallel investigations into Robinhood, an online brokerage firm that allows individuals to invest in the stock market without paying commission. In response to an unprecedented demand to trade in certain stocks, Robinhood restricted trading of those stocks.<sup>1</sup>

On Friday January 29, the SEC issued a statement launching what appears to be an investigation into Robinhood.<sup>2</sup> The SEC is not alone, however. The Texas Attorney General issued thirteen investigative demands on Robinhood and other entities who had engaged in similar actions.<sup>3</sup> Other states, including New York and Colorado, are also reviewing the situation.<sup>4</sup> Finally, Robinhood customers have filed multiple class-action lawsuits in several states, claiming

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<sup>1</sup> Mamta Badkar et al., *Markets latest: Robinhood to allow ‘limited purchases’ of previously restricted stocks – as it happened*, FT.com (Jan. 28, 2021), <https://www.ft.com/content/2028aa29-204c-3b2f-862a-f2e34986d2e6>.

<sup>2</sup> See *Statement of Acting Chair Lee and Commissioners Pierce, Roisman, and Crenshaw Regarding Recent Market Volatility*, U.S. SECURITIES AND EXCHANGE COMMISSION, available at <https://www.sec.gov/news/public-statement/joint-statement-market-volatility-2021-01-29> (last accessed Jan. 31, 2021).

<sup>3</sup> See *Texas Launches Probe into Online Brokers’ Halt of GameStop Trading*, COURTHOUSE NEWS SERVICE, available at <https://www.courthousenews.com/texas-launches-probe-into-online-brokers-halt-of-gamestop-trading/> (last accessed Feb. 4, 2021)

<sup>4</sup> See *New York attorney general’s office ‘actively reviewing’ Robinhood activity*, THE HILL, available at <https://thehill.com/regulation/finance/536418-new-york-attorney-generals-office-actively-reviewing-robinhood-activity> (last accessed Feb. 4, 2021); *Robinhood blocks purchase of Game Stop stock, Colorado Lawmaker calling for investigation*, THE DENVER CHANNEL, available at <https://www.thedenverchannel.com/news/local-news/robinhood-blocks-purchase-of-game-stop-stock-colorado-lawmaker-calling-for-investigation> (last accessed Feb. 4, 2021).

that Robinhood's actions in restricting trade illegally manipulated the market against its customers.<sup>5</sup> Robinhood will, therefore, be defending against multiple lawsuits and government investigations for the foreseeable future.

But are parallel investigations like those facing Robinhood allowed? As a general matter, the answer is yes. Courts have consistently upheld the propriety of parallel investigations.<sup>6</sup> In *United States v. Kordel*, which involved a criminal investigation by the United States Attorney for the Eastern District of Michigan and a civil investigation by the Division of Regulatory Management of the Food and Drug Administration (FDA) into misbranding, the Supreme Court permitted the use of parallel investigations. The Supreme Court's decision was grounded in public policy considerations, animating the next half-century of parallel investigations:

The public interest in protecting consumers through the Nation from misbranded drugs requires prompt action by the agency charged with responsibility of administration of the food and drug laws. But a rational decision whether to proceed criminally against those responsible for the misbranding may have to await consideration of a fuller record than that before the agency at the time of the civil seizure of the offending products. It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief or to defer civil proceedings pending the ultimate outcome of a criminal trial.<sup>7</sup>

However, the government's ability to conduct concurrent or simultaneous investigations is not absolute. In *Kordel*, the Supreme Court outlined times in which parallel investigations would not be allowed, including where:

- The government brings a civil action solely to obtain evidence for a criminal prosecution;
- The government fails to advise a defendant in a civil proceeding that it is contemplating a criminal prosecution;
- A defendant is unrepresented;
- There is potential for prejudice from adverse pretrial publicity or other unfair injury; and
- Special circumstances might suggest the unconstitutionality or impropriety of a criminal investigation.<sup>8</sup>

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<sup>5</sup> See *Class-action lawsuit filed against Robinhood following outrage over GameStop stock restriction*, CNN, available at <https://www.cnn.com/2021/01/28/investing/lawsuit-robinhood-gamestop-wallstreetbets/index.html> (last accessed Feb. 4, 2021).

<sup>6</sup> See, e.g., *United States v. Kordel*, 397 U.S. 1, 10 (1970) (“It would stultify enforcement of federal law to require a government agency ... invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the outcome of a criminal trial”).

<sup>7</sup> *Id.* at 11.

<sup>8</sup> *Id.* at 11-12.

While these limits are not always clear-cut, the overarching principle from *Kordel* and subsequent case law is that parallel proceedings are permissible so long as the government acts in good faith.<sup>9</sup> In other words, the parallel investigations must be justified by genuine enforcement purposes.

## II. Representing Corporations in Parallel Criminal and Civil Investigations

Counsel for corporations involved in or facing the risk of potential parallel investigations must take into account the ways parallel proceedings could intersect with, inform, or trigger each other. The complex nature of these proceedings requires coordinated and strategic planning from day one. By employing a coordinated strategy to manage these complex, multi-faceted investigations, a company increases its chances for successfully resolving these types of matters in a way that is in the best interests of the company.

First, strategic decisions must be made regarding whether and when to try to determine if parallel investigations are underway. Because criminal investigations are often covert, especially in their early stages, it is more often the case that the company becomes aware of a civil inquiry by the government but the existence of a criminal inquiry remains unknown. While understanding the full state of play can aid decision-making and facilitate overall case strategy decisions, the question of whether to ask about the existence of criminal investigation is not always as straightforward as it may seem. For example, a company's inquiry about the existence of a criminal investigation could prompt additional interest from the government or encourage them to open an investigation if one was not already underway. In addition, gaining more information about the existence of a criminal investigation may create disclosure obligations, depending on the overall facts and circumstances at play. Thus, company counsel is wise to treat the decision to inquire about the existence of a criminal investigation as an important tactical decision that merits a fulsome discussion of the benefits and risks.

If a company is facing both criminal and civil government investigations, this can materially alter the landscape given the risks associated with a criminal conviction. For example, the reputational risk of a criminal conviction—or even just an investigation—is significant, and can increase the government's leverage in negotiations. The incentives to successfully resolve a parallel investigation with a civil-only resolution are especially great in industries like healthcare, where certain convictions can trigger exclusion from participation in government healthcare programs. Further, a criminal conviction is generally admissible in a civil proceeding, thus arming civil plaintiffs with a key piece of evidence if civil cases remain pending following a guilty plea. The company may also find that current or former employee witnesses may assert their Fifth Amendment right against self-incrimination in civil proceedings if the government has not closed its investigation with respect to those individuals.

In considering the possible strategic approaches to managing parallel government investigations, it is also important to understand the relevant incentives that exist for government attorneys. Parallel proceedings are standard practice for the government today. In fact, the DOJ's *Justice Manual* requires it:

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<sup>9</sup> *Id.* at 11.

Department policy is that criminal prosecutors and civil trial counsel should timely communicate, coordinate, and cooperate with one another and agency attorneys to the fullest extent appropriate to the case and permissible by law, whenever an alleged offense or violation of federal law gives rise to the potential for criminal, civil, regulatory, and/or agency administrative parallel (simultaneous or successive) proceedings.<sup>10</sup>

This type of coordination provides a number of advantages to the government. Importantly, coordination allows each government team—whether civil or criminal—to get the benefit of broader access to information. For example, civil law enforcement may have the benefit of information gathered with criminal law tools, from search warrants to undercover operations.<sup>11</sup> Conversely, the criminal enforcement team may use information obtained during civil discovery.<sup>12</sup>

Third, if actions do proceed in parallel, counsel should ensure that any coordination on the part of opposing counsel does not violate ethical or legal boundaries, like those described in *Kordel* and outlined in Section I. Critically, the government may not use one investigation merely to leverage a settlement in another investigation. Neither can one investigation be pursued merely to collect evidence for the other. For example, the government’s criminal enforcement team may not direct civil or administrative personnel to collect evidence exclusively to support a criminal case. Doing so would deprive the defendant of important due process rights. Recently, in *United States v. Rhodes*, a federal district court in the Southern District of New York made clear that cooperation in parallel proceedings violates the Due Process Clause of the Fifth Amendment if the government “conducts a civil investigation solely for the purpose of advancing a criminal case.”<sup>13</sup> In addition, criminal prosecutors may not disclose grand jury proceedings or evidence collected pursuant to a grand jury subpoena unless they first secure a court order.

Finally, counsel should keep in mind possible downstream implications of parallel proceedings. Since the DOJ released its memorandum on Individual Accountability for Corporate Wrongdoing (otherwise known as the “Yates Memo”) in 2015, companies have been under increasing pressure to share factual findings from internal investigations, including wrongdoing by former or current company employees, in order to receive cooperation credit. The information provided and documents produced may end up the subject of discovery requests in related investigations or follow-on civil suits. And cooperation between federal and state investigators could subject a client’s information and documents to state-level FOIA requests because states often have more expansive FOIA statutes.

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<sup>10</sup> Dep’t of Justice, Justice Manual, Organization and Functions Manual, Pt. 27 (last updated July 2012).

<sup>11</sup> *Id.*

<sup>12</sup> *Kordel*, 391 U.S. 1 at 13 (holding that the use of information gathered through civil interrogatories in a parallel criminal proceeding was constitutionally permissible).

<sup>13</sup> *United States v. Rhodes*, No. 18-CR-887 (JMF), 2019 WL 3162221 (S.D.N.Y. Jul. 16, 2019); see also *U.S. v Tweel*, 550 F.2d 297 (5th Cir. 1977); *U.S. v. Scrushy*, 366 F. Supp. 2d 1134 (N.D. Ala. 2005).

### III. Representing Individuals in Parallel Civil and Criminal Investigations

Representing individuals in parallel investigations is no less daunting a task than representing corporations. While the challenges of representing a corporation versus an individual often overlap, there is one key difference: the privilege against self-incrimination is available only to natural persons, not corporations.<sup>14</sup> An individual may refuse to answer questions that may incriminate them by invoking their Fifth Amendment rights against self-incrimination. Importantly, the privilege is not limited to criminal proceedings and may be asserted “in any proceeding, civil or criminal, administrative or judicial, investigatory, or adjudicatory.”<sup>15</sup>

With the ability to invoke the Fifth Amendment, individuals (and their attorneys) facing parallel investigations must understand the implications of invoking the privilege against self-incrimination or cooperating with civil authorities. There are significant risks for individuals facing just a civil investigation, and the threat of potential criminal investigation only increases this. Individuals and their attorneys, therefore, need to understand the full scope of an investigation when making a decision about testifying or cooperating. An individual may choose to cooperate with authorities to avoid threatened actions. But cooperation may increase the risk of criminal prosecution if he or she reveals incriminating evidence, unless immunity has been offered for such testimony. However, asserting one’s Fifth Amendment rights may come at a price, allowing the judge or jury to draw an adverse inference or forfeiting the right to present certain evidence later.

If it is impossible to make a statement or provide testimony without providing incriminating evidence, invoking the Fifth Amendment should be an important consideration. However, invocation can lead to unanticipated consequences. For example, a regulator or investigator may push harder or dig deeper to obtain facts believed to be concealed. Invoking the Fifth Amendment may also result in an individual losing his or her employment, particularly in heavily regulated industries. While terminating an employee based on assertion of privilege may be unconstitutional in some contexts, it is allowed in others if the employer is a purely private actor.<sup>16</sup>

Another important consideration is the company attorney’s interactions with company employees during parallel investigations. Because an attorney has a duty to represent the best interests of its client, the corporation’s attorneys should disclose who they represent when interviewing company employees in connection with an investigation. Sometimes called an Upjohn warning after the landmark Supreme Court decision in *Upjohn Co. v. United States*,<sup>17</sup> attorneys who are interviewing a company employee about the subject matter of the investigation should advise the employee that the attorney represents the corporation, and does not represent the

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<sup>14</sup> *United States v. White*, 322 U.S. 694, 698-99 (1944).

<sup>15</sup> See *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

<sup>16</sup> See, e.g., *Garrity v. New Jersey*, 385 U.S. 493 (1967) (where police officers were questioned regarding alleged fixing of traffic tickets, the Supreme Court ruled it was unconstitutional to give police officers the choice between self-incrimination and forfeiture of their jobs); *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 270 F.3d 155, 161 (2d Cir.), cert. denied, 123 S. Ct. 580 (2002).

<sup>17</sup> 499 U.S. 383 (1981).

employee. The attorney should also notify the employee that, while the attorney-client privilege protects the confidentiality of the interview because the information is being used to provide legal advice to the company, the corporation alone holds the privilege and can unilaterally decide whether to waive the privilege at a later time.

#### **IV. Conclusion**

Regardless of industry, parallel investigations and proceedings are increasingly common. Given the complexity of parallel proceedings and the number of interested parties, achieving global peace can be difficult. Appreciating the unique challenges presented by parallel proceedings and recognizing the critical role counsel can play in navigating these challenges are critical to success.