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Increasing Regulatory Protections in Foreign Markets

Many regulators have become more comfortable examining and punishing extraterritorial conduct, as long as it impacts their home market in some manner.

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In August, the Trump Administration issued a sweeping executive order concerning civil and administrative enforcement proceedings, supplementing an already-robust system of protections. Memorandum M-20-31 ordered all federal departments and agencies to provide specific protections and processes concerning the government's burden of proof, the disclosure of evidence, the length of investigations, and the notification of parties under scrutiny, among other subjects.

But beyond U.S. shores, regulatory processes and procedures run the gamut. Having represented global financial institutions in numerous jurisdictions across six continents on matters related to banking, finance, securities, and antitrust/competition, we can attest that every foreign regulatory agency presents its own unique challenges. Each is shaped by its own timelines, investigative and enforcement methods, and cultural factors—both institutional and national.

Yet we have found that no matter the nation or specific agency, the best pathway to a successful resolution of a regulatory matter is to supplement the existing regulatory framework with additional processes, protections, communications, and disclosures—even where they have no formal precedent.

The Regulatory Spectrum

Global financial institutions encounter an incredibly diverse range of processes and procedures among enforcement regulators.

At the robust end of the spectrum stands the U.S. Securities and Exchange Commission (SEC). Its evolution—from the Wells Committee, to the Seaboard Report, and additional reforms since—has created an institution that generally facilitates transparency. Financial institutions can expect dozens of conversations between their outside counsel and the SEC Enforcement team. The SEC staff share their positions and legal theories and, in turn, outside counsel offer their legal and factual defenses. Given these robust procedures ensuring transparency, if the SEC charges a financial institution with wrongdoing, it is usually the case that the unknowns largely have been eliminated before any official proceeding.

A decade ago, the Directorate-General for Competition (DG Comp) of the European Commission (EC) was nothing like the SEC. The EC process provided for the collection of information from the subjects of investigations. But it offered almost no opportunity for meaningful dialogue with investigative staffers before DG Comp would initiate an enforcement action via a Statement of Objections, the EC's formal charging document. That almost invariably led to significant fines.

Today, the EC sits in the middle of the spectrum, as a result of efforts to codify more robust guidelines. In 2011, DG Comp began offering three "State of Play" meetings, including: soon after proceedings open; at an advanced stage, during which "parties can clarify certain issues and facts relevant to the outcome"; and after the issuance of a Statement of Objections. Despite these vast improvements, the EC's three meeting framework remains rigid, offering little room for the informal and robust dialogue between regulators and those being investigated that is often seen in the United States.

The Competition Commission of South Africa (CCSA), for example, sits at the less transparent end of the spectrum. Financial institutions and their outside counsel may receive little or even no notice that an investigation has been launched into their business before the CCSA files a formal complaint. Often, it is only then that the institution under investigation learns about the specific charges.

The Dangers of Contagion

Due to increasing cross-border regulatory cooperation, an investigation in any one market—even those with limited procedures and communication—may draw the attention of additional foreign regulators. Many regulators have become more comfortable examining and punishing extra-territorial conduct, as long as it impacts their home market in some manner.

Of even more concern, the media and the public often are not attuned to the very real differences in process and procedure among the various national and regional regulators. As a result, when any regulator acts, no matter their place on the spectrum for regulatory procedures and transparency, the announcement may draw media attention and ignite sweeping class action lawsuits—all based on imperfect information, limited procedures, and inadequate communication.

Preparing the Client and the Public

Education becomes a critical element when action is taken by a regulator with less-than-robust procedures and few communication opportunities. Financial institutions may require additional guidance on that regulator's processes, procedures, and communication channels, as compared to those in more familiar jurisdictions. At the appropriate juncture, companies may also wish to consider public disclosures of proceedings in order to provide context for any contemplated regulatory action, including guidance and context about the regulatory process, as well as a description of avenues for appeal within the regulatory agency and, if necessary, in the related courts.

Supplemental Process and Procedures

Meanwhile, financial institutions can improve the quality and frequency of their interactions with such regulators and better shape the outcome by politely but firmly insisting on additional steps and safeguards similar to those available in more developed markets.

When engaging such foreign regulators, the strategy to be followed will depend on the exact circumstances, but we typically recommend that companies:

- **Hire local counsel.** Even exceptional local counsel may not satisfy financial institutions accustomed to U.S.-level dialogue. In fact, local counsel may be overly invested in the existing local procedures. Hire them anyway. They will provide guidance on local customs and culture, set expectations, and outline the standard process—useful even when taking the non-standard approach outlined here.
- **Be respectful but insistent.** Subjects or targets of an investigation must be cognizant of the tone and tenor of the dialogue at all times. Approach every regulator respectfully and politely. And simultaneously, where a meeting is essential, do not take "no" for an answer. Local counsel can suggest multiple touchpoints within the regulator to lodge meeting requests and can double the

volume of those requests by making some themselves.

• **Know the facts.** Subject companies should review relevant documents and conduct interviews at the outset, going beyond the scope of the discovery requests as necessary to understand as best as possible the regulator's theory of the case.

• **Be early.** If it becomes clear that the institution is the subject or target of the regulatory investigation, request a meeting at the earliest possible juncture. It does not matter if such meetings are uncommon in the particular jurisdiction. Feel free to concede the request as an "unusual one," but get in front of the investigatory staff as soon as the facts are in order. In some jurisdictions, cases may be open for years before a formal invitation is extended. Further, it is often the case that the longer the matter is open, the more likely that the regulators involved will become emotionally invested in a particular outcome, especially if no counter-narrative has been offered.

• **Set the agenda—deliver data and narrative.** Once a thorough internal investigation has been completed and the necessary documents have been reviewed, build a presentation for the regulator that sets the agenda. Include any broader context, market analysis, trading records, or original materials that may be exculpatory. Finally, be ready to deliver a proffer.

• **Consider enlisting an outside expert.** A credentialed expert can provide a unique and respected perspective during discussions with the government. Especially in competition matters, where local rules may be idiosyncratic, a former official from the enforcement agency can deliver insight and opinion rooted in prior government service and experience.

• **Go everywhere.** If more than one regulator is involved in a given country, meet with all of those claiming jurisdiction. For example, a financial institution's matters are often subject to both a securities regulator and a competition regulator. Do not expect that they will share information, but assume that they may.

Similarly, if the same matter has sprawled across multiple jurisdictions or reached regional regulators, meet with each of them. To borrow a term from investment banking, build a road show.

• **Consider local laws.** Consider client confidentiality, employee privacy, legal privilege, bank secrecy and data protection laws and rules when building a presentation or offering findings. If it is a cross-border matter, be cognizant of conflicting statutes. Include on the team someone adept at negotiating these issues.

• **Check in often.** Where appropriate, regular contact with the investigatory staff will provide opportunities to answer additional questions, deliver new clarifications, and illustrate good will and helpfulness—all while keeping abreast of any developments and the evolving timeline for resolution.

• **Keep detailed records.** Pursuing this aggressive yet respectful strategy can yield successful outcomes across a wide variety of regulators operating in vastly different systems. But occasionally, the regulator in question has simply refused to engage after sustained outreach from multiple parties. Keep detailed records of every attempt at contact, including by local counsel. Be ready to present these efforts to the relevant appellate court, delivering the message, "We tried to offer help, and they affirmatively refused."

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When financial institutions face regulatory inquiries from jurisdictions where process and communication are less than robust, it is possible to create additional protections and positively shape the outcome by engaging in a meaningful dialogue with the investigative staff—overcoming insufficient procedure and unhelpful precedent and practice.

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