SEC/DOJ Parallel Proceedings: Contemplating the Propriety of Recent Judicial Trends

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Mark D. Hunter*

I. INTRODUCTION

Parallel proceedings are “simultaneous, adjudicative proceedings that (1) arise out of a single set of transactions, and (2) are directed against the same defendant or defendants.”¹ Parallel proceedings may include investigations by any federal regulatory agency, civil injunctive or penalty actions, administrative disciplinary proceedings, cease and desist proceedings, private actions (including both class and derivative actions), proceedings by self-regulatory agencies, various state proceedings, grand jury inquiries, and/or criminal prosecutions. The term is most frequently used to refer to a civil and a criminal action by a federal agency arising from the same activities.² For the purposes of this Article, “parallel proceeding” will refer to a simultaneous civil investigation or proceeding by the United States Securities and Exchange Commission (“SEC”) and criminal investigation or proceeding by the Department of Justice (“DOJ”) through the United States Attorney’s Office regarding alleged violations of the federal securities laws.³

Part II of this Article introduces traditional authority, both statutory and case law, for the SEC and the DOJ to conduct parallel proceedings. Part III briefly describes the SEC’s methods and procedures for gathering and sharing information with the DOJ. Part IV describes the rights and privileges afforded to suspects, while Part V describes the rights and privileges that suspects are not afforded despite the obviously unfair situations such suspects must face as a result. Part VI describes the procedures used by targets to combat these unfair situations, with particular attention afforded to the procedure of moving for a stay of the civil proceeding pending the resolution of the criminal proceeding. Part VII analyzes the judicial standards utilized by courts in determining whether to grant the stay of the civil proceeding, focusing on apparent recent judicial trends. Part VIII describes criticism of SEC/DOJ parallel proceedings, as well

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1. 21 MARVIN G. PICKHOLZ, SECURITIES CRIMES § 3.01 (1998).

2. Id.

as the effectiveness of such criticism, while Part IX discusses why such criticism is largely inappropriate.

II. TRADITIONAL STATUTORY AND CASE LAW AUTHORITIES FOR PARALLEL PROCEEDINGS

A. Statutory Authorities

Both the Securities Act of 1933 and the Securities Exchange Act of 1934 explicitly empower the SEC to investigate possible violations of federal securities laws while contemplating both civil and criminal enforcement. Furthermore, the 1933 Act and 1934 Act both allow the SEC to share any information obtained through discovery with the DOJ. Section 20(b) of the 1933 Act provides, in relevant part:

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or any rule or regulation prescribed under authority thereof, it may . . . transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title.

Similarly, Section 21(a) of the 1934 Act provides, in relevant part: “The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, or is about to violate any provision of this title[,]” Section 21(d)(1) of the 1934 Act further provides that the SEC may “transmit such evidence as may be available concerning such acts or practices . . . to the Attorney General who may, in his discretion, institute

the necessary criminal proceedings under this chapter." These statutory sections, thus, explicitly authorize cooperation between the SEC and the DOJ.

B. Case Law Authorities

This Part discusses several cases that have contributed to the current judicial standards associated with SEC/DOJ parallel proceedings. The cases are discussed below in chronological order beginning with the United States Supreme Court's first discussion of parallel proceedings and continuing through the seminal case addressing SEC/DOJ parallel proceedings, SEC v. Dresser Industries.9


As early as 1912, in Standard Sanitary Manufacturing Co. v. United States,10 the United States Supreme Court acknowledged that a course of conduct or transaction could, under a single statute, become the subject of both criminal and civil proceedings, either "simultaneously or successively," with discretion to prevent injury in particular cases left to the courts.11 Reviewing an alleged violation of the Sherman Act, the Court reasoned that "an imperative rule that the civil suit must await the trial of the criminal action might result in injustice or take from the statute a great deal of its power."12 The Standard Sanitary Court reasoned that courts would retain discretion to prevent injury to either party, in cases of parallel proceedings. Subsequently, the courts have exercised this discretion in a variety of ways.

2. The Parrott Cases

The two Parrott cases illustrated the possible injuries associated with parallel proceedings and how differently two separate courts might choose to address such injuries.13 In Parrott I, decided in 1965, during an SEC

11. Id. at 52.
12. Id.
investigation, the defendants were advised of their rights, including their right against self-incrimination. They were not informed, however, that a referral had been made to the U.S. Attorney's Office when they were called to testify in a subsequent administrative hearing. When the government returned an indictment twenty-two months after the SEC's referral, the federal district court in the District of Columbia dismissed it, stating that "the Government may not bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for a subsequent criminal proceeding." In Parrott II, reviewing facts essentially identical to those in Parrott I, a federal district court in New York concluded that the defendants had been properly advised of their rights and that all the evidence in question was obtained from a proper SEC investigation resulting from a valid SEC subpoena. As such, cooperation that was forbidden by the Parrott I court was deemed appropriate by the Parrott II court.

3. United States v. Kordel

In 1970, the Supreme Court revisited the holding of Standard Sanitary with its decision in United States v. Kordel. In Kordel, the defendants were prosecuted for introducing misbranded drugs into commerce and causing drugs to be misbranded after they had been shipped in interstate commerce. The Court concluded that requiring government agencies to choose between bringing criminal prosecution and pursuing civil relief would harm efforts to enforce federal food and drug laws. The Court, therefore, held that civil proceedings need not be postponed pending the resolution of parallel criminal proceedings unless special circumstances make the postponement necessary to serve the needs of justice. The Court stated that a stay of civil proceedings may be proper where:

(1) the government has brought the parallel civil action solely for the purposes of obtaining evidence for the criminal action,
(2) the defendant in the civil proceeding has not been warned of the government contemplating to prosecute him criminally,
(3) the defendant does not have the benefit of the representation of counsel,

15. Id. at 199.
16. Id. at 202.
17. Parrott II, 315 F. Supp. at 1015-16.
19. Id. at 1.
20. Id. at 11-12.
The federal government may, however, proceed with related criminal and civil actions arising from the same set of operative facts either simultaneously or successively, absent these “special circumstances.” Although Kordel listed as examples several factual situations that might require a stay of the civil proceedings pending the resolution of the parallel criminal proceeding, the list was not exhaustive and left practitioners with many questions regarding what other factual situations constituted “special circumstances.”

4. United States v. Fields

In 1978, the Second Circuit Court of Appeals offered strong support for SEC/DOJ cooperation. In United States v. Fields, the court cited a report by Congress stating that “[t]raditionally, there has been a close working relationship between the Justice Department and the SEC. The Committee [on Interstate and Foreign Commerce] fully expects that this cooperation between the two agencies will continue.” The Fields court reasoned that preliminary communication between the SEC and the United States Attorney is a “commendable example of inter-agency cooperation” that (1) familiarizes the United States Attorney with the complex facts of the case, (2) minimizes statute of limitations problems, and (3) allows earlier initiation of criminal proceedings consistent with the defendant’s right to a speedy trial.

5. SEC v. Dresser Industries

Following the same general trend as United States v. Fields, in 1980 the Court of Appeals for the District of Columbia issued its opinion in what has become known as the seminal case addressing SEC/DOJ parallel proceedings.

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21. Id.
22. Id.
24. Id. at 646 n.19 (quoting H.R. REP. No. 95-640, at 10 (1977)) (alteration in original).
25. Id. at 646.
26. Although Dresser is a decision from the Court of Appeals for the District of Columbia Circuit, and, therefore, not binding on other circuits, it is heavily cited in secondary sources as the seminal case on SEC/DOJ parallel proceedings. See William R. McLucas et al., Article: A Practitioner’s Guide to the SEC’s Investigative and Enforcement Process, 70 TEMP. L. REV. 53, 101 (1997) (“The leading Commission case dealing with parallel proceedings is SEC v. Dresser Industries.”); see also DAVID H.
SEC v. Dresser Industries, Inc. While investigating alleged “illegal and questionable corporate payments,” the SEC subpoenaed documents from Dresser. Dresser moved to quash the subpoena duces tecum, but the district court denied Dresser’s motion and ordered him to comply. In affirming the decision of the district court, the court of appeals recognized that parallel proceedings are “unobjectionable under our jurisprudence,” as long as the rights of parties involved are not substantially prejudiced. The Dresser court cited Kordel for the authority of courts to stay civil proceedings when the court deems the stay necessary and held that this decision must be made in the “light of the particular circumstances of the case,” but noted that the strongest argument for staying the civil proceeding until the completion of the parallel criminal proceeding is when the party under indictment would be forced to defend a civil proceeding regarding the same subject matter as the criminal proceeding. If the civil proceeding is not deferred, several problems could arise, including: (1) violating the defendant’s Fifth Amendment privilege against self-incrimination, (2) expanding discovery beyond the scope of Federal Rule of Criminal Procedure 16(b), (3) allowing the prosecution to gain access to the defense theory before the criminal trial, or (4) prejudicing the case in some other unforeseen way. As such, a court may be justified in deferring the civil proceeding if its delay would not “seriously injure the public interest,” although deferring civil discovery or entering a protective order might be adequate as well.

The court then applied the facts of the case to these standards and found that, because Dresser had not been indicted, his Fifth Amendment privilege was not threatened (and Rule 16(b) was not yet in effect), and, thus, the case at bar was “a far weaker one for staying the administrative investigation.” Furthermore, the court noted, the subpoena did not require Dresser to reveal the


27. Id. at 1368 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980).
28. Id. at 1370.
29. Id. at 1374.
30. Id. at 1375-76.
31. For a discussion of the parameters of Fed. R. Crim. P. 16(b), see infra Part V.C.
32. Dresser, 628 F.2d at 1376.
33. Id.
34. Id.
35. Id.
theory of its defense in the criminal action. According to the Court, “[t]he investigation of Dresser based as it was on the staff’s conclusion that Dresser may have engaged in conduct seriously contravening the securities laws falls squarely within the Commission’s explicit investigatory authority.”

The court cited the 1933 Act and the 1934 Act as explicit authority for the SEC to investigate possible violations of federal securities laws for the purposes of both civil and criminal enforcement, and continued by discussing the necessity of SEC/DOJ parallel proceedings to ensure that such enforcement is timely. The court reasoned that, in order to maintain the integrity of securities markets, the SEC and the DOJ must both be able to act quickly if either suspects that the laws with which they are charged to enforce have been violated. Because neither the SEC nor the DOJ can wait for the other to conclude its proceedings before beginning the relevant actions, the court reasoned, parallel investigations by these agencies should not be blocked without the showing of “special circumstances” that would prejudice substantial rights of either party.

Dresser argued that the SEC’s transmittal of Dresser’s file to the DOJ was identical to a “referral” under United States v. LaSalle National Bank, and, thus, the SEC’s power to subpoena lapsed afterwards. Under LaSalle, the IRS may not exercise its summons authority to investigate possible violations of tax laws after referring those violations to the DOJ. Alternatively, Dresser argued, even if the SEC’s transmittal was not identical to a “referral” under LaSalle, the SEC could not enforce investigative subpoenas into the same matters as the grand jury investigation.

Analyzing LaSalle and applying its rationale to the case before it, the Dresser court reasoned that both of Dresser’s arguments were invalid because the LaSalle rule applies only to the Internal Revenue Code and not to the federal securities laws, where the SEC’s civil authority continues after the DOJ initiates a parallel proceeding. The “policy interests” that the Supreme Court identified in LaSalle were only enunciated after the Court determined that the

36. Id.
37. Id. at 1376-77.
38. The statute of limitations for criminal securities fraud, for example, is five years from the date on which the fraudulent action occurred. United States v. Scop, 846 F.2d 135, 138 (2d Cir. 1988) (citing 18 U.S.C. § 3282 (1982)).
39. Dresser, 628 F.2d at 1377.
40. Id.
42. Dresser, 628 F.2d at 1378.
43. Id.
44. The Internal Revenue Code states that the IRS’s civil authority ceases once it refers a case to the DOJ.
45. Dresser, 628 F.2d at 1378. According to the Court, “[t]he investigation of Dresser based as it was on the staff’s conclusion that Dresser may have engaged in conduct seriously contravening the securities laws falls squarely within the Commission’s explicit investigatory authority.” Id. at 1380 (footnote omitted).
46. Such policy interests were to avoid expanding the DOJ’s discovery rights and
IRS had no authority to issue a summons after it had referred a case to the DOJ. The SEC’s authority remains post-indictment, no such “policy interests” existed in this case. The Dresser court reasoned that, even if the “policy interests” identified in LaSalle are relevant, they have “little practical significance in this context.” The limitations on criminal discovery, found in Federal Rules of Criminal Procedure 15-17, are not applicable until an indictment has been returned. Prior to the indictment’s return, no possibility exists that the DOJ could expand its discovery abilities because the subpoena power of the grand jury is “as broad as—perhaps broader than—that of the SEC.”

Dresser concentrated more heavily upon LaSalle’s “policy interest” of avoiding any infringement on the grand jury’s role. Dresser first argued that enforcement of the SEC subpoena would undermine grand jury secrecy protections, given that the SEC subpoena requested access to many documents which already had been subpoenaed by the grand jury. The court reasoned that, because the documents requested by the SEC were created for independent, corporate purposes and did not reveal what had occurred before the grand jury (but rather only what had occurred in Dresser’s foreign corporate operations), those documents were not insulated from investigation in another forum. Dresser’s second argument was that the SEC might choose selective documents to provide to the grand jury through the DOJ. The court, acknowledging that the SEC’s policy is to provide the DOJ with continuing access to all its files, held Dresser’s argument to be “purely speculative” and found the presumption that the SEC would pre-select documents in order to prejudice the grand jury improper. The court further held that, because the grand jury members would be aided by experts provided by federal regulatory agencies, pursuant to Rule 6(e), the efficiency and rationality of the process would be promoted. If Dresser was concerned about possible selective disclosure by the SEC, the court of appeals reasoned, Dresser could negate any possible danger by providing directly to the grand jury copies of any documents he provided to the SEC.

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48. Dresser, 628 F.2d at 1381.
49. Id.
50. Id.
51. Id.
52. Id.
53. Id. at 1382.
54. Id. at 1383.
55. Id.
56. Id.
57. Id.
58. Id. at 1384.
Dresser court held, in conclusion, that “Dresser’s invocation of LaSalle can avail [him] nothing.”

In discussing the policy of cooperation between the SEC and DOJ, the court, after reiterating that both the 1933 Act and the 1934 Act authorize the SEC to share evidence with the DOJ for the purposes of initiating a criminal proceeding, noted that the same statutes also impose no limitations as to when the transmission of such evidence may occur. The court continued by citing segments of the legislative history of the Foreign Corrupt Practices Act of 1977, which explicitly state the expectations of both the Senate and the House that the SEC and the DOJ will closely cooperate in the preparation of cases. The court acknowledged that, “[a]lthough the legislative history of the Foreign Corrupt Practices Act is not directly probative of congressional intent governing the [1933] and [1934] Acts, these statements by the 95th Congress are nevertheless entitled to some weight.” (The Dresser court reasoned that the LaSalle Court’s holding—that a “bad faith investigation” is one commenced solely for criminal justice purposes—was the applicable standard.) An agency “acts in good faith under the LaSalle conception,” according to the court, “even if it might use the information gained in the investigation for criminal enforcement purposes as well.”

Although Dresser still left open what constitutes “special circumstances” for the purpose of determining whether to grant a stay of a civil proceeding to a defendant subjected to parallel proceedings, the case at least made the standard easier for subsequent courts to analyze.

III. SEC PROCEDURES FOR GATHERING AND SHARING INFORMATION

An overview of the SEC’s procedures for conducting investigations and sharing information with the DOJ will help the reader understand the problematic nature of parallel proceedings.

The SEC generally utilizes information from two types of sources: internal and external. “Both types of sources are extremely important to the SEC in its

59. Id.
60. Id. at 1385.
62. See Dresser, 628 F.2d at 1385-86.
63. Id. at 1386.
64. Id. at 1387 (citing United States v. LaSalle National Bank, 437 U.S. 298, 307-08, 316, 316 n.18 (1978)).
65. Id.
enforcement of the federal securities laws. Internal information leading to the
discovery of violations of law can be obtained from filings under the 1933 and
1934 Acts.67 Additionally, surveillance of market activity helps detect unusual
trading patterns and possible violations of securities laws.68

Internal sources of information are also supplemented with external sources
of information.69 Informants, public complaints,70 referrals from self-regulatory
organizations, and state and federal regulatory agencies often provide the SEC
with information regarding violations of the federal securities laws.71

When the SEC’s sources have provided enough information to indicate it
is necessary, an investigation is commenced, usually by the SEC’s Division of
Enforcement. The SEC conducts investigations at two levels: informal and
formal. SEC investigations begin largely as informal investigations. At the
informal stage,72 formal authorization from the Commission is not required, but
SEC staff have no official power to compel the production of evidence from
parties73 and any cooperation by the parties during the informal investigation is
voluntary.74 At this stage of the investigation, the SEC will attempt to secure as
many documents as possible for the purposes of reconstructing the transaction(s)
in question.75 Although the SEC cannot compel the production of documents by
the target at this point, regulated entities (national securities exchanges,
brokerage firms, transfer agents, clearing agencies, etc.) can be compelled to
produce books and records they are required to maintain.76 Additionally, the

67. Id.
68. Id.; see also SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 130 (3d
69. Rule 5(a) of the SEC’s Rules of Practice states that “complaints received from
members of the public, communications from federal or state agencies, examinations of
filings made with the Commission, or otherwise” can initiate the informal inquiry, but
leads come from several other sources, as well. MARK STEINBERG & RALPH FERRARA,
SECURITIES PRACTICE: FEDERAL AND STATE ENFORCEMENT § 3.03 (1992 and Supp.
1998).
70. See Securities and Exchange Commission, SEC Division of Enforcement
Complaint Center, at http://www.sec.gov/complaint.shtml (describing complaint
initiation procedures).
71. HICKS, supra note 66, § 2.02[2].
73. Id.; see also SEC v. Jerry T. O’Brien, Inc., 467 U.S. 735, 738 n.1 (1984);
HICKS, supra note 66, § 2.02[3][b].
74. It is important to note, however, that a witness’ refusal to answer a question
may provide sufficient basis for a Staff Attorney to seek a formal order. Ralph C. Ferrara
& Philip S. Khinda, SEC Enforcement Proceedings: Strategic Considerations for When
the Agency Comes Calling, 51 ADMIN. L. REV. 1143, 1150 (1999).
75. Ira Lee Sorkin & Arthur G. Jakoby, SEC INVESTIGATIONS, 18 REV. SEC. &
COMMODITIES REG. 45, 46 (1985).
76. Id.
subject of the investigation may submit a written statement of her position, called a “Wells Submission,” regarding the investigation’s subject matter.\footnote{77}

Once the SEC exhausts all forms of voluntary cooperation (or has suspicions regarding the credibility of cooperation it has received) and the staff believes there is a “likelihood”\footnote{79} of a violation, the Commission\footnote{80} can issue a Formal Order of Investigation.\footnote{81} Under Section 19(b) of the 1933 Act,\footnote{82} once a formal order has been issued, the SEC staff can issue subpoenas duces tecum and examine witnesses under oath.\footnote{83} Further, the SEC is not required to indicate the reasons for the subpoenas\footnote{84} and the persons subpoenaed are financially responsible for complying with the requirements of the subpoena.\footnote{85} Federal law does not require the SEC to notify the target of an investigation that it has issued subpoenas to third parties,\footnote{86} since providing a target notice of third-party subpoenas might burden the discretionary powers of the SEC or hinder the

\begin{footnotes}

77. The term “Wells Submission” arises from the SEC’s Advisory Committee on Enforcement Policy (referred to as the “Wells Committee” after its first Chairman, Charles Wells) and refers to a statement from a target used to address the legal and policy issues why the SEC should decline to initiate an enforcement action. RICHARD W. JENNINGS ET AL., supra note 26, at 1573-76. The opportunity to make a Wells Statement and the required format is discussed in Securities Act Release No. 5320, 37 Fed. Reg. 23,829 (Nov. 9, 1972); see also 17 C.F.R. § 202.5(c) (2002).

78. HICKS, supra note 66 § 2.02[3][b].

79. See SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 130 (3d Cir. 1981) (discussing that the “likelihood” of a securities violation must exist before the SEC may issue a Formal Order of Investigation).

80. Congress has granted investigative and subpoena power to the SEC, but not to the individual staff members themselves. See 15 U.S.C. §§ 77s(c), 77l(a), 78u(b) (2000).


83. See also Rule 4(b) of the SEC’s Rules Relating to Investigations, 17 C.F.R. § 203.4(b) (2002) (specifying that the SEC delegates to the officers assigned to the investigation the power to subpoena evidence or documents which they feel is material to the inquiry).

84. SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047, 1052-53 (2d Cir. 1973) (holding that the SEC’s investigation should not be impeded by the requirement of describing why each person was being subpoenaed).

85. SEC v. Arthur Young & Co., 584 F.2d 1018, 1033 (D.C. Cir. 1978) (holding that “[t]here is a continuing general duty to respond to governmental process; in consequence, subpoenaed parties can legitimately be required to absorb reasonable expenses of compliance with administrative subpoenas”).

86. SEC v. Jerry T. O’Brien, Inc., 467 U.S. 735, 742 (1984) (holding that SEC subpoenas are not subject to due process requirements because no legal rights come into play during non-public SEC investigations, and the Sixth Amendment right to confrontation of witnesses is inapplicable since a non-public SEC investigation is not a full-blown criminal proceeding).
\end{footnotes}
investigation by tipping off the targets who may then attempt to evade or impede the investigation.\footnote{Id. at 749-51.}

The staff will provide the witness with a standard form discussing various routine uses, notices, and warnings regarding any information provided to the SEC, whether a witness provides testimony voluntarily or in accordance with a formal order.\footnote{See SEC Form 1662 ("Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena").} Further, any information provided to the SEC may be forwarded to a number of government and/or regulatory agencies.

The SEC has the authority to initiate only civil and administrative proceedings to investigate potential violations of federal securities laws, while the DOJ has sole jurisdiction over criminal proceedings.\footnote{17 C.F.R. § 202.5(f) (2002). One exception to this rule is Rule 42(b) of the Federal Rules of Criminal Procedure, which permits the court to appoint the SEC to prosecute a criminal contempt charge. See Fed. R. Crim. P. 42(b) (contempt may be prosecuted by "an attorney appointed by the court"); Frank v. United States, 384 F.2d 276, 278 (10th Cir. 1967), aff’d, 395 U.S. 147 (1969); SEC v. Murphy, No. CV 75-2775, 1983 U.S. Dist. LEXIS 14568, at **6-7 (C.D. Cal. Aug. 16, 1983) (nothing that neither the 1933 Act or the 1934 Acts prohibit the SEC from being appointed by the court to prosecute a criminal contempt charge arising from alleged disobedience of an injunction obtained by the SEC, and the occurrence of such does not constitute a violation of the defendant’s due process rights).}

When considering whether to refer a case to the DOJ, the SEC has focused on four types of violations: (1) those involving organized crime, (2) those committed by a chronic violator, (3) those where the scheme posed a significant threat to investors, and (4) those involving corruption of SEC staff or other government officials.\footnote{Steven Amchen et al., Securities Fraud, 39 AM. CRIM. L. REV. 1037, 1093 (2002) (citing STEINBERG & FERRARA, supra note 69, § 6.15).}

When providing information to the DOJ, there are two procedures by which the U.S. Attorneys can request access to SEC files and information: formally and informally.\footnote{Pickholz, supra note 1, § 1.04[6][a].}

Under a formal referral by the SEC for criminal prosecution, authorized by Section 24 of the 1933 Act,\footnote{15 U.S.C. 77t(b) (2000).} the SEC prepares a lengthy report detailing all relevant facts upon which charges should be brought.\footnote{Pickholz, supra note 1, § 1.04[6][a].} This process is extremely cumbersome and results in a delay in bringing criminal proceedings, which may cause statutes of limitations to run, important documents to be lost,
and/or the failure of witnesses’ memories.\textsuperscript{94} Although many considerations deemed this time-consuming process necessary in the first few decades of the SEC’s existence,\textsuperscript{95} the DOJ now has a separate fraud section to handle securities matters.\textsuperscript{96} Because increased understanding of securities matters by DOJ officials has alleviated some of the oversight responsibilities of the SEC, the formal method of referral is rarely used today.\textsuperscript{97}

Today, the SEC generally relies on the less cumbersome informal process known as “granting access,”\textsuperscript{98} which was developed to alert prosecutors to possible criminal violations in a more timely manner.\textsuperscript{99} Most commonly, either an SEC staff member will ask the SEC for authority to advise the DOJ about information regarding a possible defendant or the DOJ can make a request which is subsequently forwarded to the SEC.\textsuperscript{100} With increasing frequency, however, the DOJ relies on the SEC rules that allow United States Attorney’s Offices access to SEC investigatory files in order to bypass the referral procedures.\textsuperscript{101}

The methods differ significantly, however, in the form and degree of influence the SEC plays in the criminal prosecution. The SEC plays a more active role in formal referrals and merely makes its files available to the DOJ in informal referrals.\textsuperscript{102}

IV. TRADITIONAL RIGHTS AND PRIVILEGES AFFORDED TO DEFENDANTS

While the SEC does possess a great deal of leverage and authority, defendants possess a number of rights and privileges as well. During the informal phase of the investigation, for example, the defendant has no affirmative duty to comply with any requests by the SEC.\textsuperscript{103} Upon the issuance of the Formal Order of Investigation by the Commission, the SEC’s Rules Relating to Investigations (“Rules”) regulate the staff’s activity.\textsuperscript{104} The Rules provide the defendant with an unqualified right to counsel during the course of

\begin{itemize}
\item \textsuperscript{94} \textbf{PICKHOLZ, supra} note 1, § 1.04[6][a].
\item \textsuperscript{95} Lack of sophistication in U.S. attorneys who dealt with financial fraud or the lack of attention devoted by the U.S. Attorney’s Office to financial crimes, for example.
\item \textsuperscript{96} Such as the Securities/Commodities Fraud Task Force of the U.S. Attorney’s Office in the Southern District of New York or the Business/Securities Fraud Section of the U.S. Attorney’s Office in the Eastern District of New York.
\item \textsuperscript{97} \textbf{PICKHOLZ, supra} note 1, § 1.04[6][a].
\item \textsuperscript{98} \textit{See}, e.g., Order Granting Access, SEC NEWS DIG., Oct. 24, 1988, at 1.
\item \textsuperscript{99} \textbf{PICKHOLZ, supra} note 1, § 1.04[6][a].
\item \textsuperscript{100} \textbf{PICKHOLZ, supra} note 1, § 1.04[6][a].
\item \textsuperscript{101} Amchen et al., \textit{supra} note 90, at 1336.
\item \textsuperscript{102} Amchen et al., \textit{supra} note 90, at 1336.
\item \textsuperscript{103} \textit{See} supra Part III.
\item \textsuperscript{104} \textit{See} 17 C.F.R. § 203.1 (2002).
\end{itemize}
the proceeding,\(^\text{105}\) as well as an unqualified right to inspect the (1) Formal Order of Investigation\(^\text{106}\) and (2) official transcripts of the defendant’s own testimony.\(^\text{107}\) Additionally, subject to the SEC’s approval, the Rules provide the defendant with (1) a copy of the Formal Order of Investigation\(^\text{108}\) and (2) a copy of the defendant’s documentary evidence, if such evidence is non-public information.\(^\text{109}\) These rules ensure that, even though a defendant may be subjected to a very coercive environment when facing an SEC investigation, the defendant is not totally without protection.

V. TRADITIONAL RIGHTS AND PRIVILEGES NOT AFFORDED TO DEFENDANTS

Although defendants faced with parallel proceedings are afforded the aforementioned rights and privileges, many traditional privileges, including some of those guaranteed in the Bill of Rights, are not afforded. This leaves defendants faced with some extremely pressing concerns, including concerns related to self-incrimination, right to counsel, discovery, and collateral estoppel.

A. Self-Incrimination Concerns

The Fifth Amendment provides that “no person . . . shall be compelled in any criminal case to be a witness against himself.”\(^\text{110}\) The privilege against self-incrimination protects a person from being forced to provide information that might provide a direct link in a chain of evidence that might lead to his conviction,\(^\text{111}\) and is said to reflect “our preference for an accusatorial rather than an inquisitorial system of criminal justice.”\(^\text{112}\) The privilege against self-incrimination does not exist solely to protect a defendant at a criminal trial; rather, the privilege may be invoked in proceedings, both state and federal, that the defendant fears will eventually lead to a criminal trial.\(^\text{113}\) A party may invoke the privilege where the risk of criminal prosecution is “remote,”\(^\text{114}\) or even where

105. *Id.* § 203.7(b).
106. *Id.* § 203.7(a).
107. *Id.* § 203.6.
108. *Id.* § 203.7(a).
109. *Id.* § 203.6.
110. U.S. CONST. amend. V.
the party has received informal “assurances” that he will not be criminally prosecuted.\textsuperscript{115}

The decision to invoke one’s Fifth Amendment privilege against self-incrimination does not come without consequences, however. While adverse inferences may not be drawn against a criminal defendant who asserts his privilege against self-incrimination,\textsuperscript{116} the Fifth Amendment does not forbid the finder of fact to draw adverse inferences against parties in a civil action when they refuse to testify in response to questions posed to them.\textsuperscript{117} Further, evidence concealed through the invocation of the privilege against self-incrimination may not later be introduced by the defendant to support a claim or defense. For example, if a defendant in an SEC/DOJ parallel proceeding invokes the privilege to cease pre-trial civil discovery, the court has the authority to prevent the defendant from presenting the evidence at the time of trial for his benefit, even if the SEC independently receives evidence comparable to that which the witness refused to provide.\textsuperscript{118}

Conversely, testifying during the civil proceeding carries its own risks for the defendant. Evidence or testimony presented by the defendant on his own behalf in the civil suit may be used against him in a subsequent proceeding, whether civil or criminal in nature.\textsuperscript{119} In an SEC/DOJ parallel proceeding, this leaves the defendant “faced with a ‘double-edged sword’ by having to choose between self-incrimination in the SEC proceeding and self-incrimination in a later criminal or civil proceeding.”\textsuperscript{120}

B. Right to Counsel Concerns

The Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his

\textsuperscript{115} Estate of Fisher v. Commissioner, 905 F.2d 645, 649-50 (2d Cir. 1990);


\textsuperscript{117} Baxter v. Palmigiano, 425 U.S. 308, 318 (1976); SEC v. Graystone Nash, Inc., 25 F.3d 187, 190 (3d Cir. 1994) (noting that the “invocation of the Fifth Amendment poses substantial problems for an adverse party who is deprived of a source of information that might conceivably be determinative in a search for the truth”); see also SEC v. Rehtorik, 755 F. Supp. 1018, 1020 (S.D. Fla. 1990) (permitting the drawing of adverse inferences in SEC civil securities fraud suit). But see SEC v. Colello, 139 F.3d 674, 678 (9th Cir. 1998) (holding that, in order for a finder of fact to draw an adverse inference from a party’s invocation of the Fifth Amendment, evidence independent of the party’s silence must exist).


\textsuperscript{119} United States v. Kordel, 397 U.S. 1, 13 (1970).

defense.”¹²¹ A defendant’s Sixth Amendment right to the effective assistance of
counsel¹²² may be undermined by the existence of parallel proceedings. For
example, the government may be able to obtain information that would normally
have been protected by the attorney-client or work product privileges. “This risk
could arise either during the pretrial phase, via such avenues as defense
attorney’s questions during depositions, or as a result of the civil proceedings in
which prosecutors could gain access to defense counsel strategy.”¹²³ If an
attorney reveals her work product, including her case theory and specific claims
and/or defenses, while defending the civil case, she may weaken the defendant’s
position in the criminal case.¹²⁴

Regardles of these infringements upon the defendant’s interest in effective
counsel, courts will probably not find any violation of a defendant’s Sixth
Amendment rights unless counsel in the civil proceeding completely fails to
protect the defendant’s interest in the criminal proceeding.¹²⁵ As such, a
defendant’s claim of a constitutional violation based on her being subjected to
parallel proceedings will most likely fail.

C. Discovery Concerns

Discovery in federal criminal cases is generally governed by Rule 16 of the
Federal Rules of Criminal Procedure. The defendant is not entitled to the
statements of government witnesses, government attorneys, or any federal
agents.¹²⁶ Defendants are only entitled to receive:

(1) relevant written or recorded statements made by the accused; (2) a
copy of the defendant’s prior record; (3) the results and reports of
any physical and mental evaluations, or scientific experiments, which
are either material to the preparation of the defense or are intended for
use at trial by the prosecution; and (4) a written summary of any expert
testimony the prosecution intends to use, including the experts’
qualifications, opinions, and the bases and reasons for those
opinions.¹²⁷

¹²¹ U.S. CONST. amend. VI.
¹²² See McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (holding that the
Sixth Amendment “right to counsel is the right to the effective assistance of counsel”).
¹²⁴ Georgia A. Staton & Rene J. Scatena, Parallel Proceedings—A Discovery
Minefield, 34-Jul ARIZ. ATT’Y 17, 18 (1998) (citing FED. R. CRIM. P. 16(b)).
Additionally, witness statements possessed by the prosecution are not discoverable until the conclusion of that witness’s testimony on direct examination.128

Civil procedure, however, generally rejects criminal procedure’s emphasis on the preservation of an adversarial nature when such emphasis impedes the “search for truth.”129 The Federal Rules of Civil Procedure provide for “discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”130 Specifically, the Federal Rules of Civil Procedure “permit a party to depose other parties and witnesses, to serve interrogatories on other parties, and to examine other parties’ documents and tangible items.”131

D. Collateral Estoppel Concerns

The collateral estoppel doctrine states that “issues litigated and determined in a proceeding are binding for the parties involved should those issues arise in any subsequent proceeding.”132 The principal virtue of collateral estoppel is that it “promotes judicial economy by reducing the burdens associated with revisiting an issue already decided.”133 The collateral estoppel doctrine may affect the outcome of multiple proceedings, depending on the order in which the actions are resolved.134 When an issue that was necessary to the outcome of a proceeding is litigated and decided by a final judgment on its merits, the party against whom the issue was decided may not re-litigate the same issue in a subsequent action.135

130. FED. R. CIV. P. 26(b)(1) (emphasis added).
131. See FED. R. CIV. P. 30, 33, 34; Using Equitable Powers, supra note 124, at 1029 n.28.
132. GILBERT POCKET SIZE LAW DICTIONARY 43 (1994).
133. SEC v. Monarch Funding Corp., 192 F.3d 295, 303 (2d Cir. 1999).
134. See Helvering v. Mitchell, 303 U.S. 391, 398 (1938) (holding that res judicata is not available to a defendant in a civil suit following acquittal in a criminal case); Wolfson v. Baker, 623 F.2d 1074, 1077 (5th Cir. 1980) (allowing the application of estoppel in an action arising from a prior criminal conviction during a civil suit by an investor against a broker).
1. Criminal Convictions and Guilty Pleas

Generally, a guilty plea or conviction in a criminal proceeding triggers the application of collateral estoppel in subsequent civil litigation.\(^{136}\) If a criminal conviction is secured, issues that were considered as essential to the verdict of the conviction need not be litigated again.\(^{137}\) For example, in *SEC v. Gruenberg*,\(^{138}\) the court held that, if a review of the allegations in each count of the criminal indictment had the same identity of issues as the parallel SEC civil complaint, a criminal proceeding will have collateral estoppel effect.\(^{139}\) To minimize the damaging affects of a guilty plea, a defendant may request permission from the court to plead “nolo contendere”\(^{140}\) to avoid the collateral effect of a guilty plea.\(^{141}\) The DOJ may be “reluctant to accept such pleas, however, especially when they have sufficient evidence to [proceed] to trial.”\(^{142}\)

2. Criminal Acquittals

If a criminal acquittal is secured, the defendant is afforded nothing because of the differing burdens of proof.\(^{143}\) All issues will have to be fully re-litigated because evidence that fails to prove guilt beyond a reasonable doubt may still

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138. 989 F.2d 977 (8th Cir. 1993).

139. *Id.* at 978.

140. A nolo contendere, or “no contest,” plea “generally has no collateral estoppel effects at all, nor is it admissible into evidence at a criminal or civil trial in federal court.” Jared Edward Mitchem, *Parallel Proceedings: Concurrent Qui Tam and Grand Jury Litigation*, 51 ALA. L. REV. 391, 404 (1999).

141. *See* Blohm v. Commissioner, 994 F.2d 1542, 1554 n.11 (11th Cir. 1993) (If a defendant pleads nolo contendere, that defendant “does not expressly admit his guilt, but nonetheless waives his right to trial and authorizes the court for the purposes of his case to treat him as if he were guilty.”); Refined Sugars, Inc. v. Southern Commodity Corp., 709 F. Supp. 1117, 1120 (S.D. Fla. 1988).


143. PICKHOLZ, *supra* note 1, § 3.06[3].
sufficiently meet the civil standard of preponderance of the evidence.144 As the result of these differing standards, defendants can be harmed by the doctrine of collateral estoppel, but not benefitted.

VI. PROCEDURES DEFENDANTS USE TO COMBAT THESE SITUATIONS

To combat this inherent unfairness, defendants will most likely attempt to seek redress from the courts, which have the sole discretion to resolve procedural and constitutional issues presented by parallel proceedings.145 A federal civil judge may enter "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."146 Although dismissal of a civil proceeding is extremely rare, depending on the particular circumstances of a case, a court may (1) issue protective orders or (2) stay civil discovery or the civil proceedings entirely.147

A. Protective Orders

A court may enter a protective order when it concludes that the public interest necessitates the denial of a stay, but still wishes to protect the defendant's Fifth Amendment protection against self-incrimination.148 "In theory, a protective seal acts directly on the source of the harms arising from parallel proceedings by preventing the intermingling of the civil and criminal actions."149 Reliance on a protective order can be somewhat risky, however, because protective orders are subject to judicial modification at any time150 even though a party may rely upon the protective order to his detriment.151 If a party

144. See Eastern School v. United States, 381 F.2d 421, 438 (Ct. Cl. 1967) (acquittal of members of partnership in criminal action has no effect on counterclaims of United States in civil action involving same partnership); Jones v. District of Columbia, 212 F. Supp. 438, 449 (D.D.C. 1962) (civil action not barred by acquittal of criminal charges although both actions based on same facts), aff'd, 323 F.2d 306 (D.C. Cir. 1963); see also Peter Ball & Karen Pickett, Parallel Criminal and Civil Prosecutions in Massachusetts Federal Court, 46 B.B.J. 18 (Nov./Dec. 2002).


147. SEC v. Dresser, 628 F.2d 1368, 1375 (D.C. Cir. 1980).


150. United States v. GAR Corp., 596 F.2d 10, 16 (2d Cir. 1979).

cannot rely on a protective seal remaining in effect indefinitely, the party may not
wish to speak freely and, thus, the seal will not be a realistic option to a
defendant seeking to preserve her privilege against self-incrimination.

B. Stays

It is well-settled that, while courts have the power to issue a stay when the
interests of justice require it, the Constitution does not require a stay of a civil
action in a parallel proceeding.152 Courts have broad discretion in granting or
denying a stay and their decision will not be disturbed absent an abuse of
discretion.153 To determine whether or not to issue a stay, courts use a balancing
test by weighing the public interest in continuing the civil action against any
prejudice experienced by the defendant if the civil action is not stayed.154 A stay
may be requested by either the government or the defendant.

Courts will often find a stay of civil discovery necessary where liberal
discovery will allow a litigant to gain an unfair advantage in a parallel criminal
prosecution. In Campbell v. Eastland,155 a case in which a taxpayer attempted
to utilize a civil suit to gain discovery for a criminal case, Judge Wisdom held
that "[a]dministrative policy gives priority to the public interest in law
enforcement. This seems so necessary and wise that a trial judge should give
substantial weight to it in balancing the policy against the right of a civil litigant
to a reasonably prompt determination of his civil claims or liabilities."156 The
United States Attorney may intervene in a federal civil action, pursuant to Rule
24 of the Federal Rules of Civil Procedure, to seek a partial stay of discovery
when there is a parallel criminal proceeding, either anticipated or already
underway, and which involves common questions of law or fact.157 Courts have

152. Kashi v. Gratsos, 790 F.2d 1050, 1057 (2d Cir. 1986); Dresser, 628 F.2d at
Property, 751 F. Supp. 1060, 1062 (E.D.N.Y. 1989); Brock v. Tolkow, 109 F.R.D. 116,

153. Landis, 299 U.S. at 254-55; Afro-Lecon, Inc. v. United States, 820 F.2d 1198,
1203-04 (Fed. Cir. 1987); Campbell v. Eastland, 307 F.2d 478, 492 (5th Cir. 1962), cert.

(2002).

155. 307 F.2d 478 (5th Cir. 1962).
156. Id. at 487.
157. SEC v. Chestman, 861 F.2d 49, 50 (2d Cir. 1988) ("The government has a
discernible interest in intervening in order to prevent discovery in the civil case from
being used to circumvent the more limited scope of discovery in the criminal matter.");
SEC v. HGI, Inc., No. 99 Civ. 3866, 1999 U.S. Dist. LEXIS 17377, at **3-4, 10
(S.D.N.Y. Nov. 9, 1999) (granting the government’s motion for a stay because “[t]he
granted requests for stays of discovery by the government in order to protect the integrity of pending criminal investigations both when an indictment has not yet been returned,\textsuperscript{158} as well as when an indictment has been returned.\textsuperscript{159}

Courts seem to go to great lengths to grant a motion by the government to stay the civil proceeding in a parallel proceeding. For instance, in \textit{SEC v. Oakford Corp.},\textsuperscript{160} after a sixty-day stay had ended without application for renewal and discovery had begun, the SEC moved for a stay and then later moved to dismiss the complaint without prejudice. The court concluded that the SEC had filed an action it had no intention of prosecuting and reprimanded the SEC for such conduct, but nonetheless granted the SEC’s application and dismissed the case.\textsuperscript{161} Further, although a defendant may argue that a stay is not warranted because the DOJ’s interest is adequately protected by the presence of the SEC, courts have often recognized that the DOJ may have an interest that is qualitatively different from the SEC’s interest, and that the DOJ is better suited to explain its need for intervention rather than have the SEC as its conduit.\textsuperscript{162}

Defendants tend to be less successful than the government when requesting stays of civil proceedings. Although concerns favoring a stay may be heightened when the government is the civil plaintiff, an indictment has issued, and/or both actions stemmed from the same conduct, these concerns may be overridden when the public interest in the civil proceeding would be harmed by the requested stay.\textsuperscript{163}

Stays are granted under certain circumstances, however. For example, in \textit{SEC v. Google},\textsuperscript{164} Judge Covello noted that several factors, such as the late timing of the motion (which was filed at the close of discovery) coupled with the interests of the SEC, the public, and the court, weighed against granting the stay. Nevertheless, Judge Covello granted the stay, holding that the preservation of

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\textsuperscript{160} 181 F.R.D. 269 (S.D.N.Y. 1998).

\textsuperscript{161} Id. at 273; see also Chestman, 861 F.2d at 49 (in which the Second Circuit Court of Appeals upheld the grant of a stay in a civil action pending the resolution of a parallel criminal action, even though the SEC itself performed discovery prior to the civil action).

\textsuperscript{162} Chestman, 861 F.2d at 50; \textit{In re} Ivan F. Boesky Secs. Litig., 128 F.R.D. 47, 48-49 (S.D.N.Y. 1989).


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defendant's privilege against incrimination was a more important consideration than any inconvenience experienced by the SEC.\textsuperscript{165}

The trend of courts to grant stay requests from the government but to deny stay requests from private defendants has certainly been met with criticism. One commentator, when questioned about his level of success in attaining a stay for clients, summarized his analysis of parallel proceedings problems in securities matters by stating:

\begin{quote}
I believe that whether the competing proceedings are IRS, SEC, grand jury, FTC, or private damage actions, the trend of the law seems to be that whenever the government wants to stop one of the parallel proceedings, if it files a motion, the court will accommodate the government. As a result, the private party cannot use, for example, civil discovery in a private action, which would help him in defending the grand jury investigation or subsequent criminal prosecution. On the other hand, whenever a private party tries to stop the government from going forward in the parallel proceeding—usually the IRS or the grand jury—the courts almost invariably refuse to stop the government from pursuing the parallel enforcement case.\textsuperscript{166}
\end{quote}

VII. JUDICIAL STANDARDS FOR DETERMINING WHETHER TO STAY THE CIVIL PROCEEDING

In exercising their discretion to grant or deny a stay of a civil proceeding pending the resolution of a pending criminal proceeding, courts search for “bad faith” on the part of the government, as well as “special circumstances,” as introduced by the \textit{Kordel} and \textit{Dresser} courts. This Part analyzes the standards courts use, focusing particularly on recent trends.

\textit{A. Traditional Standard—The “Bad Faith” Standard}

Special circumstances could include agency bad faith or malicious government tactics, such as the government having the SEC serve as a mere conduit for a future criminal prosecution. Other circumstances weighing in favor of granting a stay of the civil proceedings while criminal prosecutions are pending include malicious prosecution, absence of counsel for the defendant during depositions, or other “special circumstances.”\textsuperscript{167} A bad faith SEC

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{165} \textit{Id. at *9.}
\item \textsuperscript{166} Arthur F. Mathews, \textit{The Role of Outside Counsel}, 61 N.C. L. REV. 483, 493 (1983).
\item \textsuperscript{167} Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1202 (Fed. Cir. 1987).
\end{enumerate}
\end{footnotesize}
investigation is one conducted solely for criminal enforcement purposes. As long as the SEC is pursuing an active civil investigation, its investigation is in good faith even if it later shares some of its information with the DOJ. Although the choices presented to defendants met with parallel proceedings are unpleasant, they are not illegal and must be faced. Moreover, courts tend to be very supportive of SEC and DOJ cooperation. For instance, in United States v. Szur, in which the DOJ had formally requested and been granted access to the SEC’s investigative files, the court denied the defendant’s motion to quash the SEC’s investigative subpoena in order keep the DOJ from gaining access to evidence produced to the SEC, holding that “[t]he SEC’s general policy is to grant [the DOJ] continuing access to the entirety of a given investigative file once the Commission formally grants access.” Defendants who accuse the SEC and DOJ of bad faith investigations must have a substantial basis for such accusations. For example, where a defendant’s allegations that the SEC brought the civil proceeding solely to gain evidence for the criminal proceeding is viewed by the court as merely conclusory, the defendant’s request for a stay will most likely be denied. Court findings of government abuse are not totally nonexistent, however. For example, in Afro-Lecon, Inc. v. United States, the court found government abuse warranting a stay of the civil proceeding when government investigators

168. In re Sealed Case, 676 F.2d 793, 824 n.127 (D.C. Cir. 1982).
172. Id. at *6 (citing Dresser, 628 F.2d at 1383); see also United States v. Teyibo, 877 F. Supp. 846, 856 (S.D.N.Y. 1995), aff’d, 101 F.3d 681 (2d Cir. 1996) (ruling that the use of evidence from an SEC civil proceeding is generally admissible in a subsequent criminal trial if: (1) the SEC did not bring the action solely to obtain evidence for the subsequent criminal trial; (2) the U.S. Attorney’s Office conducted its own investigation; and (3) the SEC properly informed the defendant that his testimony could be used against him in subsequent criminal proceedings, so he had the right to refuse to testify based on his privilege against self-incrimination); SEC v. Rubenstein, 95 F.R.D. 529, 531 (S.D.N.Y. 1982) (in which Judge Lasker declined to impose any limitations on the United States Attorney’s use of discovery obtained from the SEC “in view of the clear statutory authorization [of the SEC to provide the DOJ with discovery] and the prior judicial interpretation of that authorization”).
174. 820 F.2d 1198 (Fed. Cir. 1987).
surreptitiously attended discovery meetings in parallel proceedings. Still, decisions such as Afro-Lecon are unusual and the civil proceeding will be allowed to continue in the absence of specific agency bad faith.

Because the SEC’s explicit mandate is to enforce the federal securities law, the task of showing that the SEC is investigating alleged violations of those securities laws solely for the purposes of providing the DOJ with evidence for use in a criminal proceeding will be, at best, extremely difficult. As such, the grant of a stay based upon a showing of agency bad faith will likely remain an infrequent occurrence.

**B. Modern Trends**

In addition to the traditional “bad faith” standard, when deciding whether or not to grant a stay pending resolution of a parallel criminal proceeding based upon the presence of “special circumstances,” modern courts generally consider the following factors: (1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the criminal case at the time the motion is filed, including whether the defendants have been indicted; (3) the interests of the courts; and (4) the public interest.

1. Issue Overlap

The most important factor in determining whether or not a court will grant a stay of a civil proceeding pending the resolution of a parallel criminal proceeding is “the degree to which the civil issues overlap with the criminal issues.” If the civil proceeding involves alleged violations of a different statute than does the criminal proceeding, then it cannot be said that the proceedings will vindicate the same public interest and a pre-indictment stay is not warranted.

175. Id. at 1200.


177. Pollack, supra note 176, at 203.

178. In re Par Pharm., Inc. Secs. Litig., 133 F.R.D. 12, 13 (S.D.N.Y. 1990) (denying the defendants’ motion for a limited stay of proceedings and for an order staying discovery where the criminal investigation involved misconduct before the Food and Drug Administration while the parallel civil action involved violations of federal securities laws); Metzler v. Bennett, No. 97-CV-0148, 1998 U.S. Dist. LEXIS 5441, at
As was stated in the introduction, the focus of this Article is on parallel proceedings where the SEC brings a civil proceeding while the DOJ, through the respective United States Attorney's Office, brings a criminal proceeding for alleged violations of the securities laws. Therefore, because issue overlap and, subsequently, the danger of self-incrimination both exist, one factor that warrants the issuance of a stay will be constant within this focus. This factor has not been determinative, however. The lack of issue overlap will generally result in the denial of a motion for a stay, but the presence of issue overlap does not necessarily result in the granting of a motion for a stay.\(^{179}\)

2. Status of the Criminal Proceeding

The status of the criminal proceeding at the time of the motion is another important factor that courts consider. A cursory glance at SEC/DOJ parallel proceedings might tend to leave an observer with the impression that courts deny the motion for a stay when an indictment has not been returned\(^{180}\) and grant the motion for a stay when an indictment has been returned.\(^{181}\) These trends are not absolute, however.\(^{182}\) Although "[t]he strongest case for a stay of discovery in the civil case occurs during a criminal prosecution after an indictment is returned,"\(^{183}\) courts will still deny the motion for a stay when they think that it is

\(^{21-22}\) (N.D.N.Y. Apr. 15, 1998) (denying the defendant's motion for a stay of the civil proceeding where the defendant was a party to a civil ERISA proceeding and a parallel criminal proceeding alleging securities fraud, even though the defendant had already been indicted).

\(^{179}\) See Par Pharm., 133 F.R.D. at 14 (stating that "[a] pre-indictment stay is particularly appropriate where both the civil and criminal charges arise from the same remedial statute such that the criminal investigation is likely to vindicate the same public interest as would the civil suit"). But see SEC v. Incendy, 936 F. Supp. 952, 953 (S.D. Fla. 1996) (denying the defendant's motion for a stay where "[b]oth cases concern [the defendant's] activities as a registered representative with various broker-dealers of securities").


\(^{181}\) See Google, 1997 U.S. Dist. LEXIS 20878, at *8 (granting the defendant's request for a stay because the defendant was currently under indictment, regardless of the late timing of the motion or the interests of the SEC, the public, and the court).

\(^{182}\) See Incendy, 936 F. Supp. at 953-54 (accepting the Report and Recommendation of a Magistrate denying the defendant's request for a stay where the degree of overlap between the civil and criminal issues was large and the defendant was currently under indictment).

\(^{183}\) Pollack, supra note 176, at 203.
in the interest of justice. For example, in SEC v. Thrasher,\textsuperscript{184} a defendant who was the subject of an SEC civil proceeding and a DOJ criminal action (for which he had already been indicted) had fled to Australia and resided there during a period of nearly two years when a stay of the civil proceeding had been issued for the purposes of resolving criminal charges against a co-defendant. The court held that no interest of justice was served by a stay of the civil proceeding where the defendant had left the jurisdiction, "apparently without the intention to return to face the pending criminal charges," and denied the defendant's motion for a stay.\textsuperscript{185} This is an excellent example of the rule that a civil defendant who is under indictment has no automatic right to a stay.\textsuperscript{186} Ultimately, the inherent power to grant a stay belongs to the court.\textsuperscript{187}

3. Judicial Efficiency

Judicial efficiency is another factor that is considered by courts when deciding whether or not to grant a stay. "A guilty verdict would likely have a collateral estoppel\textsuperscript{188} or res judicata effect on this case, but even a trial resulting in acquittal could expose the strengths and weaknesses of each side, thereby assisting settlement discussions."\textsuperscript{189} This factor ties in with issue overlap, as collateral estoppel (and its resulting benefit to judicial efficiency) can only apply to the extent that the issues overlap between the civil and criminal proceeding.

4. The Public Interest

The public has a strong interest in the timely resolution of federal agency civil enforcement actions.\textsuperscript{190} As enunciated by the Dresser court, "[e]ffective enforcement of the securities laws may require prompt civil and criminal enforcement, and neither proceeding can always await the completion of the parallel proceeding without jeopardizing the public interest in protection of the efficient working securities markets and of investors from the dissemination of false and misleading information."\textsuperscript{191}

\textsuperscript{185} Id. at **47-48.
\textsuperscript{186} SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980).
\textsuperscript{187} United States v. Kordel, 397 U.S. 1, 12 n.27 (1970).
\textsuperscript{188} For a further discussion of collateral estoppel effects in parallel proceedings, see supra Part V.D.
\textsuperscript{189} SEC v. HGI, Inc., No. 99 Civ. 3866, 1999 U.S. Dist. LEXIS 17377, at *10 (S.D.N.Y. Nov. 9, 1999); see also Pollack, supra note 176, at 204.
\textsuperscript{191} Dresser, 628 F.2d at 1377; SEC v. Incendy, 936 F. Supp. 952, 955 (S.D. Fla. 1996); see also SEC v. First Fin. Group of Texas, 659 F.2d 660, 667 (5th Cir. 1981); SEC v. Zimmerman, 854 F. Supp. 896, 900 (N.D. Ga. 1993) (all noting the public interest in
The Author found no cases where an SEC/DOJ parallel proceeding addressed an issue that was not found to be a matter of public interest. Although courts have found other alleged violations to be not so damaging to the public interest as to justify denying a stay on those grounds,192 alleged violations of securities laws have continued to be viewed by courts as sufficiently damaging to the public interest to justify denial of a stay. For instance, in SEC v. Grossman,193 where the defendant was receiving living and attorney’s expenses from funds that were otherwise frozen by a judicial order, the court held that “staying this case pending completion could result in lengthy delay, and thus serious injury, to the public interest.”194 In the future, given the recent increased volatility of the markets due to factors such as expanded access to research on publicly traded companies and more efficient trading methods via the Internet, parallel proceedings based upon alleged violations of federal securities laws will most likely continue to be viewed as important matters of public interest and a strong priority for government agencies.

VIII. CRITICISMS OF PARALLEL PROCEEDINGS AND THE EFFECTIVENESS OF SUCH CRITICISMS

The concept of parallel proceedings has faced heavy criticism. For example, the American Bar Association has formally recognized the problems associated with parallel proceedings and has called for statutory amendments to protect defendants subjected to them.195 Additionally, several commentators...
have sharply criticized parallel proceedings as being patently unfair to defendants and unconstitutional. For example, one commentator has argued that, based on problems defendants are faced with during parallel proceedings, "the courts should adopt new standards or, in the alternative, Congress should enact a statutory amendment in deciding when and if to grant a stay in the SEC’s proceeding when an indictment has not yet been returned."\(^{196}\)

No such amendments have been enacted, however. In fact, parallel proceedings appear to be gaining rather than losing support. For example, in a recent speech at the Financial Executives International 2002 Conference, SEC Commissioner Cynthia A. Glassman stated:

> The heaviest hammer against financial fraud, of course, is criminal prosecution and serious jail time. The new Corporate Fraud Task Force, established by President Bush, is the latest step in what has been a remarkable run of coordinated enforcement efforts between the SEC and federal criminal authorities. This year, even before the Task Force was put into place, approximately 75 criminal actions by 17 different U.S. Attorney’s Offices and the Department of Justice were taken with [the SEC’s] assistance for securities related offenses or obstruction of justice in our investigations. By the end of the fiscal year, these figures had grown to 259 and 30.\(^{197}\)

These comments by Commissioner Glassman obviously indicate a favorable impression of cooperation between the SEC and DOJ and definitely lend the impression that similar acts of cooperation in the future should be anticipated.

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196. Eckers, supra note 120, at 113; see also Using Equitable Powers, supra note 124, at 1044 (“Parallel civil and criminal proceedings harm the accused by diminishing the value of the protections provided by the privilege against self-incrimination, limited prosecutorial discovery, and the assistance of counsel.”). But see Ball & Pickett, supra note 144, at 18 (explaining that parallel proceedings can provide a defendant with excellent opportunities to obtain civil discovery to defend the criminal case).

197. See Cynthia A. Glassman, Remarks at the Financial Executives International 2002 Conference: Current Financial Reporting Issues (Nov. 5, 2002), available at http://www.sec.gov/news/speech/spch604a.htm.; see also Harvey L. Pitt, Remarks Before the U.S. Department of Justice Corporate Fraud Conference (Sept. 26, 2002), available at http://www.sec.gov/news/speech/spch585.htm. (“The SEC has had, and continues to have, a close relationship with its fellow law enforcement agencies. Indeed, some of the most significant SEC actions over the last several months have been brought in tandem with criminal complaints and indictments.”).
IX. Why Criticism of SEC/DOJ Parallel Proceedings Is Largely Inappropriate

Criticism of the current framework for the resolution of SEC/DOJ parallel proceedings is largely inappropriate. Allowing the SEC and the DOJ to freely share evidence is appropriate, in light of the voluminous amount of evidence in the form of paperwork that is common in actions regarding violations of the federal securities laws. As SEC and DOJ hiring capabilities are not expanding nearly as quickly as is the rate of parallel proceedings, this interagency cooperation is an excellent method for preserving the resources of both agencies. The “bad faith” standard that an SEC investigation is proper if it is not conducted solely as a mechanism to generate evidence for the DOJ is the correct standard, as it is very unlikely that the SEC has the resources to function solely as a discovery mechanism for the DOJ while still meeting its congressionally-mandated objectives.

By not intervening with a statutory amendment creating either an exception to the various laws permitting cooperation between the SEC and the DOJ or a more “bright line” test for determining when to stay a civil proceeding pending the resolution of a parallel criminal proceeding, Congress has continued to allow courts to retain discretion as to what constitutes “bad faith” on the parts of the SEC and the DOJ, as well as when “special circumstances” exist that truly call for a stay of the civil proceeding. This retained discretion will continue to allow courts to be the sole determining body, rather than relying on legislative amendments, a practice that can be particularly slow and burdensome. Further, by not implementing a “bright line” test as to when to stay a civil proceeding, Congress makes the task of scheming for “loopholes” in the SEC and the DOJ’s regulatory scheme, a practice likely to occur immediately after any statutory amendments, more difficult for potential wrongdoers. For example, if a “bright line” test existed that mandated the issuance of a stay of an SEC civil proceeding when a defendant is currently defending a post-indictment DOJ criminal proceeding, then the Southern District of New York would have been required to grant a stay in SEC v. Thrasher,198 in which the defendant had fled to Australia with no apparent intention to return. Granting a stay under these circumstances does not adequately address the “special circumstances” anticipated by the Dresser and Kordel courts. It was the Thrasher court’s discretion to either grant or deny the stay that resulted in the most appropriate solution. Any “bright line” test would damage this discretion and should be resisted.

One area where criticism of standards utilized in SEC/DOJ parallel proceedings is appropriate, however, is the standard utilized by courts to grant a stay of civil proceedings at the government’s request, but denying a defendant’s request for the same. The SEC staff is in the best possible position

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198. See supra Part VII.B.
to determine when to initiate an action against a defendant. Therefore, once the SEC initiates such an action, the standard for granting a stay to the SEC to protect the DOJ from the criminal defendant being able to circumvent the narrow criminal discovery rules should be identical to the standard for granting a stay to a defendant to prevent the DOJ from doing the same. Although the court’s holding in Campbell v. Eastland\(^\text{199}\) that “[a]dministrative policy gives priority to the public interest in law enforcement” is well-reasoned, the mere fact that defendants in SEC/DOJ parallel proceedings are faced with such extreme limitations placed upon their privilege against self-incrimination is sufficient to lend the public interest an adequate amount of priority. Accordingly, judicial standards in granting stays of civil proceedings should be identical, regardless of whether the stay is requested by the government or the defendant.

X. CONCLUSION

As the financial markets continue to evolve at an extremely brisk pace, courts are best equipped to retain discretion and flexibility in determining what situations require a stay of a civil proceeding “in the interests of justice.” In light of recent trends in securities law enforcement, parallel proceedings will most likely continue to occur with even greater frequency, and trial courts will bear the burden of balancing the competing interests to ensure the most equitable outcome.

\(^{199}\) See supra Part VI.B.