

# BRIBERY & ANTI-CORRUPTION

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## THE NICKEL OR NOT?

The Fifth Amendment Privilege For Individuals In FCPA Investigations.  
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 This article contains information regarding the following topics: STRATEGY + LEADERSHIP + RISK MANAGEMENT ||| ||| |||

During the past few years the Department of Justice (DOJ), the Securities and Exchange Commission (SEC) and local United States Attorney's Offices have increasingly begun investigating and prosecuting individuals for violations of the Foreign Corrupt Practices Act (FCPA). While FCPA investigation and enforcement has long focused upon companies, it has become clear that the DOJ means to put employees, former employees, officers and directors of corporate entities in the cross hairs of investigation and potential indictment.

If an individual receives a subpoena by DOJ for grand jury testimony, they may explore the viability of invoking their Fifth Amendment privilege and

refuse to answer questions posed in either a grand jury proceeding or in a proffer session with prosecutors and agents. The SEC or other regulatory agencies may request an on the record statement. If there are on-going and concurrent civil regulatory investigations, such as a potential SEC enforcement action, the individual runs the risk that an invocation will serve to allow regulators to argue for an adverse inference instruction before a jury if a civil action reaches trial. Moreover, companies may hold some sway over individuals and encourage them to cooperate in order to remain in good standing as an employee at the company. Thus, "taking five" is a much more delicate proposition than if a

client is simply faced with possible criminal charges alone.

The United States Supreme Court has held that the 5th Amendment's privilege against self-incrimination can be invoked in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. *Kastigar v. United States*, 406 U.S. 441, 444 (1972). An adverse inference may be drawn against a person who has asserted the privilege in civil and administrative cases. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). However, there is no rule that a jury must learn of a party's or witness' invocation of the Fifth Amendment. The court generally has significant discretion to decide whether or not to admit evidence of a witness' invocation of the Fifth Amendment. *SEC v.*

Colello, 139 F.3d 674, 677 (9th Cir. 1988).  
**Approaches To Avoid An Adverse Inference Charge**

Once a client has decided to accept the advice of counsel and invoke their 5th Amendment privilege there are a variety of arguments that may be made to avoid an adverse inference charge if the client is ultimately named in a civil regulatory or enforcement action.

First, a stay request may be available if both criminal and civil charges are brought simultaneously. Often government prosecutors request that civil proceedings be stayed pending the outcome of a criminal indictment. Second, an invocation is "proceeding specific". If the client invokes in connection with a DOJ request, civil regulators may not seek to admit that invocation to obtain an adverse inference charge. However if a client invokes their Fifth Amendment privilege in response to a request from the SEC for a formal statement, what arguments are available to counter regulators claims at trial for an adverse inference charge?

An SEC investigation, as opposed to an enforcement proceeding, does not adjudicate an individual's rights. The client is not presented with potential allegations, causes of action, or any specific instances of violations of the law from which he might prepare a response. Thus, it can be argued that the investigation was not the proceeding in question. A formal enforcement action is a different proceeding.

Moreover, the SEC's Division of Enforcement investigates and litigates the same laws and rules, albeit with different intent requirements and burdens of proof, as criminal prosecutors at DOJ. The SEC can impose fines and restitution, injunctions, industry bans and bar orders. Enforcement proceedings can end careers and bankrupt those who commit civil violations of the federal securities laws. Thus, an SEC enforcement proceeding is quasi-criminal in nature.

Indeed, arguments by the SEC in the trial of an enforcement action to draw an adverse inference against a client who invoked privilege at the investigative stage or even a client who invoked at trial may be analyzed with greater scrutiny especially in light of *United States v. Stein*, et al. In *Stein*, the Second Circuit Court of Appeals affirmed a lower court decision to order the extraordinary remedy of dismissing an indictment. In *Stein*, the court held that the government interfered with the defendant's Sixth Amendment right to counsel and intimidated the defendants' employer to adopt and enforce a policy that required cooperation as a condition for the employer advancement of client legal fees.

Under the *Stein* analysis, a forceful compelling argument may be made to a future court to interpret such pressure as an unconstitutional interference with an individ-

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ual's Fifth Amendment right against self-incrimination, much as the Second Circuit held that the government's meddling into the payment of private attorney's fees was an unconstitutional interference with the defendants' Sixth Amendment rights.

Finally, under Rule 403 of the Federal Rules of Evidence the balancing of prejudice versus probative value makes a strong case in favor of denying an adverse inference. The quasi-criminal nature of a regulatory proceeding, the potential consequences, and the governmental intimidation factor should all contribute to a strong case for denial of the adverse inference.

DOJ and SEC work in tandem very often. Whether in an FCPA case or securities fraud case the same arguments may be made to defend against a regulator seeking to admit a client's invocation of the Fifth Amendment to try to get an adverse inference.

**Expect Biography**

*Charles A. Ross is the founding member of Charles A. Ross & Associates, LLC, with offices in New York City and Miami. A cum laude graduate of New York Law School, he is a former Chair of The White Collar Crime Group at Herrick Feinstein and Partner at the former Brafman & Ross, PC., now Brafman and Associates. Dmitriy Shakhnevich is a graduate of New York Law School and an intern at the firm.*

