



OECD International Academy for Tax and Financial Crime Investigation

Managing Financial Investigations



Approaching a culpable individual: proffers and reverse proffers

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Potential Approaches

- ▶ Proffer Agreement
- ▶ Reverse Proffer
- ▶ Note:
 - ▶ Both approaches can result in “flipping” an individual and lead to his or her cooperation in the investigation and prosecution.

What is a proffer agreement

- ▶ A proffer agreement is an agreement between an individual and the government under which:
 - ▶ The individual agrees to provide complete, truthful, and honest statements about all matters, including his or her involvement in criminal conduct.
 - ▶ The government agrees not to prosecute the individual based **only** on the statements provided during a proffer interview (or interviews) **as long as** the individual is truthful.

Why use a proffer agreement?

- Your investigation has identified an individual who possesses some useful evidence and is potentially criminally liable, but that individual refuses to speak with investigators or prosecutors.
 - Note: In U.S. law, issuing a grand jury subpoena may be an option.
- Your evidence against the individual is weak, but you suspect the individual can provide evidence against others that will be very valuable to the investigation.
- Your evidence indicates that the individual plays a small role in a larger criminal venture.
- The individual has retained an attorney who demands the protection of a proffer agreement.

When not to use a proffer agreement

- If the individual you are approaching is the target, i.e., the suspect, you usually do not want to provide any protections to the individual.
 - Note that, absent advance agreement, prosecuting someone who has entered a proffer agreement is rare, though possible.
- If you don't think the individual is likely to provide truthful or useful information, there is no good reason to provide a proffer agreement.
- If the individual or his/her attorney does not request a proffer agreement, there is no obligation to provide one. But informing an individual of a potential proffer agreement may result in cooperation.

Proffer agreement principles

- ▶ I. Do not make a promise or offer a proffer agreement to an individual without consulting the prosecutor.
- ▶ II. The proffer agreement should be in writing and signed by the individual who provides statements and evidence under the terms of the proffer agreement and by the prosecutor.
 - ▶ This avoids later challenges that the terms of the agreement have been changed.
- ▶ III. Make sure the individual providing statements and evidence understands the terms of the proffer agreement before the interview begins.
 - ▶ It is often beneficial for the individual to have an attorney.

Example proffer agreement



U.S. Department of Justice
Criminal Division

Public Integrity Section

Washington, D.C. 20530

PROFFER AGREEMENT

The United States of America, represented by its undersigned attorney, and [REDACTED] enter into this proffer agreement with respect to a proffer to be made by [REDACTED] to agents and attorneys of the United States concerning [REDACTED] knowledge about matters that are the subject of the instant criminal investigation.

1. [REDACTED] will answer honestly, truthfully and completely all questions posed to him by agents and attorneys of the United States.
2. By discussing these matters and by accepting [REDACTED]'s proffer, the United States does not intend in any way to agree to, or represent that it will, confer immunity upon [REDACTED] for any possible federal criminal acts committed by him, nor has the United States made any representation or agreement about the disposition of any federal criminal charges which might be filed against him.
3. Should any prosecution be brought against [REDACTED] by the United States, the United States will not offer in evidence in its case-in-chief against [REDACTED], or at sentencing of [REDACTED], any statements made by [REDACTED] pursuant to this proffer agreement, except in a prosecution for false statements, obstruction of justice in the current investigation, or perjury, or as noted in paragraph 5.
4. The United States can use information derived from statements by [REDACTED] under the proffer agreement directly or indirectly for the purpose of obtaining leads to other evidence, which evidence may be used by the United States against [REDACTED] in any prosecution of him.
5. Should any prosecution of [REDACTED] be undertaken, the United States may use [REDACTED]'s statements as substantive evidence for the purpose of cross-examination of him should [REDACTED] testify at any phase of trial or sentencing. The United States may also use [REDACTED]'s statements as substantive evidence to rebut any evidence, factual assertions, or arguments offered by or on behalf of [REDACTED] at any phase of trial or sentencing.
6. The provisions of Rule 410 of the Federal Rules of Evidence and Rule 11(f) of the Federal Rules of Criminal Procedure do not apply to any statements made by [REDACTED] or any evidence derived from those statements, and [REDACTED] waives any right to challenge the admissibility of such evidence under either of these rules.

Dated: Nov. 9, 2018

FOR THE UNITED STATES

James I. Pearce
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Trial Attorneys
Public Integrity Section
Criminal Division
U.S. Department of Justice

FOR THE DEFENSE

Counsel for [REDACTED]

Proffer Agreement: The introduction

The United States of America, represented by its undersigned attorney, and [REDACTED] enter into this proffer agreement with respect to a proffer to be made by [REDACTED] to agents and attorneys of the United States concerning [REDACTED] knowledge about matters that are the subject of the instant criminal investigation.

- Note that the proffer agreement applies to “agents and attorneys” from the government.

Proffer Agreement: The individual must provide full and truthful statements

1. [REDACTED] will answer honestly, truthfully and completely all questions posed to him by agents and attorneys of the United States.

- If the witness fails to provide honest testimony, truthful testimony, or complete testimony, the protections under the proffer agreement do **not** apply.
- If you're not getting honest, truthful, and complete answers, stop the interview.

Proffer Agreement: The individual does not get immunity

2. By discussing these matters and by accepting [REDACTED]'s proffer, the United States does not intend in any way to agree to, or represent that it will, confer immunity upon [REDACTED] for any possible federal criminal acts committed by him, nor has the United States made any representation or agreement about the disposition of any federal criminal charges which might be filed against him.

- Proffer agreement does **not** provide immunity to the individual.

Proffer Agreement: If you tell the truth, your words will not be used against YOU

3. Should any prosecution be brought against [REDACTED] by the United States, the United States will not offer in evidence in its case-in-chief against [REDACTED], or at sentencing of [REDACTED], any statements made by [REDACTED] pursuant to this proffer agreement, except in a prosecution for false statements, obstruction of justice in the current investigation, or perjury, or as noted in paragraph 5.

- By promising the individual that the government will not use his truthful statements against him at his trial or at the sentencing phase, that individual is protected from self-incrimination.
- Lies or obstructive statements are not protected.

Proffer Agreement: No protection from investigation based on statements

4. The United States can use information derived from statements by [REDACTED] under the proffer agreement directly or indirectly for the purpose of obtaining leads to other evidence, which evidence may be used by the United States against [REDACTED] in any prosecution of him.

- The proffer agreement protects the individual from the use of his words against him, but not against further investigation based on those words.
 - For example, if an individual says during the proffer agreement that he opened a bank account at Delta Bank under a different name and deposited proceeds of crime into that account, you may (and should) obtain that bank account information.

Proffer Agreement: When an individual's proffer statements may be used.

5. Should any prosecution of [REDACTED] be undertaken, the United States may use [REDACTED]'s statements as substantive evidence for the purpose of cross-examination of him should [REDACTED] testify at any phase of trial or sentencing. The United States may also use [REDACTED]'s statements as substantive evidence to rebut any evidence, factual assertions, or arguments offered by or on behalf of [REDACTED] at any phase of trial or sentencing.

- The proffer agreement's protections do not apply if the individual testifies at trial or sentencing.
- The proffer agreement also does not apply if the individual offers any evidence inconsistent with his or her statements during the proffer interview.

Proffer Agreement: Interview under a proffer agreement is not a plea negotiation

6. The provisions of Rule 410 of the Federal Rules of Evidence and Rule 11(f) of the Federal Rules of Criminal Procedure do not apply to any statements made by [REDACTED] or any evidence derived from those statements, and [REDACTED] waives any right to challenge the admissibility of such evidence under either of these rules.

- Under U.S. law, any statement an individual makes about his conduct as part of plea negotiations cannot be used against him at a later trial. This rule promotes candor in plea negotiations.
 - Not all jurisdictions have this rule.
- That same rule does **not** apply to statements made as part of proffer agreement. In other words, an individual cannot use statements in a proffer agreement to shield himself from future prosecution.

What is a reverse proffer?

- A reverse proffer is an opportunity for agents and/or prosecutors to lay out for a target the information and evidence implicating or showing that target's participation in criminal activity.

Why use a reverse proffer?

- Convince a target to enter a guilty plea.
- Determine whether a target has a non-criminal explanation for what appears to be criminal conduct.
- Gauge whether a target is likely to admit culpability and potentially cooperate or to deny the allegations.

Reverse proffer: potential problems

- Exposing information and intelligence to the target and those with whom the target communicates.
- Tipping your hand as to investigative strategy and prosecution theory.

Proffer or reverse proffer?

- What do you hope to accomplish?
 - Proffer typically elicits more information
 - Reverse proffer typically creates leverage
- How much do you know?
 - Proffer is better when you know less
- Where are you in the investigation?
 - Proffer is more effective early in the investigation.
 - Reverse proffer is effective when your investigation is winding down
- Do you anticipate prosecuting the person approached?
 - Yes → reverse proffer
 - No → proffer

Questions?