

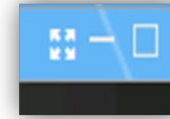
# Best Practices in Response to Government Investigations and Inquiries

July 27, 2021

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# Best Practices in Response to Government Investigations and Inquiries

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# Conducting a Parallel Investigation

- Advantages for parallel internal investigations:
  - Stop any ongoing wrongdoing – helpful for limiting liability, bad PR, shareholder suits, etc.
  - Allows for remediation to begin earlier, and to be disclosed to the government before charging decisions are finalized.
  - Independent investigation may lend credibility to the corporation's position regarding charging of the corporate entity or its employees.
  - Allows the company to start gathering facts needed for a defense early.



# Conducting a Parallel Investigation

- Disadvantages are few and come from an investigation that is not as thorough as needed.
  - If done poorly, the investigation could be costly and disruptive, privileges may be inadvertently waived, and there may be criminal, civil or PR consequences caused by the eventual disclosure of the investigation.



# Conducting a Parallel Investigation

- Role of outside counsel in the internal investigation
  - When the government initiates an investigation or investigation is made public, it is often essential to retain outside counsel.
    - Particularly helpful when the investigation has the potential to reach management.
    - Using outside counsel helps protect the attorney-client privilege, as courts often heavily scrutinize privilege claims by in-house counsel.
    - It takes in-house counsel out of the line of fire if serious problems are uncovered.



# Mechanics of the Investigation

- The litigation hold – think carefully about how broad you want it to be.
  - Keep SOLs in mind – the investigation may take longer than you think.
  - Paying for storage.
  - Is there a chance that there may be follow up litigation such that these documents are needed for that as well?
- Do any of the involved employees need to be reassigned or placed on an extended leave?
  - Is there any chance that the employee is a cooperator or a whistleblower? Some fed and state statutes are very broad and will limit what actions you can take with that employee.





# Mechanics of the Investigation

- Electronic document collection
  - Has the company prepared for this? Is there dedicated IT staff?
    - How many potential custodians? Document retention policies across the company?
    - Better to err on the side of overcollection, so that you do not have to recollect and dedupe when the scope of the investigation later broadens at the government's direction.
  - Is the investigation at a point where you want to consider getting the government to sign off on the search terms and custodian list?
    - This can pay dividends when presenting findings to the government toward the conclusion of the investigation.



# Mechanics of the Investigation

- Finding and evaluating separate counsel for company employees or executives
  - Separate counsel often only needed for higher level employees.
  - BUT: depending on an employee's role or facts particular to the investigation, lower-level employees may also need counsel.
    - May want to ask the government for guidance.
  - You will want to find friendly attorneys for employees, but ones who still have credibility with the government.
  - Is there a need for a joint defense agreement?



# Mechanics of the Investigation

- Hiring of third-parties
  - PIs, forensic accountants, PR consultants and industry experts may all be needed.
  - Will want outside counsel to hire and direct those entities for privilege and work product reasons.
- Publicly traded companies
  - Material non-public information is at issue.
  - Coordination with SEC counsel – may need longer than you would anticipate because SEC counsel and auditors may want to do their own pressure testing in advance of any filing.



# Mechanics of the Investigation

- Multijurisdictional investigations
  - Attorney-client privilege is not the same everywhere – need to keep in mind that investigations that span (national) borders may have different implications.
- Be mindful of the potential that U.S. government agencies like DOJ are coordinating with their foreign counterparts.
  - Grand jury material may be protected, but witness interviews and documents disclosed outside of a grand jury subpoena may not be.



# Mechanics of the Investigation

- Government Interviews of Employees
  - No individual can be forced to submit to government questioning without a subpoena, Civil Investigative Demand or other court order.
  - The grand jury can compel testimony, but an employee has a right not to submit himself to an interview.
  - May want to agree to an interview rather than GJ testimony – can negotiate with DOJ.
  - Sec. 1001 and other penalties still a possibility, so will want to prep witness (and think about whether witness needs separate counsel).



# Mechanics of the Investigation

- Company should have a plan for potential interviews of employees without advance notice.
  - Let employees know that it is their choice to speak with agents.
  - Inform the employee that the company can help find counsel.
  - If the company finds out about interviews after the fact, counsel should debrief the employee as soon in time as practicable.
- Company should also contact the government and inform them that the company and its employees are represented so that any further contact goes through counsel.



# Mechanics of the Investigation

- Do not instruct an employee not to speak with government agents – inviting an obstruction charge.
- Do let the employee know that they have a choice and that may speak with counsel prior to making that choice.
  - Essential to make arrangements for counsel to be available to represent the employees before there are any interviews by government agents, especially during the execution of a search warrant.
- If employees are going to be interviewed or subpoenaed for grand jury testimony, the company will have to determine whether it believes it is realistically a target or subject of the investigation and whether it wants to enter into a joint defense agreement between the employee and company.



# Voluntary Self-Disclosure

- In matters where the company initiates the investigation, the company will have to decide whether to self-report the investigation's findings to the government.
- What kind of cases allow/have VSD considerations?
  - Foreign Corrupt Practices Act
  - Office of Foreign Asset Control
  - Export Control
  - False Claims Act
- What qualifies as disclosure/cooperation?





# Voluntary Self-Disclosure

- This is a potential outcome you want to have in mind early in your internal investigation.
- How do you determine if you want to self-disclose?
  - Is the problem systemic?
  - Who are the alleged wrongdoers (and what is their level of responsibility in the company)?
    - Will this lead to more scrutiny of the company at large?
- Is there a chance that the government will discover the conduct absent disclosure?
- Is this the kind of matter that may arise from an industry-wide investigation?



# Voluntary Self-Disclosure

- What are the advantages of self-disclosure?
  - Under DOJ guidelines and SEC procedures, early and thorough cooperation by a corporation may lead to a decision not to file criminal charges, defer criminal charges and not to file an SEC enforcement action.
  - But there is also the risk that a company can inform the government of information it otherwise might not get (in a timely fashion), can telegraph the company's concerns or otherwise embolden an agent or prosecutor.
- Potential outcomes from VSD:
  - Declination of charges
  - Non prosecution agreement
  - Deferred prosecution agreement
  - Information and plea



# Remediation

- Government will consider the company's past commitment to compliance as demonstrated by its compliance programs and internal controls.
  - Any regulatory authorities to which the client has been subject is fair game in analyzing its compliance, even if it is different than the investigating agency.
- Government agencies like the SEC and DOJ will also examine the company's remediation measures undertaken *during* the investigation to correct problems detected.
  - Placing implicated individuals on leave, instituting formal program changes, hiring counsel, education of staff.
- Government will pay particular attention to what management has done and said with respect to compliance.



# Remediation

- Remediation steps to consider:
  - Stop a potential violation if it has not already occurred.
  - Recommend and implement enhanced controls or other remedial measures to address and stop systemic problems.
  - Retrain or train employees' company-wide or in at-risk groups to prevent future violations.
  - Discipline employees involved in the incident.
  - Remind employees of the company's code of conduct and code of ethics, including anti-bribery policies.



# Thank You



# Thank You for Attending!

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