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Corporate Internal Investigations

A User Guide for Companies. Part Three of a Three-Part Series

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Companies are under increasing pressure to investigate and self-report allegations of corporate misconduct. As government agencies become more aggressive in investigating allegations of corporate fraud and abuse, an unprepared company may unwittingly find itself mired in obstruction of justice charges because initial protective steps were not taken to identify and preserve potential sources of evidence and to establish the independence of the company's decision makers vis-à-vis the alleged misconduct.

This is the last of a three-part series giving companies a step-by-step guide for planning and conducting sensitive internal investigations into potential wrongdoing. Part One covered the initial decision of whether to conduct an internal investigation and immediate steps that should be taken to preserve evidence and create an independent investigation. Part Two addressed how to design and plan internal investigations, including how to define and charter the investigation and document collection and review. This last installment of the series covers witness interviews, memorializing findings, whether to self-report violations, handling whistleblowers, and pre-investigation preparation.

Interviewing Witnesses

Pre-Interview Considerations

The central goal in interviewing company witnesses is to obtain a direct, complete and truthful recitation of the employee's knowledge. This is especially important if the government requested the witness statements because, in such cases, incorrect statements made to corporate counsel — which are then turned over to the government — may lead to obstruction of justice charges. The government has indicted executives for obstruction of justice on the theory that, by their lying to the company's counsel in the interview, they misled federal prosecutors when the interview results were turned over by the company. Consequently, document review to refresh recollection is especially important when the interview results will be turned over to prosecutors to reduce the risk that failures to remember will not be misconstrued as attempts to mislead.

Prior to the interviews, counsel should distribute directives regarding cooperation and document preservation. The memorandum should describe the nature of the investigation, the possibility of witness interviews, a requirement that company employees cooperate, and that separate counsel at the company's expense may be retained. It should also include a document preservation directive, which was discussed in Part One of this series.

Witness interviews often will be conducted on an abbreviated schedule while the company rushes to investigate and respond to a surprise inquiry. Nevertheless, some consideration should be given to the order of interviews. Counsel should determine whether the element of surprise is desired with a particular witness. For strategic reasons, interviews may commence with the lower level executives and up the corporate hierarchy, or vice-versa.

Mechanics of the Interview

Questionnaires may be effective in the interview process to obtain objective, biographical information. However, the majority of the interview process is most effectively conducted in face-to-face meetings.

The interview should begin with a warning that counsel represents the corporation and not the employee. (American Bar Association Rule 1.13 states that corporate counsel's relationship is with the corporation, acting through its authorized constituents, i.e., the officers, directors and employees.) Consequently, although the attorney-client privilege extends to employees necessarily consulted, corporate counsel does not repre-

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sent the officers, directors and employees in their individual capacities.

It should be standard practice for corporate counsel to warn the employees about the limitations of the attorney-client privilege. "Upjohn Warnings," based on the holding in Upjohn Company v. United States, 449 U.S. 383 (1981), consist of statements to the employee of the following matters: 1) that counsel is the company's lawyer and not the employee's; 2) that communications with the employee are protected by the attorney-client privilege, but the company may choose to waive that privilege; and 3) that the employee should not disclose the conversation to a third party except for his/her own lawyer.

Upjohn Warnings are critical to the interviews because, under certain circumstances, an attorney-client relationship could develop with employees during the interview process. This can occur, for example, if an employee, while operating under the mistaken impression that corporate counsel is protecting everyone's personal interests, starts asking questions relative to his/her personal liability.

It is important to ensure the employee understands that the "client" is the company, not the individual. For example, the attorney-client privilege belongs to the company alone, and the company may choose to waive it if necessary. An irreconcilable conflict may arise if multiple attorney-client relationships develop during the interview process. For example, if the company decides that it is in its best interests to disclose information obtained through employee interviews to the government, the involved employee may seek to block counsel from releasing information in subsequent proceedings. If such a conflict arises, counsel may be required to withdraw.

Consistent with the purpose of the Upjohn Warnings, corporate counsel should refrain from providing legal advice to the employee, even with regard to the issue of whether the employee needs separate counsel. If the employee construes counsel's comments to mean that he/she does not need separate counsel, then that person may assume that the company's counsel is protecting his/her interests. Accordingly, the best response is simply to advice the employee that "as the company's counsel, I cannot advise you on whether or not to obtain a lawyer." Keep in mind, however, that during these interviews, some employees — whether it is because they are nervous or uninformed about the process or because of the tone or body language of the attorney — may misapprehend a warning and become suspicious of the company's intentions toward them. It is helpful to make clear that this is a standard warning to prevent misunderstanding about the relationship, either by providing the warning in writing or reading verbatim from a prepared statement identically. If all employees are given the same warning and only one person believes that he/she is represented by corporate counsel, it is more likely that a court would find that belief to be unreasonable. As well, depending on the circumstances, the company may wish to provide pool counsel, which is an attorney retained and available to the employees at company expense.

Last, the fact that an employee retains his or her own counsel does not excuse that employee from the responsibility of cooperation with the company. Employees who decline to cooperate can in some circumstances face termination or be subject to other measures short of termination, such as placed on leave, and reduced bonus or seniority.

Investigation Results: Now What?

The investigation results should be memorialized in writing. In documenting the investigation, it is important to anticipate the potential uses of the findings. For example, the company may choose to disclose the investigation results to the government or in litigation in order to obtain a more favorable settlement. Further, there are obligations and agency guidelines that strongly encourage reports of certain criminal activity.

The Decision to Self-Report Violations

Deciding whether to self-report a violation of the law is more "art" than "science." The situation should be carefully managed so that, where possible, the facts alone are disclosed and attorney-work product protections are preserved. The assessment of the pros and cons of voluntary disclosure should be done with the participation of counsel so that the process itself is protected from disclosure by the attorney-client and work product privileges.

In certain situations, such as cases involving whistleblowers, the fact of disclosure is more certain. Consequently, the benefit to the company of disclosure outweighs any loss of control over the situation once disclosure occurs.

Other benefits to disclosure include the ability to credibly frame the story for the government, which necessarily involves disclosure of both exculpatory and incriminating evidence (with appropriate explanation), as well as a description of the scope of the investigation and how it was conducted. This may result in several advantages, such as a decision by the government not to serve a subpoena, which may result in more control over the flow of information, or even to reduce the scope of or cease the investigation altogether. The possibility of reduced penalties and lower cost are also significant motivating factors.

Further, there can be public relations advantages to "going public" with the problem and announcing

an investigation. Recently, a college learned that an administrator had falsely reported the SAT scores of entering freshman in order to enhance its ranking. The institution decided to publicize the administrator's admission of guilt, released a "damage control" statement that it had no reason to believe that anyone else was involved and hired reputable outside law firm to conduct the investigation. This course of conduct helped soften the blow of a potentially damaging and embarrassing announcement.

Of course, there are risks inherent in voluntary disclosures. Importantly, unless it is absolutely accurate, disclosure should not occur. Otherwise, obstruction of justice charges may result from the conveyance of false information. The disclosure itself may result in criminal or civil prosecution and consequent damage to reputation or monitoring by government agencies.

Whistleblowers

Interaction with whistleblowers presents unique problems as a result of the many protections available to whistleblowers under state and federal laws, such as the False Claims Act, 31 U.S.C. § 3730(h), which was enacted in 1863 to protect individuals who reported fraud by suppliers to the government during the Civil War. The laws of many states also protect whistleblowers from adverse employment actions and other penalties. See, e.g., California Whistleblower Protection Statute, Cal. Labor Code § 1102.5, which imposes significant civil penalties and potential misdemeanor charges.

These whistleblower protections can complicate the interview process when counsel is confronted by a witness who has already contacted or is about to contact the government, and who declines to be interviewed or otherwise cooperate in the investigation. While the company may normally discipline an employee for refusing to cooperate in an investigation, an attempt to discipline a whistleblower under the same circumstances could be construed as a violation of public policy or of specific anti-retaliation statutes. The whistleblower may complain that he/she was disciplined for refusing an employer's directive to commit a crime, or reporting criminal activity to governmental authorities, or disclosing illegal, unsafe, or unethical practices of the employer, all of which may be considered to be violations of public policy or violations of anti-retaliation statutes.

Consequently, it is important that the company's guidelines include policies and procedures protecting whistleblowers, including Codes of Conduct and Business Ethics. There should be clear training and directions to employees to report suspected violations to the audit committee, human resources, compliance officer or management team. Management in these areas should receive education regarding the handling of whistleblower complaints, and larger companies should consider using a third-party operated telephone "hotlines" to receive whistleblower complaints.

'Adventure Is Just Bad Planning'

As Swedish polar explorer Roald Amundsen said, "Adventure is just bad planning." Failure to have a pre-existing plan for internal investigations can result in unpleasant surprises and difficult moments. Conversely, having a plan that facilitates an immediate and reasonable response to suspected activity can help the company reduce liability, fines and punitive damages — and give company management peace of mind that a process exists to navigate the company through a potentially treacherous storm.

Effective corporate compliance programs can help avoid the need for an investigation in the first instance by encouraging the detection, reporting and remediation of misconduct, requiring management training and the development of corporate policies and procedures. The existence of a well-reasoned compliance program is also viewed favorably by government investigators and can result in more favorable treatment if wrongful conduct does occur. In such cases, the government will look at whether the compliance program detected the offense before it was discovered by outsiders and whether the company promptly reported the transgression to the appropriate authorities. Consequently, while developing its compliance program, it is useful for the company to consider how the program will be evaluated in hindsight by the government.

When the government reviews a compliance program in retrospect, it will look for independence and appropriate oversight. For example, do the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations? Are internal audit functions conducted at a level sufficient to ensure their independence and accuracy? Have the directors established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law? Favorable answers to these questions will demonstrate that the company has been thoughtful in its approach to a corporate compliance program.