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INTERNAL INVESTIGATIONS

Government's New Focus on Individual Liability in Corporate Probes Will Change the Way Companies Undertake Internal Investigations

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In recent years, the frequency and scope of corporate internal investigations have increased in response to the government's enhanced focus on corporate accountability and prosecution. Among other things, the government has placed value on corporations self-reporting possible misconduct and in some instances, even serving as an effective arm of the government's own investigators. This government emphasis on cooperation and credit for self-reporting has created challenges for corporations. Those challenges may be greater in light of a recently-announced government policy with respect to conduct by individuals.

On Sept. 9, the Department of Justice (''Department'' or ''DOJ'') issued a memorandum changing its policy toward the review of conduct by individuals as part of corporate investigations, both civil and criminal (the ''Yates Memorandum'') (13 CARE 1952, 9/11/15). The Yates Memorandum was issued by Deputy Attorney General Sally Quillian Yates. In the Yates Memorandum, the DOJ makes clear that in order for a company to be considered for possible cooperation credit, it ''must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct.'' This focus on individual wrongdoing and individual liability is likely to impact significantly the scope and direction of government investigations of corporations. It also will impact the manner or degree to which investigations with respect to corporate wrongdoing may be litigated or resolved through settlement.

Another area of likely impact concerns internal investigations. This article highlights considerations for corporate counsel as they undertake an internal investigation in light of the Department's heightened focus on individual accountability for corporate malfeasance.

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An Increased Need for Independent and Comprehensive Internal Investigations

One way that a company demonstrates cooperation with the government is by undertaking an independent internal investigation to gather and evaluate the facts surrounding potential wrongdoing. Historically, the decision of whether or not to disclose to the government the results or findings of an internal investigation could be difficult. However, frequently a company would decide to report its findings to the government as a means

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of underscoring its cooperation with regulators or prosecutors.

As reflected in the Yates Memorandum, the DOJ will place even greater importance on internal investigations and reporting in the days ahead. And, in evaluating such reporting by corporations, it will assess specifically the reporting by the company with respect to conduct by its individual officers, directors or employees. The Memorandum states that ''in order to qualify for any cooperation credit, corporations *must* provide to the Department *all relevant facts* relating to the individuals responsible for the misconduct.'' Yates Memorandum at 2 (emphasis added).

The Yates Memorandum goes even further in emphasizing the importance of a company doing a complete and thorough investigation. If the company fails to learn of any facts or provide ''complete'' factual information about the alleged wrongdoers, then any cooperation credit will be considered null, even for purposes of sentencing. Thus, even if a company identifies individuals potentially responsible for wrongdoing, if the government perceives that the company has not made a sufficient effort to investigate or report all of the important facts about the conduct of those individuals, then whatever cooperation the corporation may have provided could potentially become meaningless in terms of credit granted by the government.

Process and appearances have always been important relative to internal investigations. This is true now more than ever in the wake of the Yates Memorandum. For example, the Yates Memorandum may be read to support the need to hire outside counsel to conduct the investigation, rather than in-house attorneys or investigators, in many cases. An independent and comprehensive outside investigation could go a long way toward resolving government concerns as to the people identified and assuring the government that ''complete'' factual information is being provided. Government attorneys may be skeptical of internal investigations conducted by in-house counsel when the company later claims not to be able to identify responsible individuals or only identifies low-level employees. Independence from the corporation can be an important part of assuring government attorneys as to the reliability, credibility and thoroughness of the investigation and any reported findings.

Determining Who Should Retain the Investigators

The policy articulated in the Yates Memorandum also may raise issues respecting who should retain counsel to handle an internal investigation. An investigation could lead to the identification of possible wrongdoing by senior executives, members of the in-house legal team, or other persons who may traditionally retain outside counsel or investigators for the company.

As a result, identifying ''the client'' or appropriate client representatives before beginning an internal investigation may now be more important than ever. Every circumstance is different, and the internal investigation should be structured and approached in a manner dictated by the underlying issues and known facts. But the government's new requirement that companies seeking cooperation credit must identify employees who may be involved in wrongdoing means that there may be greater need to consider having the board of directors, its audit committee or even a special board committee serve as the client or client representatives, rather than the chief executive officer, other senior executives or even the general counsel. Structuring the representation in that manner will have the dual benefit of providing a greater level of independence for the investigation and avoiding potential conflicts of interest and ethical concerns that could arise should senior employees or in-house lawyers be identified during the investigation as significant fact witnesses or potential wrongdoers. ABA Model Rule 1.3 is clear that when representing an entity, an attorney must do what is in the best interest of the company, and now, with the new government requirements concerning cooperation credit, the prospect of potential conflicts with senior executives at the company may be increased.

Consider Whether Pursuit of Cooperation Credit is Still Feasible and in the Interests of the Company

Cooperation can be an important part of an effective strategy in dealing with government investigators. And a willingness to undertake and voluntarily disclose the results of an internal investigation can be a significant piece of that effort. However, the government's new requirement that any such disclosure must identify fully the roles played by individual employees increases the potential cost of such cooperation. This is particularly true because corporate scandals or significant breakdowns in controls do not occur in a vacuum. Companies frequently face concerns by multiple regulators and possible customer or shareholder claims flowing from reported wrongdoing.

Internal investigations can be a critical tool for a company as it considers how to defend against, and how to cooperate with, a government investigation. Accordingly, an early and thorough investigation will help the company determine whether ''cooperation credit'' is even possible and whether it is an avenue worth pursuing. Of course, even if the overall facts and circumstances argue against self-reporting and the full identification of possible wrongdoing by individuals, a company is benefited by an early internal assessment of the facts. Such an investigation can shape its good-faith approach to the issues, requests by regulators or prosecutors, potential remediation and the enhancement of relevant policies, procedures or controls. The sooner a company can determine the facts, the better it will be able to assess an appropriate and cooperative approach when the government comes knocking. Cooperation and good faith, as well as credible interactions with government investigators, are hallmarks of responsible corporate practices. Regardless of whether ''cooperation credit'' before the DOJ is an outgrowth of those efforts in a given case, the Yates Memorandum makes doing a complete internal investigation as soon as possible more important than ever.

Considerations for Recommending Separate Counsel for Individual Employees

Increased focus on individual accountability also has the potential of changing the way employee interviews

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are handled during an internal investigation. First, companies may want to coordinate with the government before interviewing certain key employees who were involved in the alleged wrongdoing. And the increased emphasis on individual accountability may place added pressure on government investigators, who may as a result want to interview key people before the company speaks with them. Second, when internal investigators do speak with employees, the requirement that the corporation identify the roles played by individual employees before it can qualify for cooperation credit may serve to put the corporation and its investigations more at odds with the interviewees. Now, more than ever, corporations and their counsel should give serious thought as to whether and when it is necessary or appropriate to involve separate counsel for individual employees. The optics surrounding these matters may be significant. Among other things, companies should consider the known facts and apparent consequences of discovered misconduct, the magnitude of any resulting harm, the potential for criminal liability, and the potential need for prompt reporting to the government.

Each situation necessarily is governed by its own facts and circumstances, but it is always important to recognize that a conflict may exist between the company and an individual employee, especially in situations where the employee is a focus of the investigation, a potential or likely whistle-blower, or at risk of criminal prosecution or a civil enforcement action.[1] The policy articulated in the Yates Memorandum makes individual liability more likely and thus, there is now more reason to consider recommending separate counsel before interviewing an employee who is the focus of an investigation and about whom the corporation may have greater incentive to report to the government. There can be several benefits to an investigation when an employee has separate counsel. Outside counsel can help the employee be prepared for the meeting and review key documents in advance, thereby facilitating meaningful and accurate responses to relevant questions. Retaining counsel for employees also can make them feel more comfortable providing answers during an investigation because they understand that someone is looking out for their best interests. Retaining individual counsel may also help overall employee morale because it can reassure people the company is not abandoning its employees or eliminate any perceptions of a ''witch hunt.''

It is not always possible to know before interviewing an employee whether he or she needs separate counsel. Especially early in an investigation, it may be necessary to speak with the key people in order to ascertain the facts and determine whether any wrongdoing occurred and who may be responsible. The government's increased focus on individuals further complicates these interviews. Any attorney for the company who conducts the interview must be clear that:

(1) he or she represents the corporation, not the employee;

(2) any information provided may be privileged but the privilege is held and controlled by the corporation, not the employee;

(3) it is up to the corporation to decide whether it will waive that privilege and share any information with a third party such as the government.

Stated differently, the officer or employee should be told that he or she does not have the same expectation of confidentiality in speaking with counsel for the company that he or she would have in discussions with his or her individual counsel and that the company may decide to disclose information provided by the officer or employee to others, including the government.

Such disclosures during an interview are commonly referred to as an ''Upjohn warning,'' named after the 1980 U.S. Supreme Court case, *Upjohn Co. v. United States*, 449 U.S. 383 (1981). When conducting an interview, some attorneys may gloss over these disclosures so as not to scare a witness or ''chill'' him or her from speaking freely, but the increased possibility of now having to identify employees for possible future prosecution or civil liability means that it is more important than ever to establish clear boundaries during the interview and ensure that there is no confusion as to representation.[2] Failure to do so could undermine the company's ability to cooperate in the future and disclose certain information to the government. It could even prevent the interviewing attorney from continuing to represent the corporation.

The current environment argues for early assessment of the possible fallout from corporate wrongdoing and the roles played by individual officers and employees, proactive consideration of the need for individuals to engage separate counsel, and thoughtful interactions with witnesses or their counsel.

The government's increased focus on individual liability may also complicate efforts to get employees to cooperate with internal investigations. Among other things, employees may be more wary about speaking with investigators because they know that companies need to identify individuals in order to get credit for cooperation. As discussed above, being proactive and retaining outside counsel for certain employees may help encourage employees to provide information and cooperate with a corporation's investigation. Regardless, however, corporations still need to conduct full and complete internal investigations and employees should

[1] *See, e.g.*, New York City Bar Association Formal Opinion 2004-02: Representing Corporations and Their Constituents in the Context of Governmental Investigations (June 2004) (discussing scenarios where an attorney can represent both an individual and the company in a government investigation, as well as the limitations on those representations).

[2] *See, e.g.*, *In re Grand Jury Subpoenas*, 415 F.3d 333, 340 (4th Cir. 2005) (noting that while the Upjohn warnings may have been ''watered down,'' the investigating attorneys did provide the appellants with sufficient notice to ensure that no attorney-client relationship was ever established).

understand that cooperating with the investigation is part of their job. While the government's focus may make employees reluctant to speak to internal investigators, a company needs to ensure that it gets all of the necessary information and speaks with the relevant people. Failing to do so could hinder a company's ability to assess its options and prepare the best possible defense; it also will almost certainly undermine the credibility of the investigation and any related findings. Thus, while a corporation cannot force an employee to speak with investigators, there may come a time when it will be necessary to tell the employee that failing to cooperate fully with the investigation could lead to his or her termination.

Conclusion

Internal investigations against the backdrop of an actual or potential government investigation have long presented challenges. Those challenges grow in the wake of the Yates Memorandum. The current environment argues for early assessment of the possible fallout from corporate wrongdoing and the roles played by individual officers and employees, proactive consideration of the need for individuals to engage separate counsel, and thoughtful interactions with witnesses or their counsel. Corporate decisions with respect to self-reporting relative to individual wrongdoing—and the pursuit of ''cooperation credit''—necessarily will depend on the facts and circumstances of a given case. But the Yates Memorandum promises to shape these issues and the manner and methods by which investigations of corporations are resolved in the days ahead.

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