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5 Considerations for Handling Internal and Government Investigations

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THE CONCEPT OF CORPORATE CRIMINAL LIABILITY does not exist in much of the world. In Brazil and Sweden, for example, individual company employees can be criminally prosecuted for a variety of white collar crimes, but corporations themselves do not face the same threat.

In the United States, by contrast, corporations are frequently held criminally responsible for the conduct of their employees. Even though companies cannot serve prison sentences, they enter into nonprosecution agreements and deferred prosecution agreements (in which charges are filed but prosecution is deferred for a period of years), they plead guilty and, in rare cases, they contest criminal charges at trial.

Always looming in the background of corporate criminal cases is the threat of prosecution against individuals employees. Since the U.S. Department of Justice issued the so-called "Yates Memorandum" last year, that threat has been made even more explicit, with department policy now providing that corporations will not be permitted to obtain any "cooperation credit" unless they provide prosecutors with "all facts" about "all individuals involved in or responsible for the misconduct."

In this context, it is important to consider best practices for handling internal and government investigations, which are often a precursor to a corporate criminal resolution. The way in which companies navigate the complex strategic questions that frequently come up in investigations often directly affects the outcome, influencing the amount

of the criminal fine, the type of resolution available, and the company's reputation.

Above all, corporate defendants need to be able to guarantee prosecutors, shareholders, and others that their internal investigation was thorough and independent.

Depending upon the scope and significance of the alleged misconduct, inside counsel may be suited to handle an investigation alone. When a company faces significant exposure, however—criminal, civil, reputational—it is often necessary to involve outside counsel. Here are five considerations for handling sensitive internal and government investigations:

1. Define the Scope of the Investigation.

Investigations can begin in any number of ways—a whistleblower complaint, a newspaper article, another investigation—and without proper scoping they can easily spin out of control. For that reason, it is critical at the outset of any inquiry to define the scope of the investigation: What are the specific allegations? Who are the witnesses who may possess relevant facts and whose documents are worth collecting? What is the appropriate timeframe to focus on?

It usually helps to have a written investigation plan that all parties to the investigation—inside counsel, outside counsel and, where applicable, prosecutors—agree to in advance. Of course, issues and areas of focus may change throughout the life of the investigation, but having a written plan at the outset is an important way to keep the investigation from getting off track.

For similar reasons, in complex investigations it is often advisable to proceed incrementally rather than to try and investigate all aspects at once. Whether an investigation is purely internal or government-led, it can metastasize if not properly controlled, and proceeding methodically through the allegations is one way to focus the investigation on what matters.

In certain situations, it may be necessary to press forward quickly, and on multiple fronts at the same time; but doing so can take significant resources and be disruptive to company operations, and therefore should be the exception rather than the rule.

2. Preserve Documents, Devices, and Testimony.

Companies (and individuals) often stand in their own way when it comes to document preservation and collection. At the outset of nearly every investigation, document hold notices should be issued immediately, and concurrent steps should be taken to preserve electronic evidence. There are sometimes strategic considerations that counsel against issuing a hold notice to everyone (for example, spoliation concerns), but steps can be taken to mitigate this problem, including early imaging of electronic devices, disabling auto-delete functions, and other preservation measures.

By the same token, as described in more detail below, witness testimony may need to be preserved—if, for example, an employee is on the verge of leaving the company. In all instances, it is essential that evidence preservation steps be well documented, as they may need to be explained to regulators and others down the road.

3. Think Strategically About Witness Interviews.

The optimal time to conduct witness interviews is usually after the witness's documents have been collected and reviewed. Documents often provide important context for the interviewer and help her craft relevant questions. Moreover, witnesses are frequently unable or unwilling to remember past events without the help of emails and other documents they authored or received.

That said, document collection takes time, and it is sometimes necessary to interview witnesses before the relevant documents have been reviewed -- because the employee is voluntarily leaving the company, for example, or because time-sensitive personnel decisions depend upon the interview's outcome. In short, despite the best practice of interviewing witnesses only once their documents are available, the timing of interviews is an important strategic consideration in many investigations.

4. Consider Whether to Voluntarily Disclose.

One factor prosecutors consider in deciding how much "cooperation credit" to award a corporate defendant is the extent to which the company voluntarily disclosed the misconduct. This is often a vexing question for inside counsel, and one that needs to be carefully weighed.

There is no "how-to" guide when it comes to voluntary disclosure, but there are a number of factors worth considering, including the likelihood that prosecutors will learn of the allegations on their own, the seriousness of the alleged misconduct, and whether the company has treated the allegations with an appropriate level of concern.

5. Remediate, Remediate, Remediate.

Bad things happen in good companies. The sooner the company's management (or Board, in appropriate cases) recognizes that, and cures the problem, the better. This is sometimes easier said than done.

But appropriate remediation—including termination of responsible employees, other appropriate disciplinary action, and enhancement of relevant practices and procedures -- is often a critical factor in how prosecutors evaluate a particular case.

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