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# DOJ 'Deconfliction' Requests: Considerations And Concerns

*Law360, New York (March 1, 2017, 1:52 PM EST)* -- Over the past year, we have seen an increase in requests from U.S. Department of Justice prosecutors for companies to defer interviewing their employee witnesses until after the government has had an opportunity to do so. These so-called "deconfliction" requests raise a number of issues for companies who want to cooperate with the government's investigation. In this article, we address the considerations and concerns raised by deconfliction requests, both for companies responding to such requests and the prosecutors who issue them.

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**Background**

The increase in deconfliction requests is attributable to the DOJ's focus on leveraging cooperation credit to aid its efforts in prosecuting individuals involved in corporate wrongdoing, which is best articulated in the September 2015 guidance issued by former Deputy Attorney General Sally Yates regarding corporate cooperation and the prosecution of individuals (the "Yates memo"). Additionally, the DOJ's April 2016 memo announcing its Foreign Corrupt Practices Act enforcement pilot program stated that deconfliction, where requested, is required for a company to receive full cooperation credit under the program.

Taken together, the Yates memo and the FCPA pilot program appear to have established deconfliction, on request, as an element of the Fraud Section's expectations for corporate cooperation, regardless of whether a company is participating in the pilot program. Indeed, another indication that the expectation of deconfliction is spreading is its inclusion as a required element of cooperation in the October 2016 guidance issued by the National Security Division of the DOJ regarding export control and sanctions investigations.

There appears to be some dispute within the DOJ regarding how widely deconfliction requests should be issued. In April 2016, former Assistant Attorney General Leslie Caldwell noted this dispute and offered her view that "the situation in which we ask a company that hasn't already interviewed its employees to stand down and not interview that person should be rare ... Those requests should only be made for good strategic reasons."[1] While the DOJ has not clarified the strategic reasons that merit deconfliction requests, we presume that some prosecutors believe that interviews with company counsel will educate or prepare witnesses in a manner that will disadvantage the government.

**Considerations for Companies**

Upon receiving a deconfliction request, companies who want to meet the DOJ's expectations and the counsel advising them must consider the following questions:

***1. Would complying with the request be consistent with directors' and corporate officers' fiduciary duty of oversight?***

A company's board of directors and certain of its officers have a basic fiduciary duty of oversight, which includes (1) adopting and maintaining a compliance program designed to detect wrongdoing, and (2) taking steps to ensure that problems do not persist. In nearly every complex investigation, it is impossible to fully understand the nature and extent of wrongdoing, if any, without conducting interviews. A substantial delay in understanding and remediating wrongdoing can create a tension between directors' and officers' fiduciary duty of oversight and the company's ability to comply with the government's request. While a company's directors and officers may be protected to some extent by the business judgment rule (given that complying with a request from the DOJ is often in the best interests of the company), there are no easy answers to this question.

***2. How can a company make decisions without speaking with its employees?***

Related to the prior point, companies need to make a number of decisions in the ordinary course of business that are affected by the inability to interview their employees. For example, companies need to make informed personnel decisions, including with respect to discipline, promotions, compensation and day-to-day work flow. Not knowing the facts subject to a pending investigation can raise serious concerns. To take one potential scenario, if an active employee subject to a deconfliction request is currently the lead on a major pending transaction, a company may need to interview that employee immediately in order to assess how the employee's conduct may affect the company's ongoing work.

***3. How will a delay affect the company's other regulatory obligations?***

Delays in understanding the facts subject to investigation can also create tensions between a company's desire to cooperate with the DOJ and its other regulatory obligations in the United States and abroad. For example, government contractors required to self-report under the Federal Acquisitions Regulation and financial institutions required to file suspicious activity reports may be faced with substantial delays in their ability to fully report the facts. Additionally, companies may need to consider how a deconfliction request affects their ability to file certifications required under the Sarbanes-Oxley Act.

***4. How can external counsel advise a company without knowing the facts?***

Companies hire external counsel to conduct thorough investigations, evaluate their clients' conduct, and provide informed legal advice. These tasks can be difficult if not impossible to accomplish where external counsel have their hands tied behind their backs.

**Considerations for the Government**

Even assuming a company is able to resolve these issues and agree to a deconfliction request, an important question remains: Is the request effective from the government's perspective?

As discussed above, the government's interest in deconfliction appears to arise from the perception that interviewing employee witnesses before company counsel will further the government's pursuit of individuals, consistent with the directive of the Yates memo. The government may also perceive a strategic advantage in its pursuit of the company.

To the extent that the government perceives a strategic advantage from a deconfliction request, this advantage should be weighed against the government's interest in bringing about, as efficiently as possible, whatever outcome is merited by a full airing of the facts subject to investigation. A deconfliction request can substantially delay the investigative process, for at least two reasons.

First, external counsel retained by a company to conduct an internal investigation typically are better able to deploy the resources necessary to conduct interviews in a reasonably short time frame, particularly in large investigations spanning multiple countries. It is far more efficient from the government's perspective to allow a company and its counsel to interview employee witnesses and then package the information learned from those interviews and other fact-finding efforts into presentations and proffers to the government.

Second, a deconfliction request typically will cause employees whom the government intends to interview to retain their own counsel, which may further delay the investigative process. While employee witnesses are often willing to speak with company counsel openly and on short notice, individuals being interviewed by multiple federal prosecutors may be more guarded and only agree to an interview after extensive preparation with their own counsel.

We acknowledge that there may be certain instances where a narrowly tailored deconfliction request encompassing a limited period of time is justified and appropriate. We are skeptical, however, that broad, open-ended deconfliction requests will ever inure to the government's benefit, particularly in the context of investigations of companies that are committed to genuine cooperation.

**Conclusion**

Companies and their counsel should weigh carefully the issues raised by a deconfliction request, including whether their other obligations or pressing business needs merit pushing back on the DOJ's expectations. Companies concerned about these issues should consider engaging the DOJ in discussions regarding why the DOJ believes a deconfliction request is merited and whether alternative solutions could resolve both sides' concerns. For example, companies may suggest to the DOJ that (1) the request be narrowed to nonbusiness critical employee witnesses; and/or (2) company counsel should be permitted to conduct interviews after consultation with the DOJ regarding the topics that will be covered.

In all events, we expect that keeping an open line of communication with the DOJ regarding these issues will assist both sides in making informed decisions regarding how to proceed with an investigation.

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[1] Roger Hamilton-Martin, Global Investigations Review, "Leslie Caldwell: 'deconfliction' requests should be rare" (Apr. 28, 2016).

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