Anatomy of a Corporate Investigation

May 1, 2008
TOPIC AREAS

I. Responding to a Government Investigation
II. Conducting an Internal Investigation
III. Resolving Matters with the Government
IV. Preventing and Preparing for a Government Investigation
RESPONDING TO A GOVERNMENT INVESTIGATION
Principal Investigative Methods

• Interviews - most often done off-premises; successful at obtaining information from employees

• Subpoenas - a grand jury subpoena is evidence of a criminal investigation; often seeks important documents and information

• Search Warrants - announces government’s belief that evidence of criminal activity is located where warrant is served and is in jeopardy of being destroyed
McNulty Memorandum

New Guidelines:

1) nature and seriousness of offense
2) pervasiveness of wrongdoing
3) history of similar conduct
4) timely and voluntary disclosure and willingness to cooperate in investigation
5) existence and adequacy of pre-existing compliance program
6) remedial actions
7) collateral consequences arising from possible prosecution
8) adequacy of prosecution of responsible individuals
9) adequacy of civil or regulatory remedies
Basic Tools to Respond Effectively

Three principal tools for responding:

- Policies in place regarding response
- Established first steps
- Preservation, collection and analysis of all the relevant documents and information (including electronic data)
Determine Scope of Investigation

- Identify the subject matter of the demand (understanding that the scope may expand)
- Identify the return date
- Identify the prescribed manner of complying
- Identify the government official who signed the subpoena
Determine Company’s Status

Categories used by the government:

- “Witness” - has useful information but is not suspected of illegal activity
- “Subject” - suspected of illegal activity
- “Target” - government has concluded person or entity was involved in illegal activity
- “Person of interest” - new term, apparently occupying space between “witness” and “subject”
Initial Communications with Company Personnel

Communications with company personnel should consider:

• Location and custody of relevant materials
• Preservation of those materials
• Identification of company personnel familiar with those materials and their subject matter
• Rumors and impact caused by notice of the investigation (including unique concerns of publicly traded companies)
Search Warrants

First Steps:

- Assign a Responsible Company Representative
- Inform Counsel
- Do Not Interfere with the Search
- Record the Search
- Segregate Privileged Materials
- Inform Employees
CONDUCTING AN INTERNAL INVESTIGATION
The Fundamental Issue

(1) What happened?

(2) Who was involved in the suspected activity?

(3) Is the company responsible for that activity?
When to Conduct an Investigation

• Where there is a reasonable apprehension that a government investigation (civil or criminal) is underway

• Where a senior manager, executive or Board member’s conduct is subject to investigation

• Where allegations of fraud or violence are implicated

• Where the facts indicate a possible material effect on the company’s financial statements

• Where the company wants the assurance of a full and independent investigation and report
Overarching Considerations

The critical issues in designing and conducting the investigation are:

• What are the time constraints in gathering sufficient information to make responsible judgments on how to respond to a government investigation?

• Who should oversee the investigation for the company?

• How should the discovery of crimes or fraud be handled?

• Are there any whistleblowers cooperating with the government?
Overarching Considerations

• What actions should be taken to assure the most accurate and complete information?
• Who should conduct the investigation?
• What should the investigation deliver?
• How can the investigation be designed to allow cooperation, if that path is chosen, while preserving the option of taking a defensive posture?
Compliance Officer’s Initial Review

The Chief Compliance Officer, with assistance of the General Counsel and any engaged outside counsel, should undertake an immediate initial review:

- Who should be interviewed immediately?
- Who should gather the documents?
- What timeline should be imposed on the investigation?
- Are there company actions or operations that should be suspended pending the investigation?
- Should outside counsel be immediately engaged to conduct the investigation?
Next Steps

- Designate the Responsible Company Overseer - typically, the General Counsel
- Establish the scope of the investigation - specifically designed, but flexible, particularly at the early stages to allow for modifications in light of new information
- Document the initiation of an internal investigation
Determine Deliverables

List of typical deliverables:

• Initial schedule for initial fact-gathering
• Identification of any new issues beyond initial report
• Revision of the initial deliverables as information is developed
• Oral report regarding tentative factual conclusions and observations about their effect
• Possibly, a written report
• Assume discovery of investigation and deliverables by the Government or civil litigation
Conduct Initial Interviews

The “Upjohn” warning:

• If applicable, remind interviewee that cooperation is a condition of employment

• Inform interviewee that the attorney represents the company, not the interviewee

• Tell interviewee to keep the interview confidential

• Inform interviewee that the decision to keep the statement confidential belongs to the company, not the interviewee

• Do not give opinion if interviewee asks whether he/she needs an attorney
Preserving Privileges

- The company holds counsel privileges (attorney-client and work-product), as well as trade secrets and other proprietary privileges.
- Any step inconsistent with preserving the confidentiality of the communication could be construed a waiver.
- Voluntary waiver of counsel privileges can provide the benefit of confirming there is no basis to consider adverse action against the company.
- Consider whether to enter into a confidentiality or “joint defense” agreement to allow cooperation with individuals or other business.
Cooperating with the Government

“McNulty Memorandum” has established factors:

• Whether the company is willing to waive the counsel privileges (attorney-client privilege and attorney work product protection)

• Whether the company is providing legal representation or reimbursement of legal expenses for personnel involved in the investigation
Cooperating with the Government

- Whether the company is participating in a “joint defense agreement” that allows sharing counsel-privileged information among potentially affected company’s and personnel without waiver

- Whether the company appears to be resisting or delaying responses to the investigators’ demands for documents, information and other assistance
Waiver of Attorney Client and Work Product Protections

- Prosecutor must now obtain approval of a request for waiver –

  “Category One” Information – purely factual background, key documents, witness statements, and interview memoranda

  “Category Two” Information – attorney-client communications and nonfactual work-product

- Has the “culture of waiver” changed?
- What are benefits and risks associated with privilege waivers?
Paying for Legal Representation

If the company does not have a legal-expenses reimbursement policy or wants to diverge from it, different federal agencies react differently. The Department of Justice and its U.S. Attorneys may consider such payments as indications of non-cooperation.

*U.S. v. Stein* - district court rejected a KPMG's discontinuance of legal-expense reimbursement on the ground that it was unconstitutionally coerced by the government; case is now on appeal.
RESOLVING MATTERS WITH THE GOVERNMENT
Deferred/Non-Prosecution Agreement

An agreement with the government by which a corporation avoids the consequences of a criminal conviction based on an agreement to pay restitution and/or penalties and to abide by other terms.
Non-Prosecution Agreement - formal charges are not filed and the agreement is kept by the parties rather than filed with the court.

Deferred Prosecution Agreement - formal charges are filed with the court and the agreement between the parties is filed with the court.
Typical Terms

1) Acknowledgement of responsibility
2) Ongoing obligation to cooperate
3) Acknowledgement that, if similar criminal conduct is committed, prosecution may be initiated by criminal information and not indictment
4) Agreement that if cooperation requirement is breached, information provided by corporation may be admitted in future prosecution
5) Waiver of right to speedy trial and any relevant statute of limitations period
6) Future certifications by general counsel that corporation is in compliance with terms of agreement
7) Imposition of fines or penalties
Use of Court-appointed Monitors

New DOJ Guidelines, issued in March 2008, identify principles regarding selection and use of monitors:

Selection – approval by varies groups, including Office of the Deputy Attorney General

Scope – monitor compliance with terms and evaluate internal controls

Duration – fact specific, but encourages extension or early termination if appropriate
What is potential impact of civil liability associated with Government settlement?
PREVENTING AND PREPARING FOR A GOVERNMENT INVESTIGATION
Preparation for the eventuality of an active criminal investigation can give a company and individuals crucial options and opportunities that would otherwise be lost.
Corporate Ethics and Compliance Programs

- What benefits do companies receive from establishing and administering formal ethics and compliance programs?
- Does the existence of such a program provide substantial benefit to company in the event it ever faces an enforcement action?
Guidance from the U.S. Sentencing Commission

The USSC’s guidelines for an “effective compliance and ethics program” call for organizations to:

(1) establish standards and procedures to prevent and detect criminal conduct

(2) assure that senior management and the organization’s governing authority oversee the ethics and compliance program and assign responsibility for its implementation

(3) use “reasonable efforts” not to include within the ranks of its personnel with “substantial authority” anyone who the organization knew, or should know through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective ethics and compliance program
Guidance from the U.S. Sentencing Commission

(4) communicate periodically its ethical and compliance standards to employees through training and other activities

(5) monitor and audit for illegal conduct and operate a system whereby employees and agents may report or seek guidance regarding possible wrongdoing without fear of retaliation

(6) promote and enforce the ethics and compliance program with incentives and discipline

(7) after any illegal conduct is detected, take steps to respond appropriately and to prevent further wrongdoing
Ethics and Compliance Committee

It should meet regularly to discuss compliance activities and issues.

Annually, it should engage in a compliance risk assessment process and address the major compliance risks which are identified.
Briefings for the Board and Senior Management

Compliance Officer and others should conduct regular in-person briefings for the Board of Directors and senior management on compliance activities and issues.
Communications from Senior Management

Implement a program of ongoing communications by the CEO and others in senior management to employees emphasizing, with explicit "tone at the top" expressions, the Company's commitment to ethics and compliance.

Communications should consist of in-person remarks at staff meetings and other employee gatherings as well as comments made in printed form (in memoranda, employee newsletters, etc.)
Compliance Training

Conduct an ongoing program of in-person, and in some instances on-line, training on key compliance issues for key management personnel and Board members, with the content of the curriculum for each training course specifically tailored to the needs of the attendees.
Compliance Officer Memos

Implement a program of regular memoranda to be sent from the Compliance Officer to relevant managers on key compliance issues.
Policies and Procedures

• **Ethics Hotline.** Assess the Company's already existing employee ethics hotline program. Make adjustments as necessary.

• **Management Selection Processes.** Formalize the consideration of candidates' ethics and compliance records as part of the Company’s promotions and manager hiring processes.

• **Discipline.** HR and departmental managers should coordinate with the Compliance Officer on compliance-related employee discipline decisions.
Policies and Procedures

• **Contractors and Vendors.** Assess the need to have programs and policies reach non-employee agents, consultants, other contractors, and vendors who are involved in high risk activities on behalf of the company.

• **Compliance Auditing.** Assure that Internal Auditing, in its audit program, is paying appropriate attention to compliance-related issues and the efficacy of the Ethics and Compliance Program.
Policies and Procedures

• **Records Retention Processes.** Assess the company's records retention practices to assure that records are being retained and destroyed in compliance with applicable legal requirements and to assure that there is an appropriate "litigation hold" process in place for halting normal document destruction in the event of litigation, investigations or other such events.

• **Ethics and Compliance Program Documentation.** Develop a process for the collection and retention in a central location of written materials documenting the activities of the Ethics and Compliance Program.