

Dorsey & Whitney LLP

THE ACCIDENTAL INTERNAL INVESTIGATION:

Critical Early Decision-Making

situation

In the wake of published reports that prosecutors and regulatory agencies are conducting an investigation into industry business practices they now regarded as questionable, your company has received a grand jury subpoena demanding the production of thousands of documents, including innumerable emails, covering a period of several years.

The corporation's top executives, including its general counsel, have previously considered the media reports concerning the business practices in question and have preliminarily concluded a) that the practices are not illegal or otherwise improper, and/or b) the corporation does not engage in such practices in any event. The corporation's general counsel determines that there is no need to conduct a formal internal investigation into the publicly reported allegations.

A law firm regularly engaged to represent the company in litigation is retained to respond to the grand jury subpoena on behalf of the corporation.

in-house counsel challenge

At the outset, corporate counsel must operate on the assumption that the prosecutor and/or regulator conducting the investigation has preliminarily concluded that the industry practices under investigation violate some law, regulation or ethical duty. The prosecutor and regulatory agency will expect the corporation's full cooperation with the investigation. While the corporation has an absolute right to defend itself against false allegations of misconduct, prosecutors and regulators, having reached certain conclusions (perhaps prematurely), may regard any efforts at advocacy, explanation or defense as obstruction, or at the very least, a failure of cooperation with the investigation.

"Cooperation" in recent years has come to be defined as a corporation's willingness to share the results of its internal investigation into the allegations that are the subject of the government's investigation. The question then becomes, what constitutes an "internal investigation" for these purposes? The law firm retained to respond to the grand jury subpoena necessarily will conduct sufficient inquiry of corporate executives and employees to determine what documents are responsive to the subpoena. Will the interviews conducted by that outside law firm be regarded by the prosecutor as part of an "internal investigation"? Will

there be an expectation that the substance, if not the notes of such interviews will be turned over to the prosecutor in the spirit of full "cooperation"? Will the refusal to turn over the product of the law firm's "investigation" be considered a failure of cooperation and publicly characterized as such by the investigating prosecutor? What will be the future implications for the corporation if prosecution is actually threatened?

approach adopted

We counsel our clients to obtain an early objective assessment of the allegations that implicate the corporation or its industry. An in-house review of publicly reported allegations, particularly when they implicate particular categories of executives or business units, often yield results that are not reliable and embarrassingly inaccurate. Even where outside litigation counsel are retained to respond to a grand jury subpoena or other document demand, unless the task is approached with care, sensitivity and experience in criminal investigations, executives or employees ultimately implicated in wrongdoing can be inadvertently insinuated into the information collection process with serious, if not fatal, consequences. We advise the earliest possible communication with investigating prosecutors and/or regulators in order to establish priorities for document production, refine the scope of information to be produced and to ascertain what information not already requested might put the inquiry in fair perspective and context. It is also important to determine the strength of the prosecutor's commitment to particular legal theories and receptivity to alternative views of the facts and applicable laws.

In sum, decisions made at the earliest stages of the government's investigation can have serious long-term implications. Experience in establishing credibility with investigating prosecutors and regulatory agencies is critical. Managing the expectations of prosecutors and regulatory agencies at the earliest stages of an investigation can increase the likelihood that the corporation will be credited for its cooperation.

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