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Legal Update

Corporate Governance and Effective Internal Investigations

By Michael J. O'Brien

Statistics provided by the federal government show that the number of defendants charged with white-collar crime-related offenses decreased 51.3% between 2015 and 2020. With a new administration expected in January, however, businesses, senior executives, municipalities, and public officials can expect an increase in regulatory enforcement, investigations and white-collar prosecutions.

The Department of Justice has defined white-collar crime as "any violation of law committed through non-violent means, involving lies, omissions, deceit, misrepresentation, or violation of a position of trust, by an individual or organization for personal or organizational benefit." This includes government program fraud, healthcare fraud, insider trading, embezzlement, and a number of other financial crimes.

Corporations and other business entities facing a criminal subpoena or allegations of misconduct should be prepared to conduct comprehensive internal investigations in order to establish relevant facts, prepare an appropriate response, demonstrate transparency to employees, consumers, shareholders and government regulators, and ultimately stave off criminal prosecution. Throughout this process, outside counsel and senior company management should consider 3 specific items: 1) the Purpose of the Investigation, 2) the Scope and Applicability of Attorney-Client Privilege, and 3) Potential Cooperation with and Disclosure to Government Agencies.

Purpose of the Internal Investigation

Internal investigations are often complex and should reflect the specific matter under investigation. In many cases, however, the business entity may hope to attain the following 5 objectives:

1. Complete a comprehensive review of relevant records and other materials. Interview employees and other available witnesses with information relating to the subject of the investigation;
2. Identify instances or patterns of misconduct to prevent further wrongdoing;
3. Provide senior management the information necessary to determine the appropriate response;
4. Demonstrate transparency and document a good-faith response to allegations and other facts as the investigation develops;
5. Insulate senior management from allegations that they knew of inappropriate or illegal activity and failed to act appropriately.

Scope and Applicability of Attorney-Client Privilege

An effective investigation will require employee interviews and other communications between outside counsel and company employees. At the outset of any such interview or communication, counsel should advise the interviewee as to the scope and applicability of attorney-client privilege. This communication is often referred to as an Upjohn Warning, which takes its name

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from Upjohn Co. v. United States. In Upjohn, the United States Supreme Court held that while communications between company counsel and employees of the company are privileged, the privilege is held by the company and not the individual employee.

An Upjohn Warning must advise the interviewee of the following points:

1. Counsel represents the business entity in the matter under investigation.
2. Counsel does not represent the interviewee.
3. Counsel is conducting the investigation in order to gather information and provide legal advice to the company
4. The interview is privileged and confidential.
5. The privilege belongs to the entity and not to the interviewee.
6. The company may waive privilege and disclose the contents of the interview to third parties.
7. The interview should remain confidential.

Cooperation with and Disclosure of Findings to Government Agencies

In the course of an internal investigation, it may become necessary or appropriate to share the status, progression and/or findings of the investigation with government agencies in order to obtain cooperation credit and stave off potential criminal prosecution. The decision whether to share the findings of an internal investigation must separate the interests of the company from that of individual officers, directors, or employees of the company.

To assist in this decision, it is worthwhile to apply the facts of the case to a number of factors that the Department of Justice has identified as appropriate for federal prosecutors to consider when evaluating corporate misconduct and potential criminal indictment. These factors include but are not limited to the following:

1. The nature and seriousness of the offense,
2. The pervasiveness of wrongdoing within the company, including the complicity in, or condoning of, the wrongdoing by corporate management
3. The company's willingness to cooperate in the investigation
4. The company's timely and voluntary disclosure of wrongdoing
5. The company's remedial actions and efforts to cooperate with relevant government agencies

While DOJ and other government agencies may emphasize prompt voluntary disclosure and corrective action when determining whether criminal charges are appropriate, disclosure is not appropriate in all cases. Companies should retain experienced outside counsel to conduct a comprehensive internal investigation and to establish the facts necessary to determine the appropriate plan of action.

Eckert Seamans attorneys advise individuals and corporations confronted by state and federal criminal and/or administrative investigations and defend clients who are charged with crimes and/or named in administrative enforcement proceedings.

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This Legal Update is intended to keep readers current on developments in the law, and is not intended to be legal advice. If you have any questions, please contact Michael J. O'Brien at 215-851-8532 or mobrien@eckertseamans.com, or any other attorney at Eckert Seamans with whom you have been working.

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