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First, Stop the Shredding

When companies under government scrutiny conduct internal investigations, the question is deciding just how far to go. Today, the stakes are too high to forgo vigorous fact-finding.

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Companies that are the subject of government scrutiny face new challenges in deciding how to investigate the allegations that sparked the government's interest. No longer can a company interview employees, analyze documents, and create written records secure in a belief that the fruits of the investigation will not be demanded by prosecutors, discovered by civil opponents, and used to the company's detriment in any number of related proceedings.

The government now routinely requires that if companies want to be considered "cooperative," they must waive the attorney-client and work product privileges. As a result, companies have severely limited their internal fact-finding processes and jumped to waive traditional protections.

But have companies gone too far? Much of the case against Arthur Andersen was built on a single document authored by an in-house lawyer. And with the decline of the federal sentencing guidelines, companies and their counsel need to reassess the role of internal investigations as a cornerstone of informed strategy.

The goal for a company and its counsel faced with a potential enforcement-related risk is to fashion an expeditious yet comprehensive review that allows decision-makers to evaluate possible risks and identify potential solutions without ceding control of the process to government agencies or exposing the results of the investigation to third parties. Two important elements of that review are retaining, collecting, and reviewing documents; and interviewing and advising company employees.

IN-HOUSE COUNSEL

A predominant consideration in any internal investigation is the establishment and maintenance of the legal protections that allow the company to shield the results of its investigation from compelled production. While the exact contours of the attorney-client privilege and work product doctrine vary between jurisdictions, the basic elements are consistent: the gathering and analysis of information must involve or be at the direction of an attorney, the inquiries and communications must be designed to obtain or provide legal advice in anticipation of litigation, and the materials must be maintained confidentially.

If these steps are not followed, there is significant risk that the company will lose control over the process and over the results of the investigation.

REDUCE THE HUMAN ELEMENT

By now, all companies, regardless of size, should have a comprehensive written document retention policy in place and should conduct employee training to accurately communicate the policy's details and implementation. The policy should remove the human element from the decision of whether to retain or destroy documents.

It should instead impose a regular schedule for document disposal. It should also address the handling of computer files, e-mails, and other electronic documents, which are rapidly becoming the core of document requests in both criminal and civil litigation. Perhaps most importantly, however, the policy must include a "safety valve"—a mechanism to suspend the destruction of documents under the policy immediately upon commencement of an internal investigation or notification of a government inquiry. (For example, companies should have a "stop shredding" memo template that can be immediately sent to relevant employees if the need arises).

The policy should be drafted with the knowledge that it will likely be provided at a later date to the government, because an established procedure that reliably preserves relevant material can be a critical tool in a company's effort to convince investigators to delay subpoenas and to allow an internal investigation to continue without undue outside interference.

DOCUMENT COLLECTION AND REVIEW

Once document preservation measures are in place, the next

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task is the efficient collection and review of relevant documents. As an initial matter, this is a step where the involvement of outside legal counsel is critical to establishing viable privileges.

The retention of outside counsel to head the collection and review efforts can advance privilege claims, because there is little question that outside counsel serves in a "legal" capacity, whereas in-house counsel may be viewed by the government as serving in a privilege-compromising "business" capacity. In either instance, however, counsel should start by drafting a document collection plan.

That plan also should be drafted with the understanding that it may later be produced to government investigators to forestall the issuance of subpoenas. Employees with access to potentially relevant materials should be notified of the various categories of documents and of the sources, including electronic media, that the search request covers. Counsel must then make threshold decisions:

- Should investigators conduct the searches or should that be left to individual employees?
- Should relevant materials be segregated from general business records or merely duplicated with a copy left in general records?
- Should a forensic expert be retained to assist in the recovery of electronic files?

The resolution of these questions will influence the government's evaluation of the internal investigation, and again may affect a company's ability to forestall government intervention.

Interviewing and Advising Employees

The decisions about whom to interview, the order of the interviews, and whether and how to record the interviews conducted during an internal investigation require numerous tactical and legal considerations. While there is a temptation to immediately begin interviews at the start of an investigation, an insufficient understanding of the documentary universe will limit the usefulness of live interviews.

Ideally, a thorough review of the relevant documents would precede the start of interviews. While time pressures often make that impossible, interview preparation requires that counsel have at least an understanding of the documents authored by or reviewed by an interviewee because a first interview is often the best chance to elicit frank and unguarded information. Similarly, in selecting the sequence of interviews, counsel should consider whether some interviews need to be conducted before others in order to uncover potential conflicts in recollections or impeaching statements.

The start of employee interviews is critical because the investigator must both ensure that privileges are preserved and also give the employee fair notice of the issues involved in the interview. Thus, an introductory statement should inform the interviewee that:

- The interview is being conducted so that counsel can provide the company with legal advice;
- Counsel represents the company and not the employee;
- The interview is covered by the company's attorney-client and work product privileges; therefore, the employee should not discuss the interview with others;
- The company, and not the employee, may choose to waive those privileges in the future; and
- The company expects the employee to cooperate fully with the investigation and to tell the truth.

Whether the last two points—standard parts of an interview introduction for years—are sufficient has been the topic of recent debate. Last year, three former executives at Computer Associates pleaded guilty to obstruction of justice charges in connection with statements that they made to the company's outside counsel during an internal investigation.

The government's theory of criminal liability was that the executives, who were not accused of lying directly to federal investigators or a grand jury, sought to mislead federal officials by lying to internal investigators who later passed the false information on to the government. This potentially troubling theory has led some to suggest that an employee should be warned that any statements made during the interview will likely be provided to the government and could be used as evidence against the employee in a future criminal proceeding.

Such a warning is unnecessary and misleading in an early-stage internal investigation. An investigation should not begin with the assumption that privilege will be waived and that information will be provided to the government. Indeed, counsel should stress that the company may waive the privilege in the future, but is unable to make that determination until the investigation has been concluded.

Of course, this statement may be inappropriate in a situation where the company is contractually bound, for example through a deferred prosecution agreement, to provide investigation results to the government.

The final question is how to create a written record of employee interviews. Concerns that interview memoranda may be discovered by an opponent have led some to counsel against the documenting of interviews—a decision certain to attract skepticism from the government. Others have argued that memoranda should be stocked with a lawyer's personal impressions of a witness—an argument that ignores the fact that any non-verbatim account of an interview will likely be deemed to be attorney work product, the production of which the company will be able to control. There may be strategic reasons to draft "bare bones" or expansive interview memoranda, depending on counsel's evaluation of numerous factors, including:

- Whether the company is publicly or privately held;
- Whether the subject matter of the investigation is likely to lead to litigation or settlement; and
- By whom, and for what purpose, the document might later be used should the company waive legal protections.

Decisions regarding details of an internal investigation will depend upon the circumstances a company faces and the risks and benefits of different choices. It is clear, though, that the stakes are too high for companies to forgo vigorous fact-finding due to fears that information may be later discovered.

If performed properly, internal investigations can serve their valuable purpose with an expectation of protection—even in the modern era of increased corporate cooperation.

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