CORPORATE COUNSEL

Cooperating With the DOJ: A Shift in Policy

Questions and Dilemmas

Corporate Counsel
April 21, 2015
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A significant policy shift by the U.S. Department of Justice has produced both questions and dilemmas for companies trying to limit their potential exposure to criminal charges and substantial criminal fines. The change has redefined what it means to "cooperate" with the Justice Department in a criminal investigation. Cooperation, of course, is one of the key factors that DOJ uses in deciding whether to bring criminal charges against corporations for violations of federal law, and how large a penalty to seek from corporations. Now that the DOJ is seeking guilty pleas and billion-dollar fines from large companies on a semi-regular basis, the issue of cooperation is more important than ever.

The Shift

Over the last several months, in a series of well-coordinated speeches, senior DOJ officials have announced that companies are now being evaluated on whether they have produced evidence that can be used by prosecutors in criminal trials against culpable employees. In other words, if a company has not identified and produced evidence of a credible criminal case against individuals within the relevant statute of limitations (five years for many violations of federal law), the DOJ may conclude that the company has not cooperated and that it should be treated harshly—even if it otherwise voluntarily disclosed the misconduct and identified the culpable employees.

Marshall Miller, a senior official in the department's Criminal Division, first described DOJ's position in September 2014: "Even the identification of culpable individuals is not true cooperation, if the company fails to locate and provide facts and evidence at their disposal that implicate those individuals." Two months later, Leslie Caldwell, the DOJ official in charge of the Criminal Division, suggested in a speech that the oil and gas company Petro-Tiger Ltd. was not charged with foreign bribery because it disclosed facts in time for the Justice Department to file charges against two of its former chief executive officers. As recently as April 17, Caldwell observed that "[d]uring my first year in leading the Criminal Division, we have tried to make as clear as possible what we expect from those companies that choose to cooperate" and "[p]erhaps most critically, we expect cooperating companies to identify culpable individuals—including senior executives if they were involved—and provide the facts about their wrongdoing."
DOJ's policy change raises a number of important questions:

- Is the Justice Department now applying a negligence standard in determining whether a company is cooperating and punishing those companies that fail to discover relevant evidence?
- Does a company have an obligation to ensure that its employees are prosecuted and imprisoned for any unlawful conduct?
- Does it matter if the board of directors or senior management did not know about the misconduct when there was a failure to report it?
- If the statute of limitations has already run out on the misconduct, does a company receive any credit for disclosing evidence of misconduct and identifying culpable individuals?
- How should this shift in policy affect a company's decision whether to voluntarily disclose misconduct at all to the DOJ?

Because actions speak louder than words, it will take time to determine the answers to these questions. The Justice Department is famously reluctant to share the details of its decisions to decline prosecutions, so the defense bar will need to parse through future settlements to determine whether this is a permanent

change in DOJ's policy or whether this factor is going to be a temporary emphasis in the Justice Department's treatment of corporations.

The Dilemma

To respond in this legal environment, companies need to give consideration to whether they need yet another enhancement to their compliance programs. Nearly every company of any appreciable size has legal and compliance departments, along with teams of internal and external auditors. But these compliance mechanisms often are structured to be reactive and to respond to concerns raised by others. Internal reviews usually are prompted by complaints identified by employees, auditors, whistleblowers, anonymous sources, industry trends and news coverage of problems affecting similar companies. Internal reviews also can be prompted by subpoenas or inquiries from prosecutors or regulators.

Until now, this review process made perfect sense, given the standards articulated by the U.S. Sentencing Guidelines and the Justice Department's own Principles of Federal Prosecution of Business Organizations. The Sentencing Guidelines gave credit to companies that self-report "within a reasonably prompt time after becoming aware of the offense" and do not condition this credit on whether government authorities are able to bring future prosecutions of individuals. The DOJ's principles focused on whether there was "timely and voluntary disclosure of wrongdoing" and "willingness to cooperate in the *investigation* of its agents" (emphasis added). The Sentencing Guidelines and the DOJ principles rewarded companies for designing and implementing effective compliance and ethics programs, which were supposed to identify potential problems that could be investigated and voluntarily disclosed to the Justice Department.

However, companies should consider whether their compliance programs are strong enough to respond to the current environment. If a company wants to catch illegal conduct within the statute of limitations and qualify for "true cooperation" with the Justice Department, a company may have to look aggressively and affirmatively for the misconduct and not wait for someone else to identify it first. The clock may be ticking now in a way that it was not before.

Large companies should consider whether they need to employ internal lawyers or other investigators to look for evidence of past illegal conduct within the company. These in-house professionals would be people with strong investigative skills and the industry and legal knowledge to identify and investigate areas of potential misconduct. Just as importantly, these professionals must have the judgment to refrain from engaging in unwarranted witch hunts.

Some companies may rely on existing compliance officers or lawyers to handle this role as one part of their jobs, but they often are not best situated to do so. Compliance officers must be accessible to business units to provide candid advice on contemporaneous transactions and company policies, and many do not have the time, resources or mandate to initiate substantial inquiries on past matters without an existing complaint or a concrete problem. The same is true for many in-house lawyers.

However, there are clear benefits to using a lawyer who affirmatively seeks the discovery of problems before a whistleblower or an audit process identifies them. If the lawyer finds evidence of past illegal conduct, the company is better positioned to claim credit for cooperation with the Justice Department. Because this type of investigator is not a common feature for many compliance programs, a company would be able to stand out for its strong commitment to compliance. Moreover, by discovering any problems at the early stages, this new investigator could prevent or limit some of the guilty pleas and sky-high fines and penalties that have dominated the news. Some large companies could have saved themselves a lot of anguish and front-page headlines if they had employed effective permanent investigators.

The downside of this type of investigator is equally apparent. No company is eager to have Inspector Javert roaming its halls. A permanent investigator would potentially distract the business and may duplicate duties of some existing legal, compliance and audit personnel. A company may worry that a permanent investigator would undermine its culture, which is built on trust and not on an assumption that

its employees may be breaking the law. Internal investigations can be stressful and costly experiences for everyone involved and can take a significant toll on a company. And a permanent investigator may not find any misconduct and, instead, cause the company to question why it went to all this trouble in the first place.

Despite the drawbacks, some large companies already have begun to move in this direction. For instance, some large global financial institutions have directed their inspector general units to increase the frequency of reviews in sensitive areas. Other companies, often in highly regulated industries, have formed internal investigation units to assist in the discovery of improper conduct. By using tools such as foreign bribery audits, and by increasing the sophistication of anti-money-laundering reviews, more companies have begun investigations without the prompting of some initiating event.

The Bottom Line

Large companies face a difficult balancing act in deciding how to structure their compliance programs. At this moment, it is not common even for large companies to employ full-time investigators with a broad mandate to affirmatively seek out illegal conduct without a precipitating complaint.

With the ever-increasing criminal penalties and DOJ's new policy emphasis, the time may be coming when an internal investigator with a broad mandate becomes a familiar figure in the compliance programs of large companies trying to limit their risks of exposure to the U.S. criminal justice system.

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