

Corporate Internal Investigations: A Modern Cost of Doing Business

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In-house corporate counsel have lamented that internal investigations represent a necessary cost of doing business for corporations. Since Enron, these internal investigations have become more frequent, perilous, and complicated. Companies and their boards are deciding to preemptively perform internal investigations upon notice of alleged wrongdoing because they may be led to believe that if misconduct is discovered, the company may seek to avoid prosecution or other onerous sanctions as a result of their affirmative corrective action. If the government is investigating, however, it may request that the corporation disclose the result of its investigation to government prosecutors or regulators, to receive any government leniency. Such a decision is difficult and the consequences are potentially severe. Further, as a result of waiving privileges, third parties in parallel or subsequent related civil litigation may obtain the results of the entire internal investigation, to the further detriment of the corporation. For in-house counsel and the corporation, the first critical decision is whether the internal investigation will be performed by in-house counsel herself, or outside attorneys experienced in conducting internal investigations. An investigation conducted by in-house counsel may be less costly than one conducted by outside counsel, but in-house attorneys are employees of the corporation and regulators may not regard them as independent. To maximize the independence and credibility of the results of the internal investigation and any attendant benefit from it, the company's in-house counsel may wish to retain outside attorneys as "special counsel" to conduct an internal investigation. Experienced outside corporate counsel understand when deciding to undertake an internal investigation that the first critical task is to define the scope of the internal investigation based upon the nature of the alleged misconduct and to work within that scope and not exceed it during the inquiry. If wrongdoing is discovered, the company must decide whether it is subject to mandatory self-reporting, and if not, whether it intends to fully cooperate with the government and voluntarily disclose the misconduct. These decisions should be made with the guidance and expertise of special counsel conducting the investigation. If government scrutiny and process have already commenced, the company has a duty to preserve all "documents," including electronically stored information that are likely to be relevant.

Failure to do so may result in additional sanctions and criminal or civil liability. A company choosing to cooperate must understand that it relinquishes rights and privileges provided by the law in exchange for leniency. The KPMG LLP case of several years ago provides an example of what “full cooperation” with a government investigation may mean. KPMG was prompted to conduct an internal investigation as a result of an IRS inquiry involving allegedly fraudulent tax shelters and discovered wrongdoing. To avoid indictment, the company agreed to fully cooperate with the government investigation. The government required the company to waive the attorney-client privilege and work product protection; refuse to pay legal costs of its partners and employees unless they agreed to talk to prosecutors; decline to enter into any joint defense agreements; agree to tell prosecutors which documents its partners and employees were requesting to use in their own defense and to provide prosecutors with copies of those documents at the same time it provides them to defense counsel; and refuse to allow defense attorneys access to the full set of documents it has provided to the government. The foregoing requirements were onerous, and many believe inappropriate. See *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008) (dismissing criminal charges against KPMG partners and employees because government pressured KPMG not to advance legal fees in violation of their Sixth Amendment rights). The KPMG case represents a dramatic and heavy-handed example of what the government may demand from companies that wish to cooperate. And while the government [has moderated](#) some of its positions since then, the KPMG case serves as a harsh reminder that corporations face difficult choices in determining whether to cooperate. In the current environment, heightened pressure exists for corporate clients to minimize their exposure by considering full cooperation with the government regarding alleged misconduct. Experienced outside corporate counsel must be vigilant regarding the erosion of fundamental legal rights encouraged by cooperation, and give careful consideration to myriad issues that confront the corporate client during the internal investigation, to protect the client from unwarranted sanctions and costly related civil litigation, so that the corporate client may focus on being successful in business for its shareholders and employees.

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