Corporate Investigations & White Collar Defense

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Sleeping With the Enemy: Can Corporate Counsel Be "Too Cooperative" With the Government?

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In 1999, then-United States Deputy Attorney General Eric Holder issued the "Holder Memorandum" – a document that has come to profoundly impact the way in which corporations conduct internal investigations and deal with the government in the face of misconduct allegations. The Holder Memorandum set forth specific factors to be considered in determining whether to file criminal charges against a corporation. Among them were "[t]he corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work-product privileges."

Although the guidelines set forth in the Holder Memorandum have undergone several iterations, a corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents remain factors to be considered by prosecutors in determining whether a corporation should be criminally charged.[1] While the current guidelines provide that "[e]ligibility for cooperation credit is *not* predicated upon the waiver of attorney-client privilege or work product protection," they nevertheless provide that "the government's key measure of cooperation" is whether the corporation has timely disclosed "the relevant facts about the putative misconduct."[2]

Based on the guidelines set forth in the Holder Memorandum and its subsequent iterations, numerous corporations have conducted their internal investigations with an eye toward establishing cooperative relationships with the government. For some, this has included making sure that the corporation's employees fully comply with the investigation and that the government is apprised of all developments in the investigational efforts.

But when a corporation takes significant steps to "cooperate" with the government by requiring employees to submit to interviews during the internal investigation – and then shares the results of those interviews with the government - at what point do the lawyers conducting the investigation become government actors?

This was precisely the question recently raised in the federal district court by the defendants in *United States v. Stuart Carson.*

In *Carson*, the global engineering group IMI plc discovered that its subsidiary, Control Components, Inc. ("CCI"), had possibly made improper payments in violation of the Foreign Corrupt Practices Act ("FCPA"). Shortly thereafter, IMI retained counsel to conduct an

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internal investigation at CCI's corporate headquarters. Counsel, in an effort to minimize the corporation's own criminal exposure, apprised the DOJ of its progress in the investigation and informed all employees that they were expected to fully cooperate with and be interviewed during the investigation. CCI and eight of its executives were later indicted for charges relating to a conspiracy to violate the FCPA and violations of the FCPA.

Defendants Paul Cosgrove, CCI's former director of worldwide sales, and David Edmonds, CCI's former vice president of worldwide customer service, moved to suppress the statements they made to CCI's counsel as part of the internal investigation.[3] Cosgrove and Edmonds argued that the statements were compelled under a "penalty situation," which required them to compromise their Fifth Amendment rights against self-incrimination on the threat of termination. In response, the government argued that CCI never expressly threatened to fire Cosgrove and Edmonds. Further, the government asserted, CCI's counsel never sought or obtained the government's approval with regard to how and whether to interview particular employees.

On May 14, 2012, the district court denied the motion to suppress, ultimately finding that the actions of CCI's counsel were not so intertwined with the government that they should be attributed to the government.[4]

Carson is a stark reminder that corporations must tread carefully in deciding whether and how to share privileged information with the government when threatened with the possibility of indictment. While corporations may be understandably eager to cooperate with the government in the hopes of procuring a deferred prosecution agreement or avoiding indictment altogether, that eagerness should be tempered by considerations regarding privilege and witnesses' rights against self-incrimination. Oftentimes internal investigations are conducted with a narrow focus on the goal of obtaining as much information as possible under any circumstances necessary. *Carson* reminds us to use a wider lens and to consider the potentially negative consequences of being too eager to please.

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[1] United States Attorneys' Manual § 9-28.300.

[2] *Id.* at § 9-28.720.

[3] Defendant Hong Carson also joined in the motion to suppress, but pleaded guilty before the motion was heard.

[4] Defendant Paul Cosgrove has since pleaded guilty to one count of making a corrupt payment to a foreign government official in violation of the FCPA.