A Cautionary Note: Obstruction of Justice and the General Counsel

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Recent criminal obstruction charges lodged against in-house counsel signal a shifting enforcement climate that focuses specifically on individual responsibility for alleged illegal actions on behalf of a corporation. This newsletter offers a series of recommended practices health care general counsel should consider in order to reduce individual and organizational exposure to obstruction of justice charges.

Health care general counsel should be increasingly attentive to obstruction of justice risks inherent in any interaction with the government, no matter the degree of formality involved. The recent indictment of a pharmaceutical company's in-house counsel serves as a strong indication of the government's willingness to use obstruction-based criminal prosecution theories to address the conduct of individuals in responding to government investigations. *United States v. Stevens*, No. 10-CR-694 (D. Md. Nov. 8, 2010). This indictment is also consistent with recent attempts by prosecutors to target individuals they believe responsible for corporate misconduct.

Obstruction risks should be of particular concern to the health care general counsel, whose "internal clients" are contacted by government investigators with a frequency seemingly unsurpassed in other industry sectors.

What Constitutes Obstruction?

The term "obstruction of justice" encompasses a wide range of conduct under federal and state laws, including making false statements, witness tampering, document destruction and failure to preserve audit records. Federal obstruction laws are set forth in the Federal Criminal Code at 18 U.S.C. §§ 1501-1520. Of particular interest in the context of health care general counsel responding to government inquiries and investigations are the following:

- Sec.1505 "Obstruction of proceedings before departments, agencies and committees," which prohibits the obstruction of any proceeding by a federal agency or Congress (this was the primary statute under which Martha Stewart was prosecuted and convicted).
- Sec. 1512 "Tampering with a witness, victim or an informant," which prohibits conduct much more discreet than the obvious examples of physical force and threats of violence or harm, *e.g.*, knowingly making a false statement to a government agency, intentionally omitting information from a statement and thereby causing a portion thereof to be misleading, or intentionally concealing a material document or fact and thereby creating a false impression by such statement.

- Sec. 1518 "Obstruction of criminal investigations of health care offenses," which relates to obstruction in the context of the communication of information or records to a criminal investigator relating to a violation of a federal health care offense.
- Sec. 1519 "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," a very broad Sarbanes-Oxley-based provision intended to prohibit any act of destroying, fabricating or concealing evidence when done with the intent to obstruct, impede or influence an investigation, or the proper administration of any matter within the jurisdiction of any U.S. department or agency, or in relation to or in contemplation of such a matter or investigation.

The recent health care general counsel indictment charged violations of Secs. 1512 and 1519, as well as 18 U.S.C. § 1001, the "catch all" statute prohibiting the making of false statements to a government agency.

The Broader Context

Obstruction of justice issues must be viewed in the broader context of the federal government's increasing interest in "following the conduct" to identify individuals who can be held responsible for corporate misconduct, whether they are in the field, the executive suite or the boardroom. Indeed, recent by Assistant Attorney General Tony West serve to underscore the government's willingness to focus on individual accountability as part of federal health care antifraud initiatives.

A prominent example of the government's recent emphasis on imposing individual criminal liability is the Responsible Corporate Officer Doctrine (RCOD), a strict, liability-based theory the government has asserted in recent investigations involving pharmaceutical and medical device companies. To date, health care application of the RCOD has been limited to allegations under the federal Food, Drug and Cosmetic Act.

Another example is the Office of Inspector General's (OIG) expanded authority to apply its federal health care program exclusion authority to an officer or a managing employee of an excluded or convicted entity. Unlike the RCOD, the OIG's permissive exclusion authority is applicable to a wider range of health industry officers and other employees (*e.g.*, hospital and health system executives). Consistent with this authority, OIG recently excluded a former pharmaceutical company director from participation in federal health care programs. In this regard it should be noted H.R. 6130, the Strengthening Medicare Anti Fraud Measures Act of 2010, as recently passed by the U.S. House of Representatives, would serve to expand the government's permissive exclusion authority to include individuals and entities affiliated with sanctioned entities.

Collectively, these developments, combined with the recent criminal obstruction charges lodged against in-house counsel, signal a shifting enforcement climate with specific focus on individual responsibility for alleged illegal actions

on behalf of a corporation. Indeed, these developments underscore the government's willingness to challenge traditional concepts of legal advocacy when it perceives such advocacy as misleading or an attempt to distort the facts.

Recommended Practices

The following represents a series of recommended practices the health care general counsel should consider in order to reduce individual and organizational exposure to obstruction of justice charges.

1. Recognize obstruction risks are implicated by even the most informal of inquiries from the government, such as a phone call or preliminary correspondence seeking information relating to an agency inquiry. Under the circumstances, it makes **no sense** for the general counsel to "wing it" when responding to any governmental inquiry. Consider the value of immediately consulting with outside counsel with experience in responding to government investigations to provide advice on how best to respond to the inquiry without creating obstruction-related risks.
2. With the support of outside counsel, identify the specific obstruction risks typically falling within the scope of responsibility of in-house counsel in the context of the government inquiry, *e.g.*, statements to agency officials or government counsel, gathering and organizing documents in response to a government request and interaction with potential witnesses (especially when the in-house counsel and the potential witnesses are employed by the same organization).
3. Brief senior executive leadership on the willingness of prosecutors and health care regulators to pursue individuals it perceives as responsible for fraud or other noncompliance as aggressively as they have done with respect to corporations. Remind executive leadership that actions creating obstruction exposure often occur very early in the process of responding to an inquiry.
4. Confirm with outside counsel the effectiveness of the organization's existing document retention policy. When the organization has previously been the subject of government investigation or inquiry, or is currently the subject of such an investigation or inquiry, alterations to the document retention policy should only be made at the direction of outside counsel, to reduce the inference that the alterations were intentionally designed to obstruct the investigation.
5. A corporation should have an established policy to ensure its management team and general counsel are timely informed of all government investigations and inquiries, both formal and informal. This policy should articulate the related roles of the general counsel, compliance officer and internal auditor, to avoid confusion or worse.
6. Once a corporation learns of or anticipates receipt of a subpoena or less formal government inquiry, it should take all appropriate steps to ensure the preservation of relevant documents. As part of this

effort, the corporation should suspend the destruction of documents under its existing document preservation policy. In addition, the corporation should issue a directive instructing directors, officers and relevant employees to preserve relevant information, including emails, drafts of documents, voicemail messages and other electronic documents and data. Depending on the circumstances, this directive may need to include agents of the corporation who are in possession of the corporation's documents, such as independent contractors, lawyers and accountants.

7. A corporation, through its audit committee and general counsel, should work with its outside auditor to develop protocols and procedures designed to preserve substantive audit records and other related material for an appropriate amount of time, given applicable statutes and regulations. Included within the scope of retained information would be relevant audit records, including but not limited to conclusions, opinions, analysis, work papers and financial data relevant to an audit or review, regardless of whether they support the final conclusions reached by the auditor or expressed in the final audit or review.
8. The corporation's policies and procedures should make clear that, once notice of a government investigation is received, directives concerning document retention are to be made by a specific individual, such as the general counsel, and are not to be made by others (*e.g.*, line management, compliance officer or internal auditor).
9. Corporate managers should be informed that, upon receiving notice of a government investigation, all communications concerning the matter should be directed to the general counsel; corporate employees should not engage in unprivileged discussions among themselves concerning their knowledge of the underlying events, their prospective testimony or defensive strategies. While discussions with counsel about such matters are entirely appropriate, discussions between potential witnesses concerning the allegations are not only non-privileged and discoverable, but create needless risk of witness tampering allegations.
10. A corporation should institute, if it is has not done so already, internal compliance/educational sessions or other "in service" programs directed by the general counsel on the topic of obstruction of justice. For senior management, the subject should be integrated into new employee training programs and reinforced during periodic training for current employees.

Conclusion

There is a natural and appropriate tendency for in-house counsel to personally respond to at least initial governmental inquiries before incurring the cost of engaging outside counsel. Yet, the recent criminal indictment of a corporate in-house counsel on obstruction of justice charges serves to raise the stakes significantly in this regard. The indictment is consistent with government enforcement actions in the health care sector and, especially, with an

increased government willingness to pursue individuals it perceives as responsible for allegedly illegal conduct as vigorously as it does with corporations. In-house counsel should treat this development very seriously and enact a focused and measured organizational response.