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INTERNAL INVESTIGATIONS

Cooperation in False Claims Act Investigations: The Benefits of Conducting a Proactive Internal Investigation

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Most companies that receive a civil investigative demand (CID) in a False Claims Act (FCA) investigation decide early that they will ''fully cooperate'' with the government's investigation. That's an easy decision because there really is no alternative: Failure to cooperate with the Justice Department undoubtedly will make a bad situation worse, as the government will get what it wants the easy way or the hard way, as they say. In this context, the hard way means that the government will simply file a proceeding in federal court to enforce the CID. Such a proceeding will make public an otherwise confidential investigation, causing reputational harm; probably end in the government's favor, given the high legal bar for challenging an administrative subpoena; and guarantee an adversarial relationship with the powerful U.S. government.

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The real question, therefore, is not whether to cooperate, but how. And that question, unfortunately, often does not get the thoughtful attention it truly deserves.

Cooperating with an FCA investigation can mean different things to different people. At one end of the spectrum, cooperating can mean not fighting the CID, but doing the bare minimum necessary to meet the legal requirements for complying. Companies that choose this minimalist approach pursue a strategy of negotiating with the government to minimize the cost and burden of production, while hoping for an ultimate declination by the government. Companies adopting this course do not launch their own internal investigation, reticent to commit the resources to such an undertaking. Most are also not warm to the idea of proactively sharing bad facts with the government, doubtful that their good corporate citizenship will truly be rewarded. Indeed, some smaller companies—or larger companies that are small players in a larger investigation—may even forgo hiring outside counsel, or involve outside counsel minimally. The cost savings of this more reactive approach can be substantial, particularly in the age of electronic discovery. the government has not been shy about suggesting that companies simply produce emails without reviewing them—an approach that, if nothing else, would certainly save money. Also, the hope for a declination is not completely unreasonable: Statistically speaking,

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most False Claims Act investigations in *qui tam* cases end in a declination.

At the other end of the spectrum, a company that receives a CID may pursue a more proactive approach, launching its own internal investigation and even committing, upfront, to sharing the results of that investigation with the government. Proponents of the proactive approach treat the existence of a government investigation as a red flag alerting the company to a potential compliance problem that needs solving. Companies that adopt the proactive approach pursue a strategy focused less on how much the investigation will cost, and more on how to identify and remediate the problem most efficiently. The thinking behind this approach is simple: If the government is investigating you, you should probably investigate yourself (unless the government asks you not to) and stay at least one step ahead of the government. Such an approach is often accompanied by an active dialogue with the government, in which the company helps educate the government about the company and the facts, often through periodic voluntary presentations.

To be sure, a proactive approach usually costs more, at least in the short term. Also, an aggressive internal investigation may well uncover misconduct that the government itself might never find. What's more, the financial benefits of proactively cooperating in a False Claims Act investigation are difficult to quantify. While the FCA rewards timely self-disclosure by capping damages, the statutory requirements to claim this protection are notoriously hard to meet—requiring, for example, disclosure of all information within just 30 days of discovery—and, even if met, merely cap exposure at double damages rather than treble. [31 U.S.C § 3729 (a)(2).] Said another way, DOJ will thank you for your fulsome cooperation and self-disclosure by hitting you with double damages, a result that could probably be achieved in settlement talks anyway.

Perhaps because both ends of the cooperation spectrum have their risks and downsides, companies often opt for something in between the two extremes: They want outside counsel to negotiate with the government to keep costs down, and they would like to have at least some understanding of the underlying facts, and some sense of their potential exposure. Under this approach, the company makes some witnesses available to outside counsel, but mainly to help counsel better understand the business, locate responsive documents, and prepare for interviews by the government. This middle approach is typically more reactive than proactive. For example, companies may make a presentation to the government on the facts and the law, but only at the end of the investigation and in response to the government's own presentation, rather than proactively over the course of the investigation. This middle path, of course, sometimes bears all the hallmarks of any project that is done halfheartedly or on the cheap. Inevitably, it will cost more in the end, and won't always achieve the best outcome. This middle path also has many of the downsides of the passive approach without all of the upsides of a more active approach. Making only one presentation to the government at the end of the process can be too little and too late, coming only after the government's view of the company and the facts has already taken deep root.

There is no model of cooperation that always makes sense. Where the likelihood of enforcement is low and the potential exposure minimal, a full-scale internal investigation would probably be overkill and a waste of money. At the same time, in the wrong case merely producing documents and hoping for the best can equate to whistling past the graveyard—a risky strategy when the Justice Department is investigating your company for fraud under a statute that authorizes treble damages and civil penalties, not to mention criminal sanctions. Another option would be to conduct a thorough internal investigation but keep it under privilege, an approach that may seem less scary to clients than agreeing upfront to self-disclose the results before they are known.

The point is not that one size fits all with cooperation; rather, simply that there are a number of cooperation models, and companies would be wise to give early thought to which one makes the most sense.

The Benefits of Conducting a Proactive Internal Investigation

Because conducting an internal investigation with an intent to self-disclose is often seen as the most expensive option, at least in the short term, it is useful to consider the offsetting benefits that may weigh in favor of such an approach. As explained below, there are several.

1. Meeting the Government's Expectations Engaging in a proactive internal investigation with an intent to self-disclose represents the approach most likely to satisfy the government's expectations for what it means to ''cooperate'' in the investigation. As explained below, those expectations are extraordinarily high.

The most recent articulation of the government's expectations for cooperation in False Claims Act investigations was given by then-DOJ official Bill Baer in a pair of speeches he gave in 2016. In remarks delivered in June of that year, Baer made clear that the government would not view the minimalist approach to constitute cooperation at all: ''Cooperation,'' Baer explained, ''is not demonstrated by doing what the law requires, compliance with subpoenas or other lawful demands.'' Baer also chided defense counsel who make ''one-sided presentations'' to the government, and who ''slow-walk'' responses to the government's requests for information. To the contrary, Baer endorsed an approach to cooperation that, as even he acknowledged, amounted to a company ''surrender[ing] its right to contest and instead agree to help the department resolve'' the investigation. In fact, Baer envisioned that companies would not only conduct an internal investigation and disclose the results to the government, but that such a presentation should ''stretch[] beyond the precise information that may have been requested by the government,'' even to the point of disclosing information ''that might otherwise not have been discovered in the ordinary course of [the government's] investigation.''

Baer expanded on these themes, and arguably took them a step further, in remarks he delivered a few months later. In that speech, given in September 2016, Baer reiterated that ''mere compliance with legal requirements such as subpoenas, or one-sided presentations urging the department to decline enforcement action, do not measure up.'' He again emphasized that a company cooperates when it discloses facts relevant to the investigation ''even when not specifically asked to do so.'' The disclosure of facts is expected to focus in

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particular on ''individuals involved in the wrongdoing, no matter where those individuals fall in the corporate hierarchy.'' Baer also observed that the DOJ expects companies to point the government to ''inculpatory evidence, such as emails and text messages,'' and to provide the government with ''access to witnesses that the department might not have obtained through compulsory process—such as providing information that the government did not know about or did not recognize would be significant, and therefore did not subpoena.'' This latter observation, which contemplates not only giving the government what it asks for but what it didn't even think to ask for, seems to belie Baer's comment in his earlier speech that he was ''not asking companies to do our work for us by delivering litigatable cases as a condition of cooperation.'' To the contrary, handing the company and its culpable employees over to the government on a silver platter seems precisely what Baer had in mind.

There is at least some reason to hope that Baer's remarkable view of cooperation did not survive the change in administrations. Notably, Deputy Attorney General Rod Rosenstein recently derided the notion that DOJ policies could be articulated in speeches and memos by departmental officials, singling out the ''Yates memo,'' written by his predecessor, as one of the many policy pronouncements that are now under review. As Rosenstein explained, ''unless the statements are incorporated into the U.S. Attorney's Manual or issued through formal Department memorandum, they are not necessarily policies that govern Department employees.'' But whether Baer's earlier pronouncements on cooperation constitute binding ''policy'' or not, experience suggests that his views are consistent with the current thinking of a number of DOJ lawyers handling these investigations. And for that reason alone, as even Rosenstein acknowledged, it would be ''prudent to pay attention to them.''

A proactive internal investigation and self-disclosure need not go as far as Baer envisions to be effective. And Baer's recommended approach, with its arguable disregard of the defense lawyer's ethical duty of zealous advocacy, raises a number of unanswered questions. But it certainly is the case that, along the spectrum of cooperation models, a proactive approach that involves a thorough investigation and self-disclosure is the approach most likely to satisfy the government's expectations. Whether one chooses to partner with the government in this fashion or not—and there are many reasons why such an approach would not be wise or warranted—it is worth at least considering that anything short of such proactive cooperation will not in fact satisfy the government's expectations and will earn the company no credit at the settlement table for having ''fully cooperated.''

2. Assuming a Measure of Control A proactive internal investigation allows the company to assume at least some measure of control over the investigation.

Clients facing an FCA investigation typically have little control over the process, and have an extremely limited window into what to expect. They often ask outside counsel to predict how long will the investigation take, how many witnesses will be examined, when we will hear from the government next, when will further CIDs be forthcoming, and what else will be required? When cooperation is purely reactive—simply responding when the government asks for something, and then waiting for the next ask—the company is forced to live with the only honest response to such questions that outside counsel can offer: I don't know. Indeed, FCA investigations can take years, often with extended periods of frustrating inactivity. The absence of control in those circumstances is palpable.

But if the government can be persuaded to stand down while the company pursues its own investigation, the company can achieve at least some measure of control over the process and its timing. Outside counsel, in consultation with the government, can develop an investigative plan with a reasonably certain schedule and a target date for completion. While there is no guarantee that the government will simply accept the findings of that investigation and move on, government counsel may like nothing better than to essentially outsource their investigation to competent outside counsel with superior resources and access, if that counsel has credibility with the government and can be trusted not to sweep the dirt under the rug. In theory at least, an open-ended investigation that might otherwise take years to run its course could be contained and its conclusion accelerated. Since the government is probably going to get there anyway, it may be more cost-efficient for the company to help the government get their sooner. As Bill Baer observed, ''prolonging a government investigation often only postpones the inevitable at a considerable cost.''

3. Enhancing the Ability to Scope Potential Exposure and Develop Defenses Proactively investigating the facts allows the company to more quickly scope the extent of the company's potential exposure and develop its factual defenses.

Most clients facing a federal fraud investigation would like to know if there is a problem and what that problem will mean for the company. Under a more reactive model of cooperation, however, outside counsel is interviewing witnesses mainly to help understand the business and locate documents, and is reviewing those documents only as necessary to make decisions on whether to produce them, not for what they say. Clients and defense counsel place a premium on locating the bad emails before the government does. Such a narrow focus does not allow outside counsel a meaningful opportunity to fully explore a problem, develop available defenses, or assess the extent of any exposure. A more fulsome internal investigation better positions the company on all of those fronts.

For example, while the government may devote its limited resources to looking for inculpatory emails and disgruntled employees, the company's own investigation will pursue not only the clouds but the silver linings—not only the (inevitable) bad emails and employees, but the good emails and favorable witnesses. As a result, the company's ultimate presentation to the government on the results of its investigation will be neutral and balanced. Beginning a settlement dialogue with such a presentation can position the company far better than awaiting the government's own presentation, which surely will not mention a single good email or highlight a strong culture of compliance.

4. Influencing the Government's Perceptions A proactive approach that involves ongoing, or at least periodic, substantive dialogue with the government allows defense counsel the critically important opportunity to help shape the narrative and influence the government's perception of the company and the facts.

In most *qui tam* investigations, the government will be introduced to the company by a whistle-blower—perhaps a disgruntled former employee armed with negative information and bad emails—echoed by a relator's counsel eager to prejudice the government against the defendant. Defense counsel who do no more advocacy during the course of the investigation than negotiate about the burden of production are allowing the government's perceptions of the facts and the law to be influenced exclusively by these self-interested adversaries. Also, if the company makes its own presentation to the government on the facts and the law for the first time only in response to the government's presentation, it may be too late: Government counsel by then are probably heavily invested in the case, and their negative views of the company and the facts may be solidified.

In contrast, a proactive investigation envisions a more active dialogue with the company, perhaps with periodic presentations to the government. Such an approach allows the company to influence the government's views of the company and the case before those views harden irrevocably against it.

5. Securing the Opportunity to Remediate Proactively investigating the facts allows the company to more quickly determine whether there is a problem in need of remediation, and to remediate quickly.

While civil enforcement actions are said to be about enforcing the law, they are also about money: The government (and/or whistle-blower) alleges that the defendant's conduct harmed the public fisc. Resolution of the case will require a determination of the scope of the activity leading to that alleged loss, both to correct the problem and to reimburse the government. Too often, however, companies do not change the practices that gave rise to the investigation until the government's investigation is completed and those problems are called out. A proactive investigation can be designed to assess and remediate the problem sooner, and thereby minimize the damages.

Proactive remediation of the problem has the added benefit of taking the wind out of the government's sails. Nothing motivates government counsel more than the notion that their investigation has uncovered a crime, and that their enforcement action has punished the bad guy and compensated the victim. But if the company itself accomplishes each of those things, the case becomes much less interesting to the government. The message of an effective presentation to the government can be: Problem solved, there is nothing more to do here. While the government may seek to take credit for that resolution in a press release and settlement agreement, and exact its pound of flesh in the form of multiple damages, at least at that point their prosecutorial zeal may be substantially more muted.

6. Enhancing the Predictability of Expense Finally, taking control of the investigation by pursuing a proactive internal investigation allows the company to better predict and control the cost of the investigation.

Clients facing an FCA or other civil fraud investigation often require that outside counsel prepare a budget for the defense of the investigation. When the cooperation model chosen is essentially reactive in nature, however, those costs are simply impossible to predict with any semblance of accuracy. They depend entirely on the pace and intensity of the government's investigation. That pace and intensity may fluctuate week to week, month to month, and year to year. Also, as observed above, it is common for investigations to endure months of apparent inactivity, as government counsel are pulled in different directions, followed by a surge of attention and new demands. By assuming control and establishing an investigative plan, the level of activity, and therefore the legal spend, can be controlled and predicted, at least during the early investigative stages.

Conclusion

Whether to adopt a reactive or proactive approach, or something in between, will depend on the facts of each case. Some cases are simply untenable, both factually and legally, and not every CID or subpoena should lead to an expensive internal investigation, as even Bill Baer acknowledged. Weak cases—particularly those built on novel or otherwise tenuous legal grounds—should still be met with a vigorous defense, which may include what Baer derided as ''one-sided presentations urging the department to decline enforcement action.''

But there are certainly some investigations in which a minimalist, reactive approach to cooperation may prove penny-wise and pound-foolish. Before reflexively adopting that model for the sake of cost, companies would be wise to consider the real benefits of seizing the initiative and proactively investigating themselves, and remediating any problem they find, before the government does it for them.

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