KIRKLAND ALERT
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Enforcement Trends Place Greater Scrutiny on In-House Counsel

In-house counsel increasingly have become the focus of investigations and enforcement actions by both the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). More than fifty indictments or enforcement actions have been brought against in-house counsel in the last five years. Historically, in-house counsel had been viewed by the government as sources of information about the conduct of other corporate executives. The proliferation of white-collar cases focused on Fortune 1000 companies, however, has brought greater scrutiny on in-house lawyers based upon their knowledge of or role in business decisions.

The DOJ's aggressiveness toward in-house lawyers is evident in its willingness to risk indicting and losing difficult cases. There have been several notable failures by the DOJ in the last six months to obtain convictions against in-house lawyers. Last December, a jury acquitted a mid-level in-house tax attorney at Bechtel Corp on charges of willfully causing Bechtel and a subsidiary to file false tax returns. The DOJ had charged the attorney for filing tax returns falsely claiming a complicated tax credit despite the fact that the attorney had relied on subordinates to report back to him regarding the facts necessary to establish entitlement to the credit. Last month, a San Diego jury hung in favor of acquittal on a variety of securities, wire, and bank fraud charges brought against the former general counsel of bankrupt software company Peregrine Systems, Inc. The general counsel was charged despite having previously been cleared by an internal investigation, and despite not being named in SEC or civil suits against Peregrine. The jury hung even with the defendant not calling any witnesses at trial. And last October, a jury acquitted the former general counsel of McAfee, Inc., on fraud charges related to the backdating of stock options.

The outcomes of these trials should provide little comfort to in-house counsel. Instead, these cases demonstrate that the DOJ is willing to risk losing to pursue difficult cases against in-house lawyers. Federal prosecutors are loath to charge a case unless they are almost certain of victory at trial, evidenced by DOJ's estimated 90% conviction rate. *See* http://ojp.usdoj.gov/bjs/fed.htm (Bureau of Justice statistics). The DOJ's recent failures to secure convictions, even in the midst of today's hostile environment for corporate executives, highlight its willingness to suffer defeat in aggressively prosecuting in-house counsel.

Although the ultimate result at trial for these lawyer defendants was favorable, such cases have a detrimental impact personally, professionally and financially on individual defendants. Needless to say, it is something against which every possible precaution should be taken, especially in today's environment of aggressive scrutiny by the DOJ and SEC. Because actions of in-house counsel are drawing the government's attention more than ever before, it is critical that in-house counsel be aware of and guard themselves against potential exposure. This alert provides an overview of the key areas of potential exposure.

1. Responses to Government Investigations

Government investigations, including civil investigations by the SEC or other regulatory agencies, are the most common point of interaction between the government and in-house counsel. These interactions, whether in the form of parallel internal investigations, subpoenas, or document requests, are fertile ground for legal exposure.

The DOJ construes the obstruction of justice statutes broadly—to cover both direct and *indirect* interactions with the DOJ, SEC, or other regulatory agencies. Any representation that may eventually be relayed to the government is an obstruction of justice pitfall. The most prominent example of a successful charge and conviction under this indirect theory of liability is that of Steven Woghin, former General Counsel of Computer Associates. *See United States v. Woghin*, 04-CR-00847 (E.D.N.Y.). Computer Associates' outside law firm interviewed Woghin as a part of an internal probe into business practices that were the subject of a government investigation. As a result of this interview, Woghin was charged with concealing the existence of a fraudulent accounting practice from the company's lawyers—with the knowledge and intent that these false representations would be relayed to the DOJ, SEC, and FBI. During interviews with outside counsel, Woghin concealed the existence of an accounting practice known as "the 35-day month" within the company. He also coached other interviewees to similarly conceal the existence of this practice from outside counsel, despite the company's claims that it was fully cooperating with the government through outside counsel.

Seemingly routine SEC document requests can also be obstruction-of-justice minefields for in-house counsel. The natural tendency of counsel with a civil litigation or corporate background is to read these requests as discovery propounded by an adverse party. However, in the context of government investigations, both the scope of requests and the duty to preserve documents are construed broadly by the DOJ. For example, the DOJ has taken the position that knowledge by in-house counsel that an SEC document request or DOJ subpoena is likely to be issued is sufficient to trigger a duty to preserve materials under the federal obstruction of justice statutes. *See* 18 U.S.C. § 1501 *et seq*. In other words, the duty to preserve exists even before the filing of litigation or the receipt of a document request. This point was driven home in the prosecution of Arthur Andersen LLP, where a senior employee was charged and pled guilty to obstruction of justice for sanctioning the shredding of documents prior to the date the SEC actually issued a subpoena. *See United States v. Arthur Andersen, LLP*, 374 F.3d 281 (5th Cir. 2004).

There are several practical steps in-house counsel can take in response to government requests for information to reduce their potential exposure. First, in the context of document requests, counsel for a company can communicate and document the understood scope and meaning of requests and subpoenas with the issuing agency. Second, for voluminous electronic productions, government approval of search terms or protocols can be a bulwark against claims of concealment or insufficient compliance. Third, document holds should be put in place immediately if in-house counsel has reasons to believe that there may be a government investigation. Fourth, efforts to ensure compliance should be documented, and any employees who are likely targets of a probe, including in-house counsel, should be segregated from the preservation and production process. Claims of privilege over potentially important documents should be fully vetted by outside counsel and explicitly reviewed with the agency before they are asserted, lest they be viewed as attempts at obstruction.

Finally, in-house counsel should be aware that criminal investigations may be lurking behind civil requests from the government. It is becoming much more common for the SEC to pursue investigations using its civil enforcement powers as part of a unified investigative front with the DOJ that is ultimately aimed at both civil and criminal charges. This so-called parallel investigation tactic has been explicitly approved by the courts. *See United States v. Stringer*, 535 F.3d 929 (9th Cir. 2008) (as amended).

2. Preparing Grand Jury Witnesses

In-house counsel are often called upon to prepare corporate employees for testimony as witnesses before federal grand juries. The paramount concern is to emphasize the obligation to tell the truth. It is important to keep in mind that this is not a prep session for an ordinary civil deposition—resist all urges to coach the witness. Avoid one-off conversations about the testimony of others or desired outcomes. Best practices also warrant keeping a written record of all conversations with witnesses in preparation for their testimony and ensuring that more than one lawyer is present during preparation. It is preferable that outside counsel be present.

3. Communications with Auditors

In-house counsel face exposure if they conceal information from outside auditors. Section 303 of the Sarbanes Oxley-Act, 15 U.S.C. § 7242(a), specifically prohibits corporate officers and those acting under their direction from "tak[ing] any action to fraudulently influence, coerce, manipulate, or mislead any independent public or certified accountant" in connection with an audit. Obstruction of justice violations and securities fraud charges are also potentially in play if there is willful concealment. Additionally, in-house counsel may face civil liability for conveying the lies of others to auditors, even if they were only reckless. In-house counsel should be wary of requests from fellow senior executives to not share outside information with outside auditors that could have a material impact on their company's financial statements.

4. Analyst Conference Presentations and Earnings Releases

In-house counsel may be exposed to criminal or civil liability when they participate in reviewing and approving an executive's statements at an analyst conference or in misleading earnings releases. When in-house counsel are copied on an e-mail, the DOJ and SEC assume that they read the contents—being targeted based on a "cc: or bcc:" is becoming a norm. Ten seconds' review on a BlackBerry can lead to dire consequences.

If in-house counsel are on e-mail distribution lists where executives are seeking review and approval of earnings releases that will be made public, counsel should either check the statements for accuracy or make it clearly known that they do not have a basis upon which to review them. The DOJ and SEC are not receptive to explanations that in-house counsel did not read an e-mail. Indeed, the DOJ and SEC often engage in hindsight scrutiny of internal communications—comparing every e-mail and piece of information received by executives with statements to investors.

5. The Privilege Follows the Control of the Company

A final note to bear in mind is that control over a company's attorney client privilege—and its waiver—can change hands if control of the company should pass from the incumbent executives and board to others. "New managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply normal succession may waive the attorney-client privilege with respect to communications made by counsel, former officers and directors. Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties." *CFTC v. Weintraub*, 471 U.S. 343, 349 (1985). The current troubled economy has seen this scenario often arise when companies go into bankruptcy or other forms of receivership. In these cases, a trustee or receiver will often waive the privilege and provide previously confidential communications to regulators for use in investigating or prosecuting former executives or directors. *Id.* After the fact, these communications may give the SEC and DOJ opportunities to second-guess decisions or ascribe ill motives to some vague communications and statements made by in-house counsel in otherwise privileged conversations. In-house counsel need to be mindful that their privileged communications today may be disclosed tomorrow in the midst of hysteria and outrage over a collapsed business or disappointing earnings statement.

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