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A BLUEPRINT FOR NAVIGATING A GOVERNMENT INVESTIGATION

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INTRODUCTION: TODAY'S PANELISTS



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BASIC CASE FACT PATTERNS

Typical FCPA Case Scenarios:

- No self-disclosure
- Company under consent decree
- Pre-existing SEC investigation
- Involvement of multiple countries
- Involvement of more than one whistleblower allegation
- Exacerbating facts: travel and entertainment in addition to improper payments

KEY TURNING POINTS

Advantages to government:

- Easy for government to prove in theory
- Acts of any employee can bind company
- Threat of disbarment
- Reputational and competitive risk
- Government power to subpoena, conduct interviews, demand reports, etc.

KEY TURNING POINTS

Disadvantages to government:

- No overseas documents
- Understaffed
- Inability to get people to talk, particularly when located outside of the U.S.
- Company's ability to hire lawyers for individuals
- Company's ability to absorb time and expense of reviewing documents, etc.

KEY TAKEAWAYS

Key Takeaway 1: Persuade Government to Stand Down

- You have to own and control narrative
- Critical that counsel conduct the investigation
 - Crucial that first contacts with the government go well
 - Want the government to know the company is taking investigation very seriously
 - Want the government to know to contact counsel if they want to conduct interviews
- If government develops its own facts, you have no chance

Key Takeaway 2: Establish Credibility So That Government Defers

- To achieve Takeaway 1, must convince government to stand down
- Must evince credibility, mastery (of the facts) and complexity (of the case)
- They have to believe they are getting straight scoop
- Necessary to share damaging information at outset (But full cooperation and credibility building *does not require admissions of liability*. See below.)
- Consider the privilege – how to maintain it but still share helpful information and results of investigation. This tension is aggravated by increasing enforcement agency suspicion of in-house legal and other gatekeepers. These suspicions are difficult to address where the company makes blanket assertions of privilege for the interactions between the business and in-house legal and compliance staff.

Key Takeaway 2: Establish Credibility So That Government Defers (Cont'd)

- Counterintuitive: have to have broader scope than government (preserve broadly at the outset of investigation)
- Need to overcome their suspicions and insecurity
- Critical to have good psychological profile of prosecutors
- All while keeping eye on long term defenses
- If persuasive (and true), provide some early context to the investigators about the client company, its business model and its good faith investments in getting things right (i.e., compliance). The business context may be constructive in shaping the scope of the inquiry and the client company will appreciate not being defined exclusively by a small group of rogue employees or narrow fact pattern.

Key Takeaway 3: Separate Current Management From Conduct

- Have to show that the company can govern itself (threat of monitor, growing virus)
- Need to take tough actions to punish or fire key bad actors (but while giving government a heads up and keeping people around in case government wants to interview them – balancing act)
- Basically, need to separate current leadership from actions of a few
- Sometimes need to cut ties with profitable third parties (distributors, vendors, agents, etc.)

Key Takeaway 4: Establish Company Can Self-Govern

- Revised policies and procedures – highlight those that were revised / enhanced before the misconduct was discovered (but after the misconduct occurred)
- Sophisticated risk assessment
- Strong CCO model and local compliance resources
- Demonstrate that the company has already identified any and all prior weaknesses in the compliance program and remediated to prevent future conduct

Key Takeaway 5: Use Government Typical Slow Pace to Advantage

- Need to get passed government's initial excitement
- Weariness is your friend
- Government lawyers move to new posts or leave government
- New prosecutors lack emotional connection to case
- Internal need to wrap up old matters

Key Takeaway 6: Control Information Flow By Working With Trusted Partners

- Hire good counsel you trust
- Keep your friends close and your enemies closer
- Sometimes need to hire forensic auditors or third party forensic data collection / hosting experts to show government you took it seriously and to give credibility

Key Takeaway 7: Pivot From Prosecutorial to Defense Mode

- Shift from prosecutorial mode to defensive posture – but always be an advocate for your client
- Same vs. different firm (strategic considerations)
- How will the government actually prove the case?

Key Takeaway 8: Complexity is Your Friend

- In most cases, government loves simplicity. Prosecutors consistently avoid charging cases that can't be easily summarized, involve gray areas or potential legitimate explanations that must be disproved. The natural but counterproductive temptation is to make the facts simple just to make them happy or make it easier to understand for them (and you). Sympathize with them; but don't relent. Only simplify where it's helpful.
- But real motivations are more complex and the defense is in the details of the case. You can't shy away from the boring or unsexy details; they are essential context.

Key Takeaway 9: Commerce is Especially Complex

- Evolving area of law (*Kokesh* in June 2017, *Liu v. SEC*)
- Complexity about proving why contracts were won
- Government's lack of understanding of the company's business model may cause it to misunderstand some of the facts or to develop incorrect conclusions about the strength of the internal controls

KEY TAKEAWAYS (CONT'D)

Key Takeaway 10: Different Agency Agendas

- Timing about when to separate SEC and DOJ
- Administrative differences
- Different legal standards and burdens of proof

Key Takeaway 11: Know Your Client's Key Drivers

- Is it money?
- Type of charge?
- Personnel?
- Possibility of debarment?
- Possibility of a compliance monitor?

Key Takeaway 12: Grid for Long-Term Battle

- Need to ensure that key stakeholders, including the board, understand the strategy and are prepared to stick with it and to maintain confidentiality to preserve the privilege
- Manage the client's timing expectations “early and often” – All of the key stakeholders within the company (management, board, in-house legal) will be anxious to resolve the matter as promptly as possible because of the cost, executive distraction, and their personal impatience. They need to be frequently reminded that the passage of time is a key advantage and that impatience or efforts to accelerate the matter through imprudent concessions or early offers of settlement will definitely prejudice your position but *will not accelerate the outcome*.
- Recognize potential risk of shareholder derivative litigation and plan for it in the way in which you conduct the investigation / share (or create) documents about the investigation with the company

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