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## Regulatory: In-house counsel in the crosshairs

Recent actions against in-house lawyers for participating in alleged company wrongdoing demonstrate government crackdown

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The federal government has ramped up its efforts to hold individuals accountable in cases of corporate wrongdoing, and in-house counsel have more frequently than ever found themselves in the crosshairs of those investigations. In the past, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) rarely targeted in-house lawyers for acting in their role as legal advisors. Nonetheless, recent criminal and civil actions commenced against in-house counsel for participation in alleged wrongdoing committed by companies show that the actions of corporate counsel are being scrutinized closely by the government.

In 2010, the DOJ indicted an associate counsel at GlaxoSmithKline (GSK) for obstruction of justice and making false statements to the Food and Drug Administration (FDA) during an investigation into off-label drug marketing practices. Although the DOJ charged that this lawyer hid information from the FDA and falsely told the FDA that the company had not engaged in any improper conduct, a judge dismissed all of the charges at trial. The judge found that the attorney "should never have been prosecuted" and commented that "a lawyer should never fear prosecution because of advice that he or she has given to a client."

Despite the acquittal, the government has shown no signs of shying away from pursuing lawyers. Several weeks after the GSK attorney case was tossed, Robert Khuzami, Director of the SEC's Division of Enforcement, spoke about the SEC's frustration with both inside and outside counsel who engage in "questionable" behavior that "frustrates our investigations." Khuzami cited the following examples of such questionable behavior: a single lawyer representing multiple people with seemingly divergent interests in the same investigation; delays in the production of subpoenaed

documents until the very last moment; witnesses who fail to recollect almost anything of substance when questioned by the SEC, despite being shown documents they reviewed and even signed; defense lawyers using a “foot-tapping” strategy with witnesses during SEC interviews, whereby the witnesses cite a failure of recollection after receiving a foot tap from the lawyer; and internal investigation tactics that include lawyers interviewing multiple witnesses at once, failing to acknowledge constraints placed on the scope of their inquiry, scapegoating lower-level employees while protecting senior management, and aggressively promoting exculpatory evidence while dismissing clear and identifiable red flags. Khuzami vowed that the SEC “cannot remain passive” when confronted with what it perceives to be “questionable” conduct that frustrates and delays its investigations.

The SEC has lived up to its promise not to give lawyers a pass. Late last year, the general counsel of a leading hedge fund received a Wells Notice from the SEC in connection with a case involving legal advice provided to the fund’s manager. Although that in-house attorney was not ultimately charged, references to the legal advice that the fund’s manager received from two outside law firms were featured prominently in the SEC’s civil complaint against the fund manager. Other in-house lawyers facing SEC or DOJ scrutiny in the past several years include the assistant general counsel and senior vice president of a diversified reinsurance company; the general counsel of a financial services company; and the former general counsel, chief compliance officer and executive vice president of an investor-owned health care delivery system.

The very prospect of even facing an SEC or DOJ investigation based on actions taken as a legal adviser to a company is costly on many levels and is emotionally consuming for any lawyer. Even if a lawyer emerges from an SEC or DOJ investigation without facing civil or criminal charges, that lawyer is not necessarily in the clear: He may become a witness in a civil or criminal case. Given this enforcement environment, in-house lawyers should take some simple steps to minimize their exposure.

- **Ask questions, and be informed.** Many government inquiries into the actions of in-house counsel focus on alleged misrepresentations of fact or falsification of pertinent information. In-house lawyers often play a significant role in drafting, reviewing and approving documents and disclosures that influence investor decisions and public perception of companies. They may also have substantial interaction with government lawyers, as well as collect and produce documents to the government during the course of investigations. Thus, in-house lawyers must be well-versed in the company’s activities, have a strong command of the facts before signing off on any course of action and thoroughly understand the

basis for any representation the lawyer makes on behalf of the company. Asking lots of questions is a must for any in-house counsel. If a company or its employees are unwilling to allow its internal lawyers to question corporate activities or to have access to information relevant to carrying out a lawyer's professional and ethical duties, those are serious red flags that should make any in-house lawyer wary of continuing to serve in that capacity.

- **Maintain written records.** Keeping records documenting why in-house counsel took certain actions or gave particular legal advice is important not only for an in-house attorney's protection, but for the company's as well. The fact that an in-house lawyer and his company acts appropriately and prudently does not insulate them from a government investigation of the company's activities. When the government starts asking questions about a company's actions, there is no better insurance policy against liability than having contemporaneous documentation explaining what you did and why it was proper.
- **Consult outside counsel.** For issues that fall outside the scope of an in-house counsel's legal expertise or when confronting complex transactions, in-house counsel should consult outside counsel and provide all the relevant information to secure sound legal advice. One of the significant factors that led to the dismissal of charges against the GSK attorney was her good-faith reliance on the advice of outside counsel. Having outside counsel to talk through issues during any type of governmental investigation can be invaluable, both in the short-term and the long-term.
- **Establish and enforce company policies.** Establishing and enforcing appropriate company policies and procedures is critical to establishing a compliant culture. Moreover, government agencies find it easier to rely on companies that have solid records of following and enforcing internal policies and procedures. Having robust policies not only assists with regulatory reporting, but it also allows in-house counsel to detect and address any possible wrongdoing in which the company or its executives and lower-level employees may be engaged.

Certainly, lawyers cannot and should not get a free pass to engage in misconduct. And government agencies have made it clear that they will not tolerate misconduct by lawyers, whether they are in private practice or in-house. Given this enforcement environment, asking questions, keeping records, talking to outside counsel and having established policies now may save in-house counsel from a lot of headaches in the long run.

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