

Outsourcing of investigations to lawyers of suspected companies: United States

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Enforcement authorities worldwide are increasingly confronted with internal investigations conducted by lawyers of companies under investigation. This type of “cooperation” plays a significant role in their enforcement approach, but the trend has also fuelled the debate on individual rights, legal privilege and the degree of cooperation required to receive prosecution-related credit. While companies need to be aware of these issues in order to make an informed decision on whether to cooperate with enforcement authorities, the issues do vary by country. In earlier articles, we discussed the [Dutch](#) and [UK](#) angle. This month, we travel across the Atlantic and take a look at the possible implications of cooperation with enforcement authorities from a US perspective. Although outsourcing of investigations routinely takes place, there are risks involved in corporate counsel coordinating with the government.

Benefits and boundaries

Companies and regulators alike can benefit from cooperating in parallel internal and governmental investigations. It is, however, important that corporate internal investigations are conducted independent from government supervision. In a decision by the United States District Court for the Southern District of New York, the court drew the boundaries between conducting proper internal investigations and acting as a governmental arm. The decision has important implications for outside counsel who are engaged to represent clients in connection with regulatory investigations.

Cooperating with the DOJ and SEC

When a company learns that a government authority has launched an investigation, it has to decide whether to cooperate or not. The potential benefits of corporate cooperation under US law are well developed. The United States Attorneys’ Manual, which guides the U.S. Department of Justice (DOJ) in the civil and criminal prosecution of companies, states that “cooperation is a mitigating factor, by which a corporation can gain credit in a case that otherwise is appropriate for indictment and prosecution.” Such credit can lead to reduced charges and penalties, or avoidance of charges altogether. Cooperation with the DOJ can take many forms. It does not merely entail responding to document requests; it also includes making employees available for interviews, handing over internal investigation findings, furnishing facts gathered through interviews conducted by attorneys in the course of internal investigations, and assisting in the analysis and synthesising of potentially voluminous evidence. Companies will also need to try to identify

all culpable individuals, produce all relevant information about individual misconduct in a timely manner and agree to continued cooperation even after any charges against them are resolved. Like the DOJ, the US Securities and Exchange Commission (SEC) also offers corporate cooperation credit. The SEC considers four “Seaboard factors” in determining the appropriate amount of credit, the fourth factor being cooperation. To the SEC, this entails “providing the Commission staff with all information relevant to the underlying violations and the company’s remedial efforts.” Cooperation is, as in DOJ actions, only one of the factors that the SEC considers when determining the appropriate way to handle a case, and it echoes the DOJ’s requirement of providing all facts relevant to the alleged misconduct.

Finally, the US Sentencing Guidelines, which set out recommended sentencing ranges for federal offences, also offer credit to companies that cooperate with authorities, in the form of recommended reductions in monetary penalties. To qualify for a reduction under the US Sentencing Guidelines, “cooperation must be both timely and thorough.” The test is whether the information is sufficient for law enforcement personnel “to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.”

Acting as an arm of government

The above shows that corporate cooperation can be an important aspect of resolving any governmental investigation in the US. An important decision by the United States District Court for the Southern District of New York shows, however, that there are also risks when there has been excessively close coordination between government and company. On 2 May 2019, Chief Judge Colleen McMahon, in *United States v. Connolly*, set out the boundaries between conducting a proper internal investigation and acting as a governmental arm. The underlying case against Black and co-defendant Connolly arose from an investigation into LIBOR manipulation that had originally been initiated by the CFTC. Additional SEC and DOJ investigations followed in the US and abroad, including investigations into the conduct of Deutsche Bank.

Deutsche Bank settled the case and entered into a deferred prosecution agreement with the DOJ. It agreed to pay a large amount in criminal penalties, to continue to cooperate with the government in its ongoing investigation and to retain a corporate monitor. During the investigation, Deutsche Bank’s corporate counsel had conducted three interviews of Black, a trader at Deutsche Bank. Both Black and a former colleague, Connolly, were convicted. After the trial, Black filed a motion to dismiss his indictment and conviction on the grounds that his prosecution “was predicated on and infected by” statements he had made when he had been interviewed by the bank’s outside counsel during its internal investigation. In the motion, Black alleged that those statements had been compelled by the government. He argued that the bank’s counsel was effectively acting as an agent of the government at the time of his interviews, and that his statements were therefore “compelled” in violation of his Fifth Amendment right against self-incrimination.

Chief Judge McMahon criticised the government for having

“outsourced” the government’s investigation. Rather than conducting its own substantive investigation parallel to the bank’s internal investigation, the government had “outsourced the important developmental stage of its investigation to [the bank] ... and then built its own ‘investigation’ into specific employees, such as Black, on a very firm foundation constructed for it by the Bank and its lawyers.” Because of that “outsourcing,” the court ruled, interview statements obtained by the bank’s counsel from an employee later indicted by the DOJ and convicted after trial, were “compelled” in violation of the employee’s Fifth Amendment right against self-incrimination.

Although the court ultimately found that the prosecution had not been tainted by the use of the interview statements, it sharply rebuked the government for the degree to which it had directed the investigation by the bank’s outside counsel.

Practical implications

The decision has important implications for outside counsel engaged to represent clients in connection with governmental investigations. If one thing is made clear, it is important to substantiate the independent nature of the company’s internal investigation where a parallel investigation is conducted by the government. Below some points to put into practice:

- First and foremost, companies should independently document the reasons for starting an internal investigation and conducting employee interviews. A government investigation can be a trigger, but should not be the sole reason to start an internal investigation.
- A company’s decision to cooperate with the government should be documented separately.
- After it has decided to start an internal investigation, the company should document the scope and priorities of the internal investigation.
- The scope of the internal investigation should be distinguished from any requests by the government, particularly when there is overlap between the two.
- Employers and attorneys should carefully document what is communicated to interviewees and the circumstances surrounding internal investigation interviews in order to prevent arguments regarding compelled statements given in violation of the Fifth Amendment.
- When the company has taken actions against an employee, it should be clear that these steps are for the benefit of the company, not for the benefit of the government.

From the perspective of companies, the decision by Chief Judge McMahon gives a basis for resisting excessive government requests and attempts to micromanage corporate investigations, and it allows space to operate independently from the government to avoid concerns about state interference.

Experts



Roan Lamp
Partner
T: +31 20 577 1964
E: roan.lamp@debrauw.com



Marnix Somsen
Partner
T: +31 20 577 1628
E: marnix.somsen@debrauw.com



Patrick Ploeger
Partner
T: +31 20 577 1955
E: patrick.ploeger@debrauw.com
