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Entering the lion's den: Should in-house counsel meet with government investigators?

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Picture the following scenario: A federal government agency sends a company a subpoena for information concerning possible violations of federal law. Because of the apparent serious nature of the inquiry, the in-house counsel retains outside counsel, who sets up an initial meeting with the government to learn more about the matter. Subsequent meetings are scheduled. In-house counsel asks to participate in further meetings in order to gain firsthand knowledge of the thrust and seriousness of the government inquiry, to convey the company's commitment to compliance, and to assess outside counsel's performance in dealing with the government. In-house counsel believes that it is important to put a human face to the company. But outside counsel warns that the in-house counsel's attendance would hinder frank discussion and pose risks. Should in-house counsel insist on attending further meetings with government investigators?

Many articles have addressed the tasks performed by in-house counsel in support of a company's response to a government investigation.^[1] But few commentators have addressed the extent to which in-house counsel should move from the rear to the front lines of an investigation and interact directly with government investigators at meetings. Outside counsel often discourage such involvement, though the presence and participation of in-house counsel can sometimes add value. This article discusses the risks and the rewards of involving in-house counsel, and even members of the C-suite, especially the chief compliance officer, in meetings with the government and presents guidelines to govern such participation.

In-house counsel and government investigations

In their day-to-day activities, in-house counsel often receive inquiries and even subpoenas from government agencies that provide no indication that the company is the target of a high-stakes investigation. Perhaps the government is tracking a suspect export and seeks information on the product's distribution history in the United States. Perhaps the FBI is investigating financial fraud by a customer and seeks information about sales to that customer. These inquiries are even more common in regulated industries such as defense contracting, banking, and insurance. In-house counsel often handles such inquiries ably on their own, including meeting with government investigators, without the involvement of outside counsel.

The stakes rise considerably when a company detects wrongdoing and voluntarily self-reports it to the government, or when a government inquiry raises concern that the company may be a target of a government investigation. Substantial fines, criminal liability, and severe reputational injury may result. In such instances, the prudent company will generally undertake a thorough, independent investigation led by outside counsel and

take corrective action if wrongdoing is identified. The goal is to avoid criminal charges or other severe penalties if suspicions of wrongdoing are confirmed. Therefore, the credibility of the company-sponsored investigation, including the independence of that investigation, is of paramount importance. A key initial step in this process is in-house counsel's retention of expert outside counsel to defend the company.

In-house counsel's role, however, doesn't stop there. They will most likely:

- Disseminate document-preservation notices.
- Commence the collection of corporate documents and electronic records.
- Arrange for outside counsel to interview corporate employees.
- Educate outside counsel on the company's relevant business practices and personnel.
- Facilitate communications among key players.
- Arrange separate counsel, where appropriate, for individual employees.
- Advise top management on the progress of the government and internal investigations, as well as on strategy and settlement issues.

Generally, there is an initial meeting by outside counsel with the government to discuss the scope of the investigation, followed by subsequent meetings to discuss matters such as progress on information requests, adequacy of compliance programs, and possible settlement. In-house counsel may have experience, even extensive experience, in dealing with government investigators, either from experience in private practice or from their in-house role. In-house counsel may also have experience attending adversarial meetings (e.g., discovery or settlement conferences) in civil litigation. So when is it advisable, if ever, for in-house counsel to attend meetings with government investigators? Of course, some in-house counsel may feel uncomfortable in such settings and will want to hand off all meetings with the government to outside counsel.

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