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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.<sup>[1]</sup> 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

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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.

## **The risks of in-house counsel participation**

The direct participation of in-house counsel in government meetings may pose risks.

The greatest risk is that in-house counsel will say the wrong thing, especially if in-house counsel is inexperienced in interacting with government investigators. Outside counsel may rightly be concerned that in-house counsel may take the whole investigation "personally" and lose their temper in discussions with the government. Blowhards, table-pounders, and (most of all) dissemblers will not be well received. Participation of that nature will be counterproductive.

Another concern is that in-house counsel will make representations as to facts that turn out to be untrue, even when the representations are made in good faith and belief as to their accuracy. A lot can be said for checking and double-checking all facts presented to the government *before* they are presented.

At the start of any investigation, government investigators may have no information as to whether in-house counsel participated in the suspected wrongdoing. As a result, the direct participation of in-house counsel may discourage government investigators from a frank discussion of concerns with the company's representatives.

This concern is even greater if, at a later stage of an investigation, the government comes to the view that in-house counsel were complicit (by omission or commission) in wrongful acts. The presence of in-house counsel would suggest that the company is not really serious about cooperation or corrective action.

By attending meetings, in-house counsel may also invite greater investigative focus on their actions and potential complicity. In-house lawyers can end up being charged themselves. Just recently, on February 15, 2019, the chief legal officer of Cognizant Technology Solutions Corporation (a Fortune 200 technology services corporation) was indicted for his alleged role in approving a bribe, and for hiding reimbursement for the bribe, in violation of the Foreign Corrupt Practices Act. The indictment is noteworthy because the Justice Department declined to indict Cognizant itself due to its voluntary self-disclosure, cooperation, and remediation. The company also had to pay a civil penalty of about \$25 million.<sup>[2]</sup>

Government investigators may be concerned that in-house counsel lack independence and are less credible. Those concerns are likely to increase when the government is probing suspected wrongdoing by senior executives. For that reason, outside counsel is often instructed to report directly to a special committee of the board of directors. But if in-house counsel are too deeply involved in the investigation, including through participation in meetings with the government, the government may question the credibility of the company-sponsored investigation.

## **The benefits of in-house counsel participation**

Outside counsel, wanting to be extra cautious, may instinctively recoil at the concept of in-house counsel participation in meetings with the government. However, such participation by in-house counsel can present several advantages.

The presence of in-house counsel can help put a “human face” on the company, showing that the company takes the investigation seriously and has hired quality people to keep itself on the right side of the law. This message might also be more effectively delivered by the attendance of other, non-legal members of the C-suite, such as the chief compliance officer or the chief financial officer.

With detailed knowledge of the company’s business, in-house counsel may be able to quickly correct government investigators’ fundamental misperceptions of the company’s business or practices.

In-house counsel or the chief compliance officer will have firsthand knowledge of the company’s compliance program and remedial efforts, and may be better able to articulate the company’s past and future commitment to compliance.

Corporate executives will often look to in-house counsel for legal advice on issues relating to government investigations, including on major decisions such as settlement. In-house counsel can provide more informed insights and advice if they have heard the government’s concerns firsthand, without being filtered by outside counsel.

As mentioned, in-house counsel may already have extensive experience in government investigations and other adversarial situations such as litigation settlement, and can add value to convincing the government of the company’s innocence or commitment to corrective action. It would be a mistake to automatically assume that in-house lawyers would be prone “to fly off the handle.” In short, they should not be treated as second-class lawyers. Indeed, by participating directly in meetings with the government, in-house counsel can better contribute their insights respecting the development and implementation of the company’s strategy in any investigation.

Finally, by direct participation, in-house counsel can assess the performance of outside counsel and see how they conduct themselves. Sometimes, outside counsel has strategic reasons for passive, aggressive, or other behavior at meetings, and those reasons may not be self-evident to in-house counsel. Nonetheless, if the interactions between outside counsel and government investigators are unduly hostile or confrontational without good cause,

in-house counsel can take outside counsel to the woodshed or even replace them.

## **Guidelines for managing the participation of in-house counsel**

We suggest the following guidelines.

Businesses facing potentially serious government investigations should rely on outside counsel to attend the first meeting with the government in order to learn the scope of investigation, including the nature of the suspected violations, the context and locale of those suspected violations, and the persons under scrutiny.

In-house counsel should have a frank conversation with outside counsel about the pros and cons of in-house counsel's attendance at subsequent meetings with the government. Outside counsel's advice should be taken seriously, but in-house counsel should not feel compelled to accept generalizations that discourage in-house counsel's participation. Remember: the critical question is whether the benefits of in-house counsel's attendance will be offset by any negative effect on the government's confidence in the independence and thoroughness of any company-sponsored investigation.

In-house counsel should not attend meetings with the government unless it is clear that in-house counsel is not a possible target or percipient witness.

Outside counsel should inform government investigators of the planned attendance of in-house counsel, at least the first time. If the government objects or discourages in-house counsel's attendance, you should reassess.

The company should carefully evaluate which in-house lawyer would be the best flag-bearer for its interests. It is preferable to present an articulate, knowledgeable, and experienced in-house lawyer who is likely to positively impress the government.

A company should consider whether the attendance of other persons (in addition to or in lieu of in-house counsel) would be productive for particular meetings, such as the presence of the company's chief compliance officer at a meeting to discuss the adequacy of the internal compliance program.

Before in-house counsel or other representatives step into the lion's den at a meeting, they should be thoroughly prepared so as to anticipate possible factual questions, avoid admissions against interest, and avoid comments that may unintentionally undermine outside counsel's strategy. Where necessary, they should also be coached on proper demeanor and decorum, and be willing to listen to the instructions and direction of outside counsel. The preparation should be conducted like a moot court or deposition prep session, and even more preparation may be appropriate for any non-lawyer attendee.

## **Conclusion**

Outside counsel and in-house counsel should keep their eye on their common objective: maximizing the client's prospects for the best possible resolution of the government investigation. Turf wars can be counterproductive generally, and especially when an investigation is underway. In each case, there should be a careful balancing of the benefits and risks of in-house counsel's role in direct interaction with government investigators.

## **Takeaways**

- In-house counsel and compliance personnel can be well-qualified to deal directly with government investigators.
  - In-house counsel and compliance personnel add value in meetings with the government, such as giving the company "a human face" and explaining the compliance program.
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- For serious government investigations, however, in-house counsel and compliance personnel should refrain from attending meetings until outside counsel has learned the focus of the government's inquiry.
- In-house counsel and compliance personnel may consider attending subsequent meetings with the government only after it is clear that the inquiry does not involve them.
- Before their attendance at meetings with the government, in-house counsel and compliance personnel should be thoroughly prepared to answer any questions the government may ask.

1 Barbara Sinsley and David Felt, *How to Prevent a Tragedy: Know Your Role During Government Investigations*, ACC Docket, May 2017, <http://bit.ly/2U8FYIp>

2 *United States of America v. Gordon J. Coburn and Steven Schwartz*, February 14, 2019, <http://bit.ly/2WD7XNb>

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