

Use of Specialized Counsel in an FCPA Investigation

In an article entitled, “*Risks and Rewards of an Independent Investigation*” in the most recent issue of the ACCDocket, authors James McGrath and David Hildebrandt discuss the use of *specialized* outside counsel to lead an independent internal investigation as compliance and ethics *best practices*. This is based upon the US Sentencing Guidelines, under which a scoring system is utilized to determine what a final sentence should be for a criminal act. Factors taken into account include the type of offense involved and the severity of the offense, as well as the harm produced. Additional points are either added or subtracted for mitigating factors. One of the mitigating factors can be whether an organization had an effective compliance and ethics program. McGrath and Hildebrandt argue that a company must have a robust internal investigation.

McGrath and Hildebrandt take this analysis a step further in urging that a company when faced with an issue such as an alleged Foreign Corrupt Practices Act (FCPA) violation. The authors suggest that in such a situation, a company should engage *specialized* counsel to perform the investigation. There were three reasons for this suggestion of the utilization of specialized counsel. The first is that the Department of Justice (DOJ) would look towards the independence and impartiality of such investigations as one of its factors in favor of declining or deferring enforcement. If in-house counsel were headed up the investigation, the DOJ might well deem the investigative results “less than trustworthy”.

A second reason came from the company perspective. Many companies have sought protection of investigations behind the shield of the attorney-client privilege and attorney work-product doctrine. If an in-house attorney is utilized, many courts are skeptical of a company asserting the privileges because of the mixed responsibilities of counsel in a corporation; that of legal and business work. As noted by Russ Berland, in his article entitled, “*How to Protect Compliance Risk Assessments from an Unwanted Disclosure*”, in the most recent issue of the Society of Corporate Compliance and Ethics Magazine (SCCE) (Vol. 7 / No. 5)(Oct. 2010), some courts “presume that in-house counsel engage in a substantial amount of non-legal work”. Additionally, obstructionist attempts by corporations to improperly assert the privilege have led courts to refuse to allow the privilege to be asserted. However a company will usually not face these arguments if outside counsel is utilized.

Even if the company is willing to waive its attorney-client privilege, McGrath and Hildebrandt offer a third reason for the use of *specialized* outside counsel to handle an investigation. If a company’s regular outside counsel were retained to conduct the investigation, the DOJ might feel the results had less than full credibility due to the fact that the law firm knew “who buttered its bread” and that the law firm would not want to bring bad news to client and endanger the ongoing business relationship between the law firm and the client. The authors end by concluding that by employing *specialized* counsel comports with the expectations under the US Sentencing Guidelines, gives a company the

protections of the attorney-client privilege and the work-product doctrine and finally “assures the government of the integrity of the internal investigation.”

The article from authors McGrath and Hildebrand is a valuable resource for the FCPA compliance practitioner, when faced with an allegation which requires investigation. They raise both strategic and tactical considerations which a company should evaluate when allegations of a FCPA violation may occur and the response a company should take. The clear import of their article is that the use *specialized* outside counsel is a key component in any effective compliance program.

This publication contains general information only and is based on the experiences and research of the author. The author is not, by means of this publication, rendering business, legal advice, or other professional advice or services. This publication is not a substitute for such legal advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified legal advisor. The author, his affiliates, and related entities shall not be responsible for any loss sustained by any person or entity that relies on this publication. The Author gives his permission to link, post, distribute, or reference this article for any lawful purpose, provided attribution is made to the author. The author can be reached at tfox@tfoxlaw.com.

© Thomas R. Fox, 2010