Miranda and the FCPA: Do You Have the Right to Remain Silent?

In a recent posting, the FCPA Blog posed the question of whether a company employee was warned "that concealing information from company lawyers conducting an internal FCPA investigation could be a federal crime?" The FCPA Blog raised this question in the context of a company's internal investigation regarding an alleged violation of the Foreign Corrupt Practices Act (FCPA). Even if the company attorneys handling the investigation provided the now standard corporate attorney *Upjohn* warnings, how does a company attorney asking questions morph into a *de facto* federal agent during an internal company investigation regarding alleged FCPA violations and is the attorney thereby required to provide a *Miranda* warning to employees during a FCPA investigation?

In a recently released paper entitled "*Navigating Potential Pitfalls in Conducting Internal Investigations: Upjohn Warnings, "Corporate Miranda," and Beyond*" Craig Margolis and Lindsey Vaala, of the law firm Vinson & Elkins, explored the pitfalls faced by counsel, both in-house and outside investigative, and corporations when an employee admits to wrong doing during an internal investigation, where such conduct is reported to the US Government and the employee is thereafter prosecuted criminally under a law such as the FCPA. Margolis and Vaala also reviewed the case law regarding the *Upjohn* warnings which should be given to employees during an internal FCPA investigation.

Employees who are subject to being interviewed or otherwise required to cooperate in an internal investigation may find themselves on the sharp horns of a dilemma requiring either (1) cooperating with the internal investigation or (2) losing their jobs for failure to cooperate by providing documents, testimony or other evidence. Many US businesses mandate full employee cooperation with internal investigations or those handled by outside counsel on behalf of a corporation. These requirements can exert a coercive force, "often inducing employees to act contrary to their personal legal interests in favor of candidly disclosing wrongdoing to corporate counsel." Moreover, such a corporate policy may permit a company to claim to the US government a spirit of cooperation in the hopes of avoiding prosecution in "addition to increasing the chances of learning meaningful information."

Where the US Government compels such testimony, through the mechanism of inducing a corporation to coerce its employees into cooperating with an internal investigation, by threatening job loss or other economic penalty, the in-house counsel's actions may raise Fifth Amendment due process and voluntariness concerns because the underlying compulsion was brought on by a state actor, namely the US Government. Margolis and Vaala note that by utilizing corporate counsel and pressuring corporations to cooperate, the US Government is sometimes able to achieve indirectly what it would not be able to achieve on its own – inducing employees to waive their Fifth Amendment right against self-incrimination and minimizing the effectiveness of defense counsel's assistance.

So what are the pitfalls if private counsel compels such testimony and it is used against an employee in a criminal proceeding under the FCPA? Margolis and Vaala point out that the investigative counsel, whether corporate or outside counsel, could face state bar disciplinary proceedings. A corporation could face disqualification of its counsel and the disqualified counsel's investigative results. For all of these reasons, we feel that the FCPA Blog summed it up best when it noted, "*the moment a company launches an internal investigation, its key employees -- whether they're scheduled for an interview or not -- should be warned about the "federal" consequences of destroying or hiding evidence. With up to 20 years in jail at stake, that seems like a small thing to do for the people in the company*."