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6 Steps Corporate Counsel Must Take to Protect Themselves During Government Investigations

From the Experts

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Five years ago, the U.S. Department of Justice announced that it had charged GlaxoSmithKline vice president and associate general counsel Lauren Stevens with two counts of obstruction of justice and four counts of making false statements to the Food and Drug Administration (FDA). At issue were allegations that Stevens had sent a series of letters to the FDA denying that the company had promoted its drug Wellbutrin for off-label uses and that she failed to turn over evidence to the contrary, including various slides used by physicians paid by the company to promote the drug's off-label use.

News of Stevens' indictment rocketed through the ranks of corporate counsel nationwide, not simply because the Justice Department opted to pursue criminal rather than civil sanctions for the manner in which GlaxoSmithKline conducted itself during the FDA's investigation, but also because it chose to prosecute not the company but Stevens *individually*. Indeed, the stakes for Stevens could not have been higher—if convicted she faced a maximum of 60 years in prison.

Now, five years later, a shift in Justice Department policy placing greater emphasis on individual accountability for corporate wrongdoing has raised the stakes for corporate counsel once again. In what has become known as the "Yates Memo," Deputy Attorney General Sally Quillian Yates outlined six steps to strengthen the Department's pursuit of individual wrongdoing in corporate investigations:

1. In order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct.



2. Criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

4. Absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation.

5. Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases.

6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit

against an individual based on considerations beyond that individual's ability to pay.

In this renewed era of individual responsibility for corporate malfeasance, corporate counsel would be well advised to help protect themselves from personal liability by taking six steps of their own when notified of allegations of wrongdoing within the company.

1. Invest in outside counsel to conduct a thorough internal investigation of all serious allegations of corporate wrongdoing, particularly in areas that have historically been the most fertile for corporate prosecution. This list includes environmental, antitrust, fraud, campaign finance, food and drug and financial crimes, among others. It is axiomatic that it is hard for

corporate counsel to make legally defensible decisions without knowing all the facts in the possession of the company. It is also no coincidence that the first step in the Yates memo is to gather "all relevant facts relating to the individuals responsible for the misconduct" and report those facts to the Justice Department in order to receive credit for cooperation. The value of corporate cooperation is memorialized in Section 9-28.720 of the U.S. Attorneys' Manual, which states: "Cooperation is a potential mitigating factor, by which a corporation – just like any other subject of a criminal investigation – can gain credit in a case that otherwise is appropriate for indictment and prosecution." What this means is that corporations and their executives can *avoid* criminal prosecution through appropriate cooperation.

2. Determine whether the company and/or its executives may have engaged in criminal conduct. In this era of increased criminalization for corporate misconduct, the line between civil and criminal liability is not always clear. Indeed, in some cases the same misconduct can be punishable by both civil and criminal penalties. Getting an accurate assessment of potential criminal exposure early on from counsel experienced in handling complex criminal matters may be crucial before corporate counsel can chart a defensible course for engagement with the government.

3. Be on the lookout for client communications that could be discoverable under the crime-fraud exception. The crime-fraud exception removes the protection of the attorney-client privilege from "client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct." *In re Grand Jury Subpoenas*, (2nd Circuit 2015). "A party wishing to invoke the exception must prove: (1) that the client communication or attorney work product in question was itself in furtherance of the crime or fraud; and (2) probable cause to believe that the particular communication with counsel or attorney work product was intended in some way to facilitate or to conceal the criminal activity." This exception was front and center in the prosecution of Ms. Stevens from GlaxoSmithKline. Indeed, the federal court that presided over her trial remarked that her prosecution for obstruction and

making false statements could not have been possible without a federal magistrate authorizing disclosure of otherwise privileged materials under the crime-fraud exception.

4. Investigate potential conflicts of interest and assign separate counsel when reasonably necessary. Rule 1.13(a) of the Model Rules of Professional Conduct (Organization as Client) speaks to the situation where corporate counsel is confronted with an officer or employee who is "in violation of a legal obligation to the organization" or "in violation of a law that reasonably might be imputed to the organization." In such situations, counsel must "proceed as is reasonably necessary in the best interests of the organization." While Rule 1.13(g) permits counsel representing a corporation to also represent the corporation's directors, officers, employees, members, shareholders or other constituents, counsel may only do so in accordance with Rule 1.7 (Conflict of Interest: Current Clients).

5. Understand the difference between zealous advocacy and obstruction of justice. Stevens was charged with corruptly obstructing, influencing or impeding the FDA's investigation in violation of 18 U.S.C. § 1512(c)(2). She was also charged with knowingly altering, destroying, concealing, covering up and/or falsifying records submitted to the FDA in violation of 18 U.S.C. § 1519. Both of these offenses require proof of specific intent to violate the law. Moreover, both are subject to a safe harbor provision for attorneys, which states: "This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding." 18 U.S.C. § 1515(c). The import of these provisions is that actions taken by corporate counsel in good faith during the course of legal representation are immune from prosecution. This does not give corporate counsel a license to lie to the government. But it does speak to the *mens rea* or state of mind that the government must prove in order to convict corporate counsel of obstruction of justice.

6. Assemble a team of attorneys from inside and outside of the organization and fully consult with them so that all critical decisions are made by consensus. This is ultimately what saved Lauren Stevens -- even

in the face of evidence that she provided false information to the FDA. In its decision acquitting her of all charges, the court noted: "As to all counts relating to the question of advice of counsel, the evidence in this case can only support one conclusion, and that is that the defendant sought and obtained the advice of counsel of numerous lawyers. She made full disclosure to them. Every decision that she made and every letter she wrote was done by consensus. Now, even if some of these statements were not literally true, it is clear that they were made in good faith which would negate the requisite element required for all six of the crimes charged in this case."

Corporate counsel should take little comfort in the court's decision in the Lauren Stevens case. There is precious little precedent defining what constitutes "bona fide, legal representation services" pursuant to 18 U.S.C. § 1515(c). Moreover, the Justice Department warned that it would not be dissuaded by the court's decision in the Stevens case, as evidenced by its 2010 prosecution of Blackwater General Counsel Andrew Howell for allegedly obstructing an investigation conducted by the Bureau of Alcohol, Tobacco, and Firearms (ATF). Even Judge Roger W. Titus, who presided over the Stevens case, qualified his extraordinary decision to remove the case from the jury by stating: "Lawyers can never assist a client in the commission of a crime or a fraud, and that's well established. Lawyers do not get a free pass to commit crimes." When considered in the context of the Justice Department's 2015 policy shift placing greater emphasis on individual accountability for corporate misconduct, corporate counsel would be wise to see the writing on the wall and take steps to protect themselves.

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