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Uuuhhh, Look, We Messed Up Here

By Richard Marshall

In this era of heightened regulatory scrutiny, in-house counsel often grapple with the very difficult question of if or when they must self-report an issue to the government. For example, should in-house counsel report to the Securities and Exchange Commission when they discover that an employee may have bribed a foreign government official?

Generally, there is no legal obligation for a company to self-report. While government officials say they give credit for self-reporting, in-house counsel often fear that the opposite is the case. They may escape government scrutiny if they keep quiet, but if they self-report they will receive no credit and instead be punished with a significant fine or worse.

What, then, should in-house counsel do when confronted with a situation that may give rise to a government investigation? This article offers a five-step analysis of this difficult issue.

1. Think Before You Act.

Virtually every prosecutor has announced that credit will be given to companies for self-reporting. While you may not believe the government, it is a mistake to jump too quickly to the conclusion that self-reporting is unwise. Given all of the pronouncements of prosecutors, careful consideration should always be given to self-reporting a problem.



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On the other hand, a hasty decision to self-report before the facts are clear is imprudent. The decision to self-report can be one of the most important decisions the company can make, and such important decisions should never be made without careful reflection.

Equally important, the facts need to be understood as best they can be before the government is contacted. Understanding the scope of the problem and what it will take to fix it are key factors that in-house counsel need to understand to make an informed decision. In-house counsel may look disorganized — or even ignorant — if the company contacts the government before it is able to present a coherent statement of the events in question.

2. Will the Government Find Out Whether or Not You Self-Report?

In deciding whether to self-report,

a key consideration will be whether the government is likely to find out about the problem in any event. If in-house counsel is certain that the government will learn of the problem on its own even if no self-report is made, the decision is an easy one — contact the government and self-report.

In the real world, guessing about whether the government will inevitably uncover a problem can be difficult. However, the chances that the government will find out are much greater if any hint of the problem needs to be disclosed in a required regulatory filing.

Similarly, if large numbers of third parties, such as accountants, independent directors, shareholders, or customers, must be told about the problem, confidentiality is clearly impossible. The more information that is shared with such third parties, the greater the likelihood that one of them will insist that the problem be reported to the government, leak the information to the press, or report the information to the government.

Ironically, these third parties will perform the same analysis about self-reporting that in-house counsel will perform, but they may come to a different conclusion because their interests are different. To be blunt, these third parties may seek the benefits of self-reporting for themselves and be uninterested in the possible adverse consequences

of a government investigation for the company.

3. Do You Have a Good Story to Tell the Government?

Another key factor in deciding whether to self-report is how favorable an account can be given by the company if it reports to the government. The more favorable the report that can be given, the more beneficial it is to self-report.

Many factors contribute to what makes a favorable report. In evaluating this consideration, in-house counsel should try to put themselves in the government's shoes and ask how the government will react to the information provided. The government is more likely to react favorably if:

- All the facts are known and are presented openly to the government;
- The report to the government is made quickly after the misconduct is discovered;
- The company's culpability is minimal and/or it is an innocent victim of the misconduct;
- The problem has been fully corrected — victims have been compensated, wrongdoers have been disciplined, and procedures have been enhanced — before the problem is reported; and
- The report to the government is well presented by capable advocates.

4. Think Through the Consequences of Self-Reporting.

Before making the final decision to self-report to the government, it is important to think through all of the consequences of this decision. First among these is that once a company adopts a strategy of cooperation with the government by self-reporting a problem, the company is committed to that strategy of cooperation throughout the government investigation. It makes little sense to self-report a problem to the government then later seek to obstruct the government's investigation of the problem.

This means that the company should not expect to be able to protect key employees who may have been involved in the wrongdoing, even if the company may wish to do so for business or personal reasons. It also means that the company should expect to continue gathering and presenting information to the government even after its initial presentation.

The company should also consider the attorney-client privilege. Even though the government has withdrawn previous statements that assertion of the attorney-client privilege will be viewed as non-cooperation, there will be pressure to waive the privilege and the company should consider this issue before it self-reports.

It is impossible to control the course of a government investigation once it begins. This means that the company may find itself in unwanted and unpleasant situations, such as helping the government prosecute a formerly valued employee or even a valued customer or business partner. These consequences cannot be avoided once the company commits to cooperating with the government by self-reporting a problem.

5. Maximize the Benefits of Self-Reporting.

The last step in the consideration process, which presupposes that all of the other factors support self-reporting, is evaluating how to maximize the benefits of self-reporting. Key considerations include the following.

To Which Governmental Entity Should the Report Be Made?

This can be a difficult decision. On the one hand, there is a natural desire to report an issue to the least threatening regulator. For example, it is better to report a problem to the SEC rather than the U.S. Attorney's Office and even better to report the problem only to the Financial Industry Regulatory Authority.

On the other hand, the benefits of self-reporting can be diminished if key

prosecutors feel offended that they were not contacted first. Frequently, prosecutors compete for the best cases and may be jealous that other prosecutors were given the first look at a problem. Generally, but not always, it is wise to report a problem to all prosecutors with a perceived interest in the issue.

How Much Should Be Said in the Report?

This can also be a difficult decision. A best situation, but often an unattainable one, is to report a limited amount to the government in the hope of getting credit for self-reporting without telling the government too much. This is often impossible because the government will not accept a limited report and demands much more information. A sensible middle ground is often to present a summary report to the government, but to be prepared to quickly present additional information if requested.

What Happens After a Report Is Made to the Government?

Once the report has been made to the government, some companies become completely reactive and simply wait for the government to suggest the next step. This is a mistake. After self-reporting, in-house counsel should continue to gather information and respond appropriately to the problem. Just because you've "fessed up," don't assume that's the end of your role with regard to the reported information.

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