CRISIS MANAGEMENT AND FIRST AID: WHEN GOVERNMENT CONTRACTORS ARE THE HEADLINERS

WELCOME
Breaking News: Key Elements of Crisis Management
Enforcement Actions

• Our clients are seeing a spike in enforcement actions
• Data also shows increased FCA and S&D activity
Suspension Activity (Gov’t-wide)

• Source – Interagency Suspension and Debarment Committee
Proposed Debarments (Gov’t-wide)

- Source – Interagency Suspension and Debarment Committee

![Proposed Debarments Graph](image-url)
Debarments (Gov’t-wide)

- Source – Interagency Suspension and Debarment Committee
The Scenario:
Chain of Events Set in Motion

- Contracting Agency Issues Detailed Show Cause
- Agency Notifies SDO
- SDO Sends Referral to DOD Criminal Investigators
- Show Cause Leaked to Congress
- Grandstanding Congressmen Go to the Press and Announce Congressional Hearings
Vendor Substitutes Unauthorized Chinese Parts in Sensitive Equipment Designed to Protect the Troops

SecureDefense Stock Plummets on News of Investigation

Shareholders Raise Questions
What steps should the company have taken to manage the crisis?
Initial Investigative Steps

• Consider effective means to protect attorney-client privilege
    • KBR Ordered to produce investigation reports because they were “undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice.”

• Identify key players
  – Current and former employees
Initial Investigative Steps (cont’d)

• Communications with key players/custodians
  – Document hold
  – Anti-retaliation instructions
  – Trading blackout (if applicable)

• Scope of initial investigation
  – Properly measured to assess prospect of wrongdoing and necessity for disclosure
Preliminary Notifications

Dan Forman

Peter Eyre
Preliminary Notifications

• Purpose and scope: Sufficient to provide alert; convey broad contours of action plan; commitment to submit full disclosure upon conclusion of review

• Timing and sequence are critical

• To whom?
  – Suspension and Debarment Official
  – Contracting Officer(s)
  – Customer(s)
  – Inspector General
  – Defense Contract Management Agency

• What is required by your contracts, policies, and procedures?

• Additional considerations if safety issues or Critical Safety Items are potentially involved
Suspension and Debarment Officials

- Cognizant SDO
- Other SDOs
- Timing of communication
- Content of communication
- Coordination with DoJ/IG/CO
- Proactive options
  - Monitoring and independent experts
  - Administrative agreements
  - Voluntary exclusion
  - Others
Mandatory Disclosure

• What is required?
• Recent developments
• Common questions
• Practical considerations
• Coordination with other stakeholders
Expedited Investigation
David Ginsberg
Phil Inglima
Expedited Investigation

• Privilege considerations
  – Attorneys should actively oversee the investigation, especially if utilizing non-lawyer resources
  – Assessing involvement of dual-purpose functions (e.g., internal audit)
    • Whether to involve?
    • Degree and scope of involvement?
  – Consider distinguishing fact development team from strategic advice/opinion
Expedited Investigation (cont’d)

• Document collection/review considerations
  – “Casting the custodian net”
    • Multi-disciplinary approach
    • Former employees?

• Responding to subpoena/summons
  • Obligation to gather data housed abroad?
  • Increased focus on employees’ mobile devices/third-party ISPs

• E-discovery case law trends and observations
  – Anticipating extent of jurisdictional reach
    • In the Matter of a Warrant to Search a Certain E-mail Account Controlled and Maintained by Microsoft Corp., 2014 U.S. Dist. LEXIS 59296 (S.D.N.Y. Apr. 25, 2014) (subpoena to ISP can reach e-documents stored on server located abroad)
Expedited Investigation (cont’d)

• Employee interviews
  – Approach typically guided by scope and timing of potential issues
    • Strategic decision concerning involvement of in-house counsel
    • Degree of independence sought from counsel
  – Interviewing former employees
    • Coordination with human resources group
Expedited Investigation (cont’d)

- Employee interviews (cont’d)
  - *Upjohn* warning
    - Style and scope of warning
      - *In re Grand Jury Subpoena Under Seal*, 415 F.3d 333 (4th Cir. 2005) (district court properly denied motion to quash because AOL expressly waived its privilege)
      - *Upjohn* Warnings: Recommended Best Practices when Corporate Counsel Interacts with Corporate Employees, ABA WCCC Working Group, October 5, 2009
Expedited Investigation (cont’d)

• Root cause analysis
  – Isolate root cause and primary areas of responsibility
    • Consideration of employee(s) ongoing responsibilities
      – Reporting structure
      – Administrative leave

• Streamlined identification of corrective actions
Managing Congressional Inquiries and the Media

David Hammond
Erica Elliott
Responding to Congressional Investigations

• Set client expectations

• Objective is to avoid or minimize damage – that is a “win”

• Provide an opportunity for the executives express moral outrage and hypocrisy – internally
Subpoena vs. Letter Request

• Letter request carries fewer consequences
• Committee rules vary on how subpoenas are issued
  – concurrence of Ranking Minority or mere consultation/advisement
• Subpoena Power
  – the investigation must pursue "a valid legislative purpose"
    but does not need to involve actual legislation
  – inquiries must be pertinent to the subject matter area that has been authorized for investigation
Communications With Committee Staff

- Defend the client, but be mindful of the long-term
- Keep a paper trail of agreements and understandings
- Have more than one witness to communications with Committee staff
- Do not over promise
- Be upfront with bad news
Protecting Privileged Communications

• Congress does not recognize the attorney-client privilege or work product doctrine, but “respects” those protections

• Compelling disclosure of privileged information
  • Do not roll over at mere threat of contempt
  • Protecting the privilege for use in other forums involves many steps
Other Considerations

• Confidential Commercial/Financial Information
  – Cold comfort that Committee will keep information confidential
  – Personal identifying information likely to be protected
  – Establish paper trail requesting confidentiality, explaining the reasons, and identifying potential consequences if made public
Other Considerations

• If possible, start preparing for a subpoena or document request before it arrives
  – Suspense dates are short for producing documents
  – Most committee staff do not care about the cost of responding (another client expectation to set)
• Well-paid defense contractors will be expected to engage in full e-discovery
Other Considerations

• If a Congressional investigation is likely, consider preparing a non-privileged paper trail explaining how the company is taking the issue seriously and implementing corrective action (to be produced later to the Committee)

• Investigations have triggered *qui tam* actions
  – Committee staff have recommended that a witness talk to a *qui tam* lawyer
  – Congressional hearing/report is a “public disclosure” under the FCA -- embrace it
Other Considerations

• Relationship With The Government Customer
  – The government customer is already not happy at being put in the spotlight – do not make it worse
  – Establish contact early
  – Government agency may also receive a similar document request
  – Establish pre-clearance process early
    • Contract may have non-disclosure/pre-approval obligations
Before the Crisis: Preparing a Crisis Management Communications Plan

• Why are proactive plans necessary?
• Bullet-proofing your brand before a crisis: the communications audit
  – Stakeholders
    • Primary stakeholders: groups defined by an organization as most important to its success (e.g. employees, consumers, shareholders, etc)
    • Secondary stakeholders: key groups that do not play an active role in the day-to-day activities of the organization but are still important to its overall success (e.g. community members, media, elected officials, etc)
  – Strengths and weakness in current communications programs
  – Untapped opportunities for future communications
• Members of the crisis response team
During the Crisis: Mobilizing the Team and Implementing the Plan

• Have the team “on call”
• Once the crisis hits, mobilize and meet
• Anticipate the immediate questions
  – What happened? Who is responsible? Why did it happen? Who is affected? What should we do? Who can we trust? What should we say? How should we say it?
During the Crisis: Mobilizing the Team and Implementing the Plan

• Speak with one corporate voice. Spokesperson guidelines are as follows:
  – Remain calm
  – Don’t let the media push you into saying things that you do not want to say
  – Express concern for anyone harmed by the crisis
  – Avoid the phrase “no comment”
  – If you don’t have the answer to a question, say so, but indicate that you are working to find an answer
  – Avoid certain or absolute answers to public and media until sufficient information is available
  – Be sure to point out the uncertainty of situations with phrases such as “The situation is evolving” or “We don’t have all the facts yet.”
  – Do not over-assure stakeholders
During the Crisis: Mobilizing the Team and Implementing the Plan

• Define the story and control its course. Make the strategic decision: offense or defense?
  – Nonexistence strategies
    • Denial, Clarification, Attack or Intimidation
  – Distance strategies
    • Excuse, Denial of intention, Denial of violation, Justification
  – Ingratiation strategies
    • Bolstering, Transcendence, Praising others
  – Mortification strategies
    • Remediation, Repentance, Rectification
  – Suffering strategy
During the Crisis: Mobilizing the Team and Implementing the Plan

• Prepare for media engagement and account for how the channel will influence the message.
  – Print interviews
  – Broadcast media interviews
  – Social Media
  – Media management across borders
After the Crisis: Moving Your Brand Beyond Association with the Crisis

• When it appears as if the worst of the crisis has passed, reevaluate your relationships with your stakeholders (as in phase one) and reengage them.

• By maintaining a public profile, being visible, accessible, involved in industry and community matters, and *not being known only for having experienced a crisis*, your company has the best chance of regaining any ground lost during the crisis and winning respect from its industry and community.
CRIMINAL IMPLICATIONS:
White Collar Perspective
Phil Inglima
Criminal – Civil Overlap

• The Challenge: designing the investigation to fit the need in a parallel proceeding setting
  – For criminal & debarment authorities, cooperation is paramount
  – For civil defense, the need to resist, delay, discover
  – Importance of independence in investigative findings
  – Imperative to balance privilege with disclosure
DOJ Enforcement Trends

• Expectation of Disclosure
• Desire & Willingness to Coordinate Civil and Criminal Dispositions
• Cooperation in applying FRCrimP 6(e) and FRE 502(d) protections to produced materials
• Habeas factum: give us what you know
• Emphasis on Individual liability & enforcement
Defense Tactics & Strategies

• Whether and when to provide counsel
  – Advancement / indemnification issues
  – Implications for witness cooperation with gov’t

• Joint Defense / Common Interest Agreements
  – Effect on access to employee-witnesses
  – Effect on disclosures
Corrective Actions

- Must be prompt, meaningful and effective
- Must address root cause
- Must be fully implemented
- Must be supported by management
Potential Corrective Actions

- Employee disciplinary actions
- Employee training
- Enhanced internal controls
- Enhanced compliance programs
- Organizational changes
TYPES OF COMPLIANCE PROGRAMS

Peter Eyre
Richard Arnholt
Compliance Programs

• Finding root cause
• Fixing root cause
  – Remediation – employment actions
  – Policies/procedures
  – Training
  – Culture
  – Board/Management involvement
Compliance Programs

• Full program review
  – Board of Directors
  – Compliance/Ethics Reporting Chain
  – Policies/Procedures
  – Management Communications
    • Culture/Tone at the Top
  – Methods of Reporting (hotline/open door)
  – Measuring Effectiveness
Questions?

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