



2016 CLM Annual Conference
April 6-8, 2016
Orlando, FL

“CRISIS MANAGEMENT”

The focus of this presentation is upon:

- (1) Preparedness for a government investigation;
- (2) Considerations in dealing with the immediate moments of a government investigation; and,
- (3) Dealing with the aftermath of such an investigation. The investigation may be civil, but then again may be seeking a criminal enforcement. The question to be asked is how prepared are you and how prepared is your company for such an investigation?

The United States Department of Justice has expressly noted that “the prosecution of corporate crime is a high priority for the Department of Justice.” Also within the Department of Justice in regard to considering the prosecution of a corporation is the statement

“ . . . prosecutors should be aware of the public benefits that can flow from indicting the corporation in appropriate cases.”

These guidelines also recognize that under certain circumstances it may be appropriate to resolve even a corporate criminal case by means other than indictment. This presentation hopefully gives some guidance in this regard. Attached hereto is the Office of the United States Attorneys’ Principles of Federal Prosecution of Business organizations. A review of this Guideline for federal prosecutors in advance of a prosecution is critical to assisting in the determination of the steps to be taken once an investigation is in progress.

Set out below is a draft *Upjohn* warning based upon *Upjohn v. United States*, 449 U.S. 383 (1981).

Internal corporate investigations are a critical part once an event has occurred or a government investigation has begun. Attorneys and investigators usually give an *Upjohn* warning in these circumstances based upon the U.S. Supreme Court case cited below. In this situation, employees are advised that the attorney represents the corporation and not the employee individually. Further, that the attorney/client privilege belongs to the corporation and, in fact, the corporation may waive the privilege and disclose the substance of the

interview of the third parties. In fact, consideration as to the cooperation of the corporation may be the revelation of the contents of the interview. Note, interview notes should reflect that the warning was given and that the employee agreed to keep the interview confidential.

SAMPLE UPJOHN WARNING

1. Introductions.

Note, under ethics rules generally an attorney must reveal who he/she represents. This should be done initially. (“My name is [___] and I am an attorney with the law firm of [___]. I represent and my client is [___].)

2. Substance of Warning.

The company (my client) has retained our law firm to investigate [___]. We are meeting with you to learn more of the factors about this matter. We are doing this so we can give legal advice to the company. This is in regard to an on-going investigation; potential litigation or on-going litigation.

In our role as attorneys, we represent the company only. We do not represent you or any other employees personally. If you want a lawyer, you will need to hire your own. (Is the company going to provide counsel for this employee?) This is a consideration that should be discussed prior to the meeting.

Our interview is confidential and subject to the “attorney client privilege.” This generally means that no one can force you or me to disclose in court what we tell each other today. Understand, however, that the privilege belongs to the company, not to you personally. In the future, the company may decide to waive the privilege and disclose the information we learn in the investigation. If the company chooses to waive the privilege, it can do so without your consent and without telling you.

For the company to maintain its attorney client privilege over the information from this interview, it is important that you not share the substance of our interview with anyone. Keeping this interview confidential may also protect you if [the agency investigating or litigation opponent] ever decides to interview you again.

The company will not allow for or tolerate any retaliation or reprisals against you for cooperating with our investigation and telling the truth. However, failure by employees to cooperate with the investigation may result in company discipline, including possible termination of employment.

I need to make sure you understand. Have you understood what I’ve explained to you? Do you agree to keep this interview confidential? Do you have any questions before we begin?

[End of Sample *Upjohn* Warning]

Note, the Department of Justice freely acknowledges that it gives prosecutors wide discretion as to whether to prosecute or seek an indictment against a corporation or its employees. However, at the same time, there are factors laid out in the Principles of Federal Prosecution of Business Organizations. These can be found at 9-28.000. These include:

1. The nature and seriousness of the events;
2. The pervasiveness of wrongdoing within the corporation;
3. The corporation's history of similar misconduct;
4. The corporation's willingness to cooperate;
5. The existence and effectiveness of the corporation's pre-existence compliance program;
6. The corporation's timely and voluntary disclosure of wrongdoing;
7. The corporation's remedial actions;
8. Collateral consequences;
9. The adequacy of civil or other regulatory enforcement actions; and,
10. The adequacy of the prosecution of individuals responsible for the corporation's wrongdoing.

In being "prepared for" an investigation, you would not above that factor three and five relate to the corporation's prior history and compliance programs as a consideration as to whether the corporation has appropriate compliance programs. However, the mere existence of a compliance program will not deter prosecution. Therefore, it is important for you and the company in its preparation to be sure that its compliance programs are not nearly just paper programs – but are part of the fabric of the company and that there are checks to make sure they are being followed. Considerations will be given in regard to the adequacy of the program's design and implementation under each area of law that may be applicable, whether a human resources issue, an environmental issue, a safety or OSHA-type issue, a banking, insurance or other program area.

In regard to the value of cooperation, the Department of Justice notes specifically,

“in order for a company to receive any consideration of cooperation under this section, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the department all facts relating to that misconduct. If the company seeking cooperation credit declines to learn of such facts, or to provide to the Department with complete factual information about the individuals involved, its cooperation will not be considered a mitigating factor under this section. Nor, if a company is prosecuted, will the department support a cooperation-related reduction at sentencing.”

Department of Justice – Principles of Federal Prosecution of Business Organizations, 9-28.700 – The Value of Cooperation.

Therefore, the first and most important consideration is being prepared. This would include a consideration of (1) whether the company has in place adequate and proper compliance programs; (2) whether the compliance programs are being followed; (3) the checks to determine the adequacy of the determination of whether the program is being followed; (4) the education and training for employees as to following these compliance programs and the proper documentation in regard to same. Also, part of preparedness would include employee preparation for an actual event. This would include (1) determining and designating a company individual to be the point person in any investigation and a back-up person as well in the event of the unavailability of the designated person; (2) a check-list of contacts to identify in the event of any such investigation; (3) consideration of what the employees are to do in the event of an incident and/or investigation.