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5 Principles For Responding To Government Investigations

By **Holly Drumheller Butler** (April 5, 2019, 4:06 PM EDT)

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Government investigations are expensive and time-consuming, and carry risks of criminal and civil penalties. No one knows these truisms more than Mobile TeleSystems PJSC, or MTS.

In March 2014, MTS, the largest telecommunications company in Russia and an issuer of publicly traded securities in the United States, received requests for documents and information from the U.S. Department of Justice and the US. Securities and Exchange Commission relating to an investigation of MTS's former subsidiary in Uzbekistan.[1]

Per the norm, the company indicated its "inten[t] to cooperate with these investigations."[2] Fast-forward five years and, on March 6 and 7, 2019, those simple requests for documents and information culminated in a massive $850 million settlement to resolve charges stemming from a bribery scheme in Uzbekistan.[3]

While not every government-issued subpoena will spiral into an investigation spanning half a decade and result in staggering criminal fines, forfeiture and disgorgement, there are certain guiding principles which apply no matter the scope of the underlying investigation.

Communicate Early and Often

The fastest way to drawing the ire of the government is to neglect or even delay a response to the initial inquiry — whether it is a letter, subpoena or civil investigative demand. A simple and prompt courtesy introduction goes a long way towards establishing the foundation for a good working relationship during the investigation.

As soon as possible after receiving an information or document request, counsel should contact the issuing attorney to confirm receipt and an intent to respond. If possible, this initial contact should be used to gain an understanding of the scope of the investigation, prioritize the government's requests and address realistic timing for any response.

Getting government buy-in as to the scope of the investigation at the outset is a good way to develop a working relationship with those who will determine the ultimate resolution of the case. One way to accomplish this goal is to offer fact-finding presentations to the government to ensure everyone is

working with same factual framework and can openly discuss and respond to each other's interpretations. Such presentations are most effective at the outset of the investigation and following material developments in the case as a result of document productions or witness interviews.

Cooperate, But Don't Capitulate

In 2015, then-deputy attorney general Sally Yates authored a new Department of Justice policy regarding individual accountability in government investigations of corporate wrongdoing.[4] While the impact of the Yates memo on cooperation credit determinations was hotly debated for years, the department's practices and subsequent pronouncements have made clear that the Yates memo was not the pivotal edict it was feared to be.

In November 2018, deputy attorney general Rod Rosenstein relaxed the perceived rigid approach required by the Yates memo and emphasized the flexibility and discretion of government investigators. This month, the DOJ underscored its goal to be transparent in what qualifies as cooperation in the course of a government investigation.

On March 8, 2019, assistant attorney general Brian A. Benczkowski, while delivering remarks to the ABA National Institute on White Collar Crime Conference, explained that "[w]e strive to be open books about which factors we find aggravating, which we find mitigating and how each is penalized, credited and ultimately weighed."[5]

However, while government policies provide guidance, prosecutorial discretion is not formulaic. Moreover, cooperation does not mean complying with every governmental request for documents and witnesses, or abandoning legal privileges and protections; rather, it requires companies to embrace the department's invitation to discuss the scope of the internal investigation being conducted with the prosecutor handling the case, and reach agreement on the relevant and appropriate areas of factual discovery.

Determine Target or Witness — A Fluid Evaluation

Of course, becoming embroiled in a government investigation does not necessarily mean that the company — or an executive — is the target of the investigation.

The company may be a potential witness, may be the source of information needed regarding a target, may be part of an industry-wide investigation or may have a corporate or contractual relationship with a target so as to be able to aid in the inquiry of the investigated conduct. Although the government is not under any obligation to explain why a particular company has caught its eye in an investigation, it is advisable to seek the government's input into the company's involvement.

Despite relaxing the "all or nothing" approach espoused by the Yates memo, the government's focus continues to be on individuals — especially management, including members of a company's board of directors. To better identify and remediate any potential misconduct, it behooves both the government and the company to target the areas or persons of concern with as much particularity as possible.

To the extent that the government intimates that the company is not the target of the investigation, that disclosure is not akin to absolution. Rather, that assessment is only valid for that moment in time.

Additional documents, information or witnesses may shift that impression. As such, the determination of

whether a company is a target of a government investigation must be reevaluated and revisited throughout the investigation as facts develop.

Actively Seek Resolutions ... and Be Creative

Do not think of an investigation as linear — receive subpoena, produce documents, receive subpoena, witness testimony, potential charges or indictment, etc. Every stage of an investigation should be evaluated for an opportunity for resolution. Counsel should discuss resolution options with the government and use the cultivated relationships as a resource.

Incorporate Lessons Into Compliance

Remediate before the government does it for you. If any wrongdoing is found in the course of a company's internal investigation, immediately implement corrective actions, institute compliance policies to ensure improper conduct will not be repeated and evaluate obligations to voluntarily disclose.

Good intentions and hope cannot be the cornerstones of a company's compliance program. Rather, such programs must be tailored to the company's risk, thoughtfully implemented and embedded in the company's leadership and culture. Bottom line: Address any weaknesses in policy and operation as quickly as possible to strengthen an argument for a declination.

As assistant attorney general Brian A. Benczkowski advised an audience of former federal prosecutors, corporate counsel and white collar attorneys, "[a]t the end of the day, companies that voluntarily self-disclose, take steps to prevent misconduct through robust compliance programs and take appropriate remedial steps when misconduct is detected should know that they will get a fair shake from the Department."[6]

To alleviate any doubt that the DOJ intends to live by this rule, one only needs to compare the circumstances underlying the department's settlements or prosecutions with its declinations.

In the matter of MTS, the company did not voluntarily disclose its FCPA violations, and the company's level of cooperation was deemed to be lacking and not proactive. As a result, the penalty imposed was 25% above the low end of the U.S. Sentencing Guidelines fine range, reflecting the company's failure to self-report or fully cooperate and remediate the conduct.[7]

Further, MTS had to agree to implement rigorous internal controls and have a three-year independent compliance monitor because the company had not yet fully implemented or tested its compliance program.[8]

Conversely, in February 2019, the DOJ opted not to prosecute Cognizant Technology Solutions Corporation for FCPA violations because the company voluntarily self-disclosed the conduct within two weeks of the board learning of it, allowing the department to identify the culpable executives; engaged in a thorough internal investigation; cooperated with authorities; had a preexisting compliance program; and was willing to remediate and disgorge.

Simply put, fulsome and rigorous compliance programs, coupled with effective internal detection and reporting mechanisms, may help a company avoid becoming entangled in a government investigation or, at least, provide an instrument to triage and resolve any such government inquiry on more favorable terms.

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[1] Mobile TeleSystems OJSC (2014) March 18, 2014, 6-K Form, https://www.sec.gov/Archives/edgar/data/1115837/000110465914020584/a14-8370_16k.htm; Mobile TeleSystems OJSC (2014) March 19, 2014, 6-K Form, https://www.sec.gov/Archives/edgar/data/1115837/000110465914020809/a14-8453_16k.htm.

[2] Mobile TeleSystems OJSC (2014) March 19, 2014, 6-K Form, https://www.sec.gov/Archives/edgar/data/1115837/000110465914020809/a14-8453_16k.htm.

[3] Press Release, Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter into Resolutions of $850 Million with the Department of Justice for Paying Bribes in Uzbekistan (Mar. 7, 2019), https://www.justice.gov/opa/pr/mobile-telesystems-pjsc-and-its-uzbek-subsidiary-enter-resolutions-850-million-department.

[4] Memorandum from U.S. Department of Justice, Office of Deputy Attorney General, Sally Quillian Yates (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.

[5] Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the 33rd Annual ABA National Institute on White Collar Crime Conference (March 8, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-33rd-annual-aba-national.

[6] Id.

[7] Deferred Prosecution Agreement with Mobile TeleSystems PCSJ dated Feb. 22, 2019, ¶ 4a-c, https://www.justice.gov/opa/press-release/file/1141631/download.

[8] Id. at ¶ 4e.