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How To Work With Regulators During Internal Investigations

By **David Chaiken, Timothy Butler and Laura Anne Kuykendall** (December 14, 2018, 5:18 PM EST)

David Chaiken

Timothy Butler

Laura Anne Kuykendall

The recent courtroom battle over the admissibility in a criminal trial of statements made by former Deutsche Bank AG traders to Deutsche Bank's outside counsel during its internal investigation into misconduct involving the London Interbank Offered Rate, or Libor, shines a spotlight on a potentially recurring problem in criminal prosecutions that arise out of or rely on evidence gathered during internal investigations — excessive entanglement between company counsel and government regulators conducting parallel investigations. The problem? The Constitution. Indeed, government entanglement in or direction of an internal investigation can lead a court to conclude that company counsel acted on behalf of the government, subjecting its otherwise private investigative activity to constitutional scrutiny.

Others have written on the specific problem that arose in the Deutsche Bank Libor-manipulation trial and lessons learned from that particular situation, in which the parties litigated whether company counsel's allegedly coerced interviews violated the Fifth Amendment. But this article focuses more broadly on the host of "state action" problems that can arise when excessive entanglement exists between government lawyers and company counsel who are conducting an internal investigation, and provides some practical tips for how to avoid those problems.

What are the legal consequences of a "state action" finding?

State action problems arise when private individuals or entities, such as private employers, engage in investigative activity at the direction of law enforcement or other government actors. Ordinarily, constitutional protections do not apply here because the Constitution protects criminal defendants only against the actions of the government, not private individuals or entities. But if the government directed or interfered with the private conduct, the conduct may be imputed to the government, the private actor may be deemed to have been acting as an arm of the state, and the otherwise private investigative activity may be attacked as unconstitutional in follow-on criminal proceedings.

A judicial determination that government lawyers or agents coerced or encouraged company counsel's conduct or were entangled in an otherwise private

internal investigation can wreak havoc on a criminal prosecution. For example, private employers can coerce employee interviews in an internal investigation by threatening disciplinary action or termination, and no obligation exists for the company to provide separate counsel or any advice-of-rights. But a state action finding could render statements resulting from such coerced interviews involuntary, in violation of the Fifth Amendment right against compelled self-incrimination, and authorize a trial court to exclude them.

Company policies typically give private employers broad discretion to search employee e-mail, computers and workplaces, and nothing prevents employers from providing the results of those searches to law enforcement. But in the event of a state action finding, such searches become warrantless and, thus, illegal government searches in violation of the Fourth Amendment right against unreasonable searches and seizures. And although the government's obligation to disclose materially exculpatory and impeaching evidence to the defense under Brady v. Maryland[1] and Giglio v. United States[2] extend only to the "prosecution team" (i.e., the prosecutor and anyone over whom he or she has authority), excessive entanglement between company counsel and regulators could jeopardize a criminal prosecution by rendering the company part of the prosecution team and imputing knowledge of anything in the company's records to prosecutors.

When can private investigative activity become "state action"?

Conduct taking place during an internal investigation can be deemed "state action" when the conduct is "fairly attributable to the government"; that is, when "there is a sufficiently close nexus between the government and the challenged action 'so that the action of the latter may be fairly treated as that of the State itself.'" Such a nexus may exist where (1) the government exercised "coercive power" or provided "significant encouragement, either overt or covert," that induced the challenged conduct; (2) the private actor willfully participated in joint activity with the government; (3) the government had delegated powers to the private entity that were traditionally the exclusive prerogative of the government; (4) the government was entwined in the management or control of the private actor; (5) the private actor was so entwined with governmental policies or so impregnated with a governmental character that it became a government actor; or (6) a government regulation compelled the otherwise private actor to make the challenged decision.

What are the risks to company counsel and the company?

If a court finds that excessive entanglement or involvement by regulators caused otherwise private investigative activity to become "state action," or even if a criminal defendant makes a colorable claim that this occurred, the downside consequences can be costly for the company and its counsel.

A colorable "state action" challenge to evidence gathered during an internal investigation could lead a court to hold a full-blown evidentiary hearing to resolve it. That's a problem for the government, for the lawyers who conducted the internal investigation, and for the company. The scheduling of an evidentiary hearing would typically entitle a defendant to conduct limited discovery in order to establish his or her claims, including issuing subpoenas to the lawyers who conducted the investigation — and, if appropriate, government lawyers and investigative agents — to testify under oath at the hearing; and to produce notes, correspondence and other records reflecting meetings and communications between private counsel and regulators to show government entanglement and direction. Depending upon the evidence uncovered during the hearing, important evidence could be suppressed, confessions and other incriminating statements could be excluded, and, if such a hearing takes place after the fact, convictions could be derailed.

In addition, as prosecutors become more sensitive to and educated about potential "state action" problems, the appearance of such problems early on (where, for example, prosecutors have received a criminal referral from the initial investigative agency) could lead prosecutors to decline prosecution at the investigative stage, or even to decline to investigate altogether, allowing wrongdoers to remain unpunished.

Where a criminal prosecution results from or follows an internal corporate investigation, it is often at the end of a long, multiyear process that has been painful, distracting and expensive for the company and its officers, directors and employees. The last thing the company and its lawyers would want is for missteps in conducting the internal investigation years earlier to subject the company and its lawyers to judicial scrutiny, provide grounds for a criminal defense lawyer to effectively put the internal investigation on "trial," and jeopardize the viability of the criminal prosecution, particularly where the company was the victim of the crime.

How can counsel mitigate the risks?

Attorneys working with regulators while conducting internal investigations should take steps to minimize the risk of imputing their conduct to the government, triggering state action problems in follow-on criminal proceedings. Here are some basic tips:

1. Do not assume that government lawyers and investigators will be careful about — or even aware of — these issues, particularly civil administrative, civil investigative and civil enforcement lawyers who are not typically involved in criminal investigations or prosecutions. Even at the U.S. Department of Justice, there is little training on these issues, although the DOJ's internal policy manual instructs that "[e]xactly how and by whom the facts are gathered [in a corporate internal investigation] is for the corporation to decide."

2. Prior to speaking with the government, determine how the company will treat employees who refuse to consent to be interviewed and whether the company will indemnify or reimburse company officers, directors and employees for legal fees incurred in connection with the internal investigation. Then, apply those decisions uniformly and consistently for the remainder of the investigation.

3. Resist the temptation to be overly accommodating to regulators, as excessive deference will suggest that you have invited or allowed regulators to steer the course of the internal investigation, such as by:

- Asking how your investigation should be structured and seeking regulatory approval for its scope and content;
- Seeking or obtaining direction from regulators as to which witnesses to interview, when and under what circumstances;
- Seeking or obtaining direction from regulators as to whose e-mail, computers, documents or offices to search, when, and under what circumstances;
- Allowing regulators to dictate search terms and other parameters to apply to document collection efforts; and
- Seeking or obtaining input from regulators as to what questions to ask during an interview and/or which topics to cover.

4. Conduct witness interviews (and every other aspect of the investigation) with an eye

toward a potential state-action challenge. Ensure that witnesses receive proper Upjohn warnings; create a record demonstrating that such warnings were given in each interview; make it clear to interviewees that the results of your investigation — including the content of the interview — may be provided to the government; and create a record demonstrating that you have advised interviewees that the interview is voluntary and that they are free to leave, take breaks and to ask clarifying questions;

5. Do not conduct interviews at government offices or allow regulators to participate in or attend interviews by company counsel; and,

6. Even if you are acting under a cooperation agreement with the government, do not give the government unfettered access to the company's documents or document management databases.

Conclusion

In many internal investigations, especially those triggered by whistleblowers raising allegations that may be known only to the government, working with the government is unavoidable and even desirable. But when doing so, company counsel should attempt to minimize the risk of a state-action challenge in a follow-on criminal prosecution. Indeed, given the potentially adverse consequences, including delay, aggravation, expense and embarrassment, company counsel working with regulators during internal corporate investigations should continuously be mindful of these issues and take steps to ensure that their internal investigations are truly "internal," and not attributable to the government.

David M. Chaiken is a partner at Troutman Sanders LLP and a former assistant U.S. attorney in the Economic Crimes Section of the U.S. Attorney's Office for the Northern District of Georgia.

Timothy A. Butler is a senior associate at Troutman. Prior to joining the firm, he was a senior official in the Georgia Attorney General's Office and, prior to that, a prosecuting attorney at the Federal Trade Commission.

Laura Anne Kuykendall is an associate at the firm.

[1] Brady v. Maryland, 373 U.S. 83 (1963).

[2] Giglio v. United States, 405 U.S. 150 (1972),
