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Financial institutions often must decide whether to report potentially problematic conduct to regulatory authorities and cooperate in any investigation. The authors argue that cooperation requires an extensive commitment and presents complex issues that can be difficult to implement.

BNA INSIGHTS: Cooperation, Coordination and Civil Litigation in Internal Investigations



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After discovering potentially problematic conduct, financial institutions often must decide whether to report to regulatory authorities and cooperate in any investigation. Cooperation requires an extensive commitment and presents complex issues that can be difficult to implement. Those difficulties and complexities are multiplied when U.S. authorities partner with agencies abroad. Another set of strategic considerations comes into play where the institution faces private lawsuits with the potential for substantial damages awards.

This article touches on some of the potential benefits and complications that arise in international investigations. Decisions to self-report or cooperate must be made on a case by-case basis after consideration of the law and facts. Organizations should strive to proactively and globally manage such matters in order to position themselves for the best outcome possible.

Cooperation. Any organization electing to cooperate should understand what ''cooperation'' entails. In a context applicable to most Justice Department (DOJ) investigations, Bill Baer, the assistant attorney general who oversees the DOJ Antitrust Division, noted in a

Sept. 2014 speech at Georgetown University that companies that decide to apply for antitrust leniency ''must recognize that the policy requires far more than a quick phone call to the division and a promise to cooperate.''[1]

Instead, it ''requires complete and continuing cooperation'' throughout the investigation and resulting prosecutions, which often includes a thorough internal investigation, proffers of information to government agencies, production of foreign-located documents, and making witnesses available for interviews. Companies that are unwilling or unable to make the investments necessary or those that think they can do so on a timetable of their own choosing, ''will lose their opportunity to qualify for leniency.'' [2]

These expectations are consistent with the expectations of other U.S. authorities, such as the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC). Where conduct outside the U.S. is at issue, such expectations sometimes conflict with the laws of other countries. For example, data privacy laws, or in some cases, ''blocking'' statutes may delay or restrict the flow of information to U.S. authorities, requiring cooperating organizations to balance their desire to move expeditiously with the need to comply with foreign laws.

Historically, in the U.S., cooperation has been viewed as the route with the fewest drawbacks, particularly in the financial services industry. But recently, notwithstanding their cooperation, financial institutions have been subjected to large penalties and, in some instances, have been indicted.

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In part, this was because enforcement agencies viewed efforts at cooperation insufficient. Such results are some of the most difficult aspects of cooperation, but they must be proactively addressed in modern international investigations. Organizations that elect to cooperate and their counsel should consider creative strategies that permit compliance with foreign laws while providing information to U.S. authorities as quickly as possible.

One difficult aspect of cooperation involves disciplining employees. In his 2014 Georgetown speech, Baer said regulators ''continue to insist that the most culpable employees face the consequences of their crimes,'' and ''there should be appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect that conduct.''

From the U.S. authorities' view, Baer said, it is hard to imagine how companies can foster a corporate culture of compliance if they still employ individuals who have refused to accept responsibility for their conduct and who the companies know to be culpable. Once again, such expectations can conflict with foreign labor laws, which can limit the types of discipline on employees or otherwise dictate the circumstances under which they can be terminated.[3]

Coordination. U.S. authorities are increasingly teaming with one another and their foreign counterparts. The Financial Fraud Enforcement Task Force, comprised of more than 20 federal agencies, and state and local authorities, describes itself as ''the broadest coalition of law enforcement, investigatory and regulatory agencies ever assembled to combat fraud.''[4] Abroad, U.S. regulators are establishing ''pick-up-the-phone'' relationships with counterparts around the world. Partnering among agencies will continue.

Thus, it is critical for cooperating organizations to retain counsel experienced with each regulator in each jurisdiction, and all counsel must regularly communicate. What might be expected by one may run afoul of the expectations of authorities in other jurisdictions, and therefore great care and communication are imperative.

Civil Litigation. Private litigation often occurs contemporaneously with, or shortly following, a government's investigation of the same conduct. The broad discovery available to private litigants in the U.S. often conflicts with data privacy or blocking statutes in other jurisdictions. Organizations can find themselves in an apparent Catch-22 if they do not know how to navigate conflicting laws, and they should again have strategies for addressing conflicts.

At a high level, these are a few of the issues that financial institutions face in the context of an international investigation. Proactive, global management of the investigation is the best means by which institutions can position themselves for the most favorable outcome on all fronts.

[1] Bill Baer, Assistant Attorney General, Remarks at the Georgetown University Law Cetner Global Antitrust Enforcement Symposium (Sept. 10, 2014), available at http://www.justice.gov/atr/public/speeches/308499.pdf.

[2] Id.

[3] Bill Baer, Assistant Attorney General, Remarks at the Georgetown University Law Cetner Global Antitrust Enforcement Symposium (Sept. 10, 2014), available at http://www.justice.gov/atr/public/speeches/308499.pdf.

[4] See *About the Task Force*, StopFraud.Gov, http://www.stopfraud.gov/about.html.

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