ROUNDTABLE

Risks to Companies Arising from the Growing Focus on Executive Prosecutions

By David Craig

For a second consecutive year, Metropolitan Corporate Counsel is hosting a global roundtable series on Global Risk. We have invited longtime patron Clifford Chance to co-host three dinners with us, provide subject-matter expertise and help facilitate discussions with this year's group of 12 general counsel and chief compliance officers.

This year's attendees cumulatively represent companies with approximately $150 billion in annual revenues, offices in more than 100 countries and operations across a wide array of industries – including banking, insurance, asset management, industrials, rail, petrochemicals, information management and real estate.

The in-house counsel attend the dinner series on the precondition that their identities, as well as the names of their companies, will be kept anonymous in order to facilitate a more free range of dialogue around the table.

If you are interested in further information about the Risk Dinner Series, please contact us at kcalve@metrocorpcounsel.com.

Managing risk remains one of the most critical components to running a successful company in today's challenging and heavily regulated business climate. One risk in particular that can hang heavy over the corporate boardroom: executive prosecutions.

At a special gathering of general counsel and chief compliance officers on September 27, the group spent more than two hours discussing the proliferation of multiagency, multijurisdictional regulatory and criminal investigations and resolutions. The group also covered trends and developments in enforcement in the U.S., as well as the UK.

MCC publisher Kristin Calve opened the dinner by introducing her co-hosts for the 2017 series, Clifford Chance partners David DiBari (head of U.S. Litigation & Dispute Resolution, Washington, D.C.) and Sarah Jones (Mergers and Acquisitions, New York). The evening's featured experts were white collar litigators Christopher Morvillo (New York) and Judith Seddon (London).

With Chatham House Rule in place, participants were free to engage in a frank and open discussion about executive prosecutions.

David DiBari

And discuss they did.

The group agreed that, in the past five years, properly managing potential charges of wrongdoing has been an increasing area of concern for public and private companies alike – in part because getting it wrong can not only lead to jail time for individuals, but severe damage to their companies and shareholders.

DiBari framed the discussion around the importance of a focus on managing risk. The associated risks start with potential financial costs, with fines running in the billions of dollars. Risks to a company's brand and competitive position in the market are also increasing, due in part to the proliferation of media and digital networks that distribute information far and wide when public missteps occur.

Advances in technology are also influencing how companies do business. "And the political risk has never been closer to home," said DiBari.

With the room filled with multinational companies, DiBari provided a broad international perspective while discussing the important shifts that have taken place. The focus in the U.S., he said, used to be primarily on the companies, while regulators in Europe would target individual executives. "Now the spotlight is more on the individuals here and the companies there," he said.

Morvillo concurred with that observation. Ultimately, the overriding concern for individual executives ensnared in investigations, he said, is quite specific: The possibility of going to jail.

"Nothing gets the attention of a C-Suite member like the topic of executive prosecutions. It strikes fear in the heart of any executive under investigation," Morvillo said.

He knows the government side of the equation well, having served from 1999 to 2005 as assistant U.S. attorney for the Southern District of New York. One of his last courtroom victories was the 10-month trial of former defense attorney Lynne Stewart, who was convicted of, among other things, providing material support to a terrorist conspiracy involving her jailed former client, Sheik Omar Abdel Rahman.

But it was his two decades of experience representing high-level individuals accused of white collar crimes that proved invaluable during the evening's discussion.

Although always at the core of the Justice Department's efforts to deter white collar crime, the current climate favoring executive prosecutions in the U.S. is reflected in the "Yates memo," Morvillo said, referring to the September 2015 pronouncement by then-Deputy Attorney General Sally Yates. That memo ties corporate cooperation credit directly to a company's efforts to assist the government in identifying the individuals responsible for criminal conduct, regardless of the level of seniority.

Particularly in the context of internal investigations in the UK, the issue of what is and is not privileged has become challenging.
– Judith Seddon

"The Yates memo was seen as a reaction to the widespread criticism that individual executives largely escaped prosecution in cases related to the financial crisis," he said.

Now, in a sense, companies are charged with helping U.S. regulators make a case against their employees.

"If a corporation wants cooperation credit in an investigation, it must provide all relevant information about individuals involved in the alleged behavior," Morvillo said. And that doesn't mean simply responding to DOJ requests. "They also must

be proactive," he said.

Most companies do want cooperation credit, because they "want these cases to go away as quickly as possible," Morvillo said.

Of course, one major consequence of this shift, Morvillo added, is that "it pits companies against their own employees."

However, a clearly unintended consequence – now that executives know evidence and names will likely be turned over as companies try to cooperate – is that "individuals and executives are getting lawyers

Sarah Jones

more quickly," Morvillo noted. And the upshot of that, he said, is less information being shared and slower investigations.

Clifford Chance's Seddon is dealing with a different scenario across the Atlantic. Prior to Clifford Chance, she was a partner in a criminal law practice and is currently working on some of the SFO's – the UK's version of the DOJ – biggest and most high-profile investigations.

Seddon said that, particularly in the context of internal investigations in the UK, the issue of what is and is not privileged has become challenging. Companies there find themselves in a catch-22 situation, particularly given the recent UK decision on litigation privilege (similar to the work-product doctrine in the U.S.) in the context of criminal investigations – according to that decision, in order to claim litigation privilege where a criminal investigation is underway, the company has to believe that a prosecution will likely follow – in other words, the company has to believe that there is some truth in the allegations under investigation before it can claim litigation privilege. If an assertion to privilege over lawyer-created documents is challenged in this context, the company is required to provide evidence proving that it believed that there was truth in the allegations, and believed that a prosecution was likely to follow. In doing so, they may have to reveal the very documents that the privilege is designed to protect, and therefore help the prosecuting authorities build a case against them.

"Unless you can provide evidence you think the allegations are true, you can't claim privilege," Seddon said. "There are considerable differences in privilege between the UK, the U.S. and the EU and, in the EU, between in-house and outside counsel. If you can't claim privilege in one jurisdiction (but you can in another) and you have a cross-border investigation, you have to consider how to deal with this."

Seddon added that, in reality, a company knows at the outset of an investigation that it will likely be required to hand over documents that it may regard as privileged (in particular interview memoranda) if it wants to be perceived as cooperating, and the solution generally has been to do so on a limited waiver basis.

This prompted one of the dinner guests to ask if, when doing an internal investigation into potential wrongdoing, a company should assume that everything it produces in the investigation will have to be turned over to regulators. Seddon's answer was quick and unequivocal: "Yes."

Considering the potential downsides, another guest asked how a company should decide whether to

One major consequence of a shift in the DOJ's requirements for corporate cooperation credit is that it pits companies against their own employees.
– Christopher Morvillo

cooperate or not. "This becomes a very fact-specific decision," said DiBari. "You need to think about the overall end game strategy in each jurisdiction in which you have potential exposure – regulatory, criminal and civil exposure – weigh those risks and make an informed calculated judgment on what risk to take."

One chief legal officer asked if there was any upside in approaching the local prosecutor to establish a relationship that would smooth the way should issues arise down the road. To that Morvillo responded: "I was a local prosecutor for 6 years, and nobody ever came in and did that." That said, keeping an open and cooperative relationship with regulators and prosecutors can help avoid problems, but will be unlikely to soften the blow if serious criminal conduct occurs.

Another guest, whose company operates globally, brought up the difficulty of having to deal with what he called the "crime of the city," and talked about the concern of stumbling into an FCPA violation and not realizing it. For example, would the gift of a case of Johnnie Walker or a plane ticket or treating a local official to an expensive dinner constitute an FCPA violation? There, Morvillo said the question is whether it's a one-time occurrence or part of a systemic problem. He advised to "have a tidy file" and not to automatically self-disclose to regulators if the incident is really small and the company has taken steps to remediate and shore up compliance in the area.

Companies actually have some leeway dealing with potential violations thanks to an FCPA pilot program. The program, which the DOJ launched in April 2016 and was extended this past March, encourages companies to self-report FCPA-related violations by rewarding them with the possibility of receiving reduced fines and penalties – or avoiding them altogether – depending on how much the DOJ believes they cooperate.

The program has "been very successful," Morvillo said. In most circumstances, "companies will be inclined to self-disclose," he said. But that does not mean that every transgression warrants a call to the DOJ. "Materiality has a role. If we have not self-reported and the DOJ comes knocking on the door, we better have a good story to tell about why there was no disclosure and what steps we took to address the issues."

The overall message was clear: Make an informed decision on disclosures, and one key issue will be the need to then be prepared to prosecute your own employees. If you do not disclose, keep detailed records of the investigative and remedial steps taken, and be prepared to cooperate with regulators at the first sign that something might be amiss so that the issue doesn't become an even bigger problem. It should be standard in a company's operations.

"Privilege shouldn't become an obstacle to running your business," Seddon said.