Five "Must Do's" When the Government Knocks: Responding Effectively to Government Investigations

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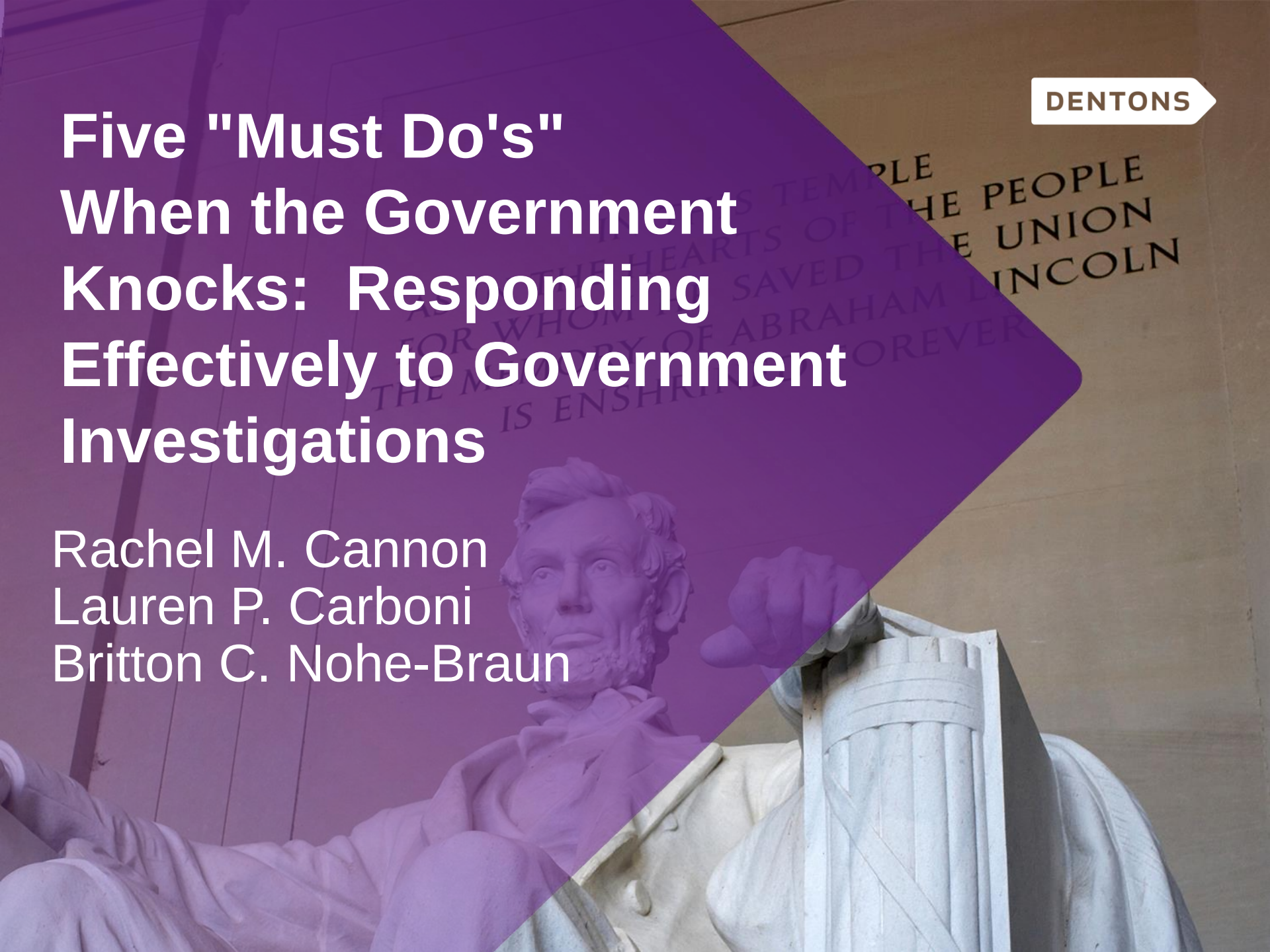


Rule #1
Don't Talk

- Be polite
  - Find out what agents are looking for, if you can; i.e., get as many details as possible
  - But do not ever sit down for an interview, or give out any information
  - You are not being rude, and government agents are expecting you to put them off; don't be intimidated by their insistence for an interview, or any suggestion that you are inconveniencing them.
  - You will want to buy as much time as possible so you can speak with outside counsel

Rule #1
Don't Talk (cont.)

- What will happen if you do talk?
  - Whatever you say will be used against you and/or your employer
  - If you end up providing inaccurate information, even by mistake, you face the possibility of federal charges (18 U.S.C. § 1001, lying to a federal agent)
  - The government agent will write up whatever you say in a report, and if you end up having to change what you told him/her down the road, even because of mistake, your initial statements will be used against you during your cross-examination at trial
- Bottom line: nothing good comes from talking to government agents without first speaking with a lawyer

Rule #1
Don't Talk

- Billions - Bill Stearns Arrested - Lawyer! - YouTube
  ▶ 0:27
  - https://www.youtube.com/watch?v=b8S4isIxo2w
  - "*Dollar*" *Bill* Stearns gets arrested and immediately begins calling for a lawyer.

Rule #2
Get Help

- If a government agent shows up at your door asking for an interview or bringing a subpoena or investigative demand, do not handle the situation yourself. Involve outside counsel immediately.
- Why? Because you can get indicted if the company's response is deficient
  - Between 2004 and 2009, more than 50 indictments or enforcement actions were brought against in-house counsel
  - Happy ending: Associate GC was ultimately acquitted
  - Case highlights the perils of having in-house counsel or other company personnel conduct an internal investigation and serve on the front-lines opposite government regulators

Indicted—Not Once, But Twice! Former GlaxoSmithKline In-House Counsel, Lauren Stevens, Tells Her Harrowing Story And Hard Lessons Learned From Being Indicted, National Law Review, Sept. 20, 2013, available at http://blogs.wsj.com/law/2012/10/01/former-glaxo-vp-the-criminalization-of-the-practice-of-law-is-here/

Rule #2
Get Help (cont.)

- GC of ICN Pharmaceuticals charged with participating in the drafting of a false and misleading press release about the significance of a "not approvable" letter form the FDA
- SEC commented that Watt, "who lacked technical and regulatory experience concerning FDA procedures and policies, did not consult regulatory counsel concerning the significance of the not approvable letter, or review the press release with regulatory counsel"
- SEC concluded not that Watt knew press release was false, but that he "should have known"

In re Watt, Order Instituting Proceedings, Exchange Act Release No. 46,899, Nov. 25, 2002

Rule #2
Get Help (cont.)

- In-house teams make easy scapegoats
  - Yahoo "said that it is also cooperating with federal, state and foreign government officials and agencies seeking information about the incidents, including the Securities and Exchange Commission, the Federal Trade Commission, the United States attorney's office for the Southern District of New York and two state attorneys general."
  - "Mr. Bell, a longtime lawyer at Yahoo, appears to be taking the blame for the company's security failures. Yahoo said he resigned on Wednesday and would receive no payments in connection with his departure. The company's chief information security officer at the time of the 2014 breach, Alex Stamos, left for Facebook in 2015 after repeated battles with Ms. Mayer over security priorities."

Yahoo's Top Lawyer Resigns and C.E.O. Marissa Mayer Loses Bonus in Wake of Hack, Vindu Goel, New York Times, Mar. 1, 2017, available at https://www.nytimes.com/2017/03/01/technology/yahoo-hack-lawyer-resigns-ceo-bonus.html?_r=0

Rule #2
Get Help (cont.)

- During panel discussion on receiving corporate cooperation credit, DOJ's deputy assistant attorney general, SEC's deputy director of Enforcement, and Delaware's state prosecutor reported:
  - "Government regulators may disregard internal investigations that haven't included outside counsel when considering whether to give companies 'cooperation credit' in criminal and civil enforcement, federal prosecutors and regulators said … maintaining that internal investigations need to be thorough and credible to ward off serious punishment."
  - "[O]utside counsel can help convince the government of the integrity of more broad and serious internal investigations of alleged criminal or civil misconduct."
  - "[A]dding outside counsel can help get 'cooperation credit,' whether in a formal program or otherwise"

Michael Macagnone, "*Internal Probes Need Outside Counsel, Gov't Regulators Say,*" *Law360*, Apr. 28, 2016

Rule #2
Get Help (cont.)

- "The nature of the role of general counsel came up again at trial as Bio-Rad defended its termination of Wadler. The company argued that his incompetence had led him to misconstrue normal business practices as FCPA violations. One board member testified that when Wadler had raised FCPA concerns with the board, his initial reaction that Wadler had made a courageous move gave way to a belief that Wadler's suspicions actually stemmed from a misunderstanding of the FCPA. Others testified that Wadler wasn't a team player."
- "But … those lines of argument conflict with the commonly understood role of the general counsel: that of a generalist who is trained to spot issues and call in specialized experts when necessary and that of an attorney whose duty is to bring attention to legal risks even when management doesn't want to hear about them. Wagstaff says he understands that people inside Bio-Rad may have felt betrayed by Wadler because his loyalty was to the company, not the individuals."

GCs May Increasingly Blow the Whistle After Bio-Rad Verdict, Melissa Maleske, Law360, Feb. 9, 2017

Rule #3
Investigate

- Unless you need to be walled off for conflict-type reasons, you and outside counsel should work together to plan and coordinate the internal investigation
- Any investigative plan will undoubtedly involve
  - Document preservation, collection, and review
  - Witness interviews
  - Analysis of evidence gathered
  - Internal reporting
  - Remediation
  - If appropriate, external reporting, including reporting to the GSA Suspension & Disbarment Official (SDO), SEC, DOJ, or other government entities

Rule #4
Preserve and Collect

- Make sure all relevant documents are preserved
- Strongly consider hiring outside technology company to preserve all existing electronic evidence, as well as on a going-forward basis
- Instruct all employees not to delete/destroy emails, documents, voice mails, etc.
- Make sure to preserve relevant evidence located on personal devices: personal cell phones (text messages), personal email accounts, papers/documents stored at home, etc.

Failure to do so can lead to obstruction of justice charges!

Rule #4
Preserve and Collect (cont.)

- Have employees sign agreement when hired indicating they understand emails and texts sent/received over work email or phone accounts belong to the company
  - Ideally, have computer message remind them so every a.m. when booting up
  - Unless employee consents, cannot search personal email or phone accounts
- Work with outside counsel and technology company to upload preserved materials and search them
  - Volume can be an issue; if so, help counsel work to isolate pertinent:
    - Locations of evidence; i.e., email accounts, hard drives, cell phones for text messages
    - Custodians
    - Search terms

Rule #5
Interview Witnesses

- Pertinent documents/emails/texts will lead to individuals you want to interview
- When hiring company employees, condition their employment on cooperating with internal investigations (including participating in interviews)
- For company employees, must administer Upjohn Warnings ("corporate *Miranda* warnings"): warnings remind employee you (and/or outside counsel) are the company's lawyer, not the employee's lawyer; the interview is privileged, but the privilege belongs to the company, not the employee; the privilege can be waived by the company at any time and information can be disclosed to anyone, including government authorities
- Failure to administer can damage quality of evidence gathered and impair prosecution down the road
- Can also result in company's failure to receive cooperation credit from DOJ

Rule #5
Interview Witnesses (cont.)

- Generally interview in ascending order of importance, least important/culpable to most important/culpable, so can gather largest information set before conducting most critical interviews
- Interview should be attended by principal questioner and a prover/note-taker
  - Note-taker must thoroughly summarize the interview
  - No "off the record" comments permitted
- If you (in-house counsel) are not serving as the principal questioner, you probably should not attend the interview so you do not become a witness
  - Exception: if your presence will comfort the witness and/or help facilitate dialog and information flow
- Ask witness to keep interview confidential

Rule #5
Interview Witnesses (cont.)

- Promptly write summary report of the interview
- But carefully consider what to say!
  - Summarize all factual information witness provided
  - For in-house counsel, if possibility exists that interview report will be turned over to government investigators down the road, make sure to exclude attorney impressions/ strategic considerations etc.
  - Document those elsewhere

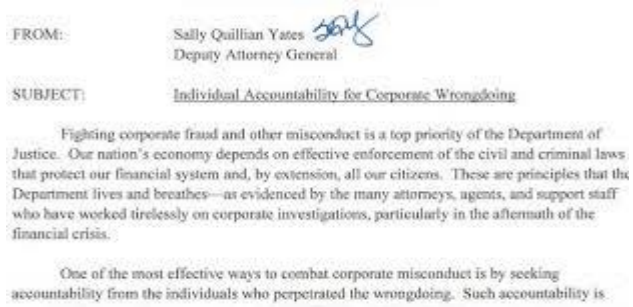
To Disclose or Not to Disclose?
That Is the Question!

- Is there a duty to disclose discovered wrongdoing; i.e., publicly traded company, or FAR 52.203-13, the Mandatory Disclosure Rule?
  - U.S. Supreme Court will soon address whether publicly traded companies have a duty to disclose investigations as part of their obligation to disclose "known trends and uncertainties."
- Will the government discover the misconduct and investigate anyway?
- Will someone with knowledge of the misconduct become a "whistleblower" in an attempt to profit financially?
- Is the company already on regulators' radar for past misconduct?
- Will disclosure subject officers and/or directors to lawsuits for breach of fiduciary duty or other causes of action?
- How bad will the fallout be from unfavorable press, including the failure to disclose?
- Need to consider the delay, or refusal to disclose, in light of Yates Memo and FAR 52.203-13

Suspension and Debarment Official

- Cases are referred to the SDO by government agencies (e.g., Inspector General's Office) and through mandatory or voluntary disclosures
  - Mandatory Disclosure Rule: FAR 52.203-13(b)(3)(i): requires contractors to disclose to the agency Office of the Inspector General (OIG) whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, there is credible evidence of a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the U.S. Code or a violation of the civil FCA (31 U.S.C. 3729-3733)
  - FAR 9.406-1(a)(2) (discusses voluntary disclosure of misconduct as a mitigating factor); FAR 9.406-3(d)(2)(ii) (debarring official can refer debarment case to another government official for findings of fact); FAR 9.407-4(d)(2)(ii) (debarring official can refer suspension case to another government official for findings of fact)
- Contractors may also make the results of an investigation available to SDO under FAR 9.406-1(a)(3)

The Yates Memo (Sept. 2015)



FROM: Sally Quillian Yates
Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is

- The 2015 Yates Memo declared that the DOJ will make prosecuting individual corporate wrongdoers a top priority
- DOJ will not be satisfied with charging a corporation alone
- Now, to be eligible for any cooperation credit, corporations must provide to DOJ all relevant facts about the individuals involved in corporate misconduct
  - Corporations cannot "decline to learn of such facts or to provide the Department with complete factual information about individual wrongdoers"
  - Once a corporation has provided all relevant facts with respect to individuals, DOJ will then assess the timeliness of the cooperation, the diligence, thoroughness and speed of the internal investigation, the proactive nature of the cooperation, etc., in determining whether to award cooperation credit
  - These considerations apply equally to corporations seeking to cooperate in civil matters, including FCA suits

How Does the Yates Memo Impact the Mandatory Disclosure Rule?

- Mandatory Disclosure Rule, FAR 52.203-13(b)(3)(i): requires contractors to disclose to the agency Office of the Inspector General (OIG) whenever, in connection with the award, performance, or closeout of a contract or any subcontract, there is credible evidence of a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the U.S. Code or a violation of the civil FCA (31 U.S.C. 3729-3733)
- In light of the Yates Memo, investigations of possible FCA violations will focus on individuals in addition to companies
- Draft any disclosures with the assumption that a DOJ attorney will be reviewing the disclosure
- Contractors should include information concerning individual misconduct in mandatory disclosures to enhance the contractor's ability to receive cooperation credit from DOJ

Are Privilege Waivers Now Mandatory?

- DOJ cannot ask for privileged information, and Yates has publicly said DOJ is only interested in "facts," not privileged confidences
- But in order to harvest out individual wrongdoers, in some situations a corporation may have to waive, or partially waive, privilege as to information about certain individuals who have committed wrongdoing; i.e., may have to turn over substance of once-privileged employee interviews with counsel where significant admissions or inconsistent statements were made
- Results in a series of considerations for the corporation
  - Does a company have to waive privilege to cooperate?
  - Does a company's privilege waiver have to be complete?
  - Can a corporation selectively decide to withhold or volunteer privileged materials?
  - Does selectively producing privileged materials result in a subject matter waiver by the corporation?
  - Will courts honor partial privilege waivers?

Questions?

DENTONS