Business Law Update

Winter 2018

Business Perspectives

International Corporate Practice – It's Business as Usual

By Frank D. Chaiken, Practice Group Leader,
Corporate Transactions & Securities

I am pleased to kick off 2018 with the winter edition of Thompson Hine's *Business Law Update*. It is a busy time in the Corporate practice for our firm, our clients, and anyone engaged in the work of financing and growing businesses.

You will note that this edition includes a guest column on crowdsource funding in Turkey, featuring a Turkish lawyer who is working on temporary assignment with our firm in the Washington, D.C. office. Thompson Hine maintains strong relationships with law firms in other parts of the world. Internships such as this help us to maintain those connections, which are essential to our strategy of providing worldwide legal advice to our clients.

For the first time in quite a while, many observers have noted a convergence to growth in diverse economies around the world. That is, of course, very good news, including for those of us who regularly advise clients on legal matters involved in cross-border transactions. We are seeing, and expecting, continued strength in demand for cross-border legal services, especially in our core M&A practice, but also in our Tax, International Trade, Intellectual Property, Real Estate, Business Restructuring & Bankruptcy practices and other areas with significant international components.

For many years now, international and cross-border activity has been growing in importance in the corporate transactions practice here in the United States. At this point it really is in the category of a core competency for corporate lawyers, and "business as usual" for our clients.

Recent News & Related Articles

- Ohio Supreme Court Reaffirms Punitive Damages May Not Be Awarded for a Breach of Contract
- DOL Sides with Circuit Courts, Adopts New Intern Test
- NLRB Chairman's Final Days Signal an End to More than His Term
- U.S. Department of Justice Provides New FCPA Voluntary Self-Disclosure Incentives

For more details on any of the topics covered in this *Business Law Update*, please contact the authors via the links at the end of each article or David R. Valz, editor-in-chief. For information on our Corporate Transactions & Securities practice, please contact Frank D. Chaiken, practice group leader.

Many U.S. companies, and not only major multinational corporations, but also small and mid-sized companies, have significant international operations. These can include:

- international supply chain arrangements
- direct exports
- local resale distributors and sales agents
- branch offices and subsidiaries in other countries
- internet sales and related information flows

International operations raise a variety of legal issues for companies in the areas of taxation, trade regulation and protection of intellectual property, and a host of compliance issues in areas such as data protection, employment law, products safety, environmental protection and other critical areas.

As a result, international M&A, an area once considered to be highly specialized, more and more is part of the mainstream of corporate transactions. This is not limited only to transactions involving the purchase or sale of companies outside the United States. With the globalization of business generally, even purchases and sales of U.S.-based businesses tend to involve major cross-border issues. These include due diligence in the substantive areas noted above, dealing with change-in-control effects under business licenses and contracts in other jurisdictions, and governmental review of transactions in areas such as antitrust, security, and other issues of national law. The latter may occur even where there may be no direct connection to the transaction in the form of assets or operations located in a given country.

For these reasons, as in this issue, from time to time in our newsletter we will highlight and address areas of international concern, which increasingly are top-of-mind issues with our clients.

We send our very best wishes to all of our readers for the new year.

Frank Chaiken leads the firm’s highly regarded Corporate Transactions & Securities practice, which comprises more than 100 professionals who represent clients of all sizes across virtually every industry. If you have questions or would like to share your thoughts, please contact Frank at 513.352.6550 or Frank.Chaiken@ThompsonHine.com.

Mergers & Acquisitions

Navigating the "Gray Zone": Stockholder Approval Requirements Under Section 271 of the Delaware General Corporate Law

By Branwen Buckley

Under Section 271 of the Delaware General Corporate Law, any sale of "all or substantially all" of the property and assets of a corporation requires stockholder approval. Although experienced practitioners often advise clients that any disposition of assets representing 60 percent of more of a corporation's asset value may trigger stockholder consent requirements, there is no bright-line rule as to what will be considered a sale of "all or substantially all" of a corporation's property and assets under Section 271.

Rather, Delaware courts apply a two-pronged analysis to any such determination: (i) a quantitative analysis, focused on whether the assets in question are vital to the operation of the corporation; and (ii) a qualitative analysis, focused on whether the transaction is out of the ordinary and substantially affects the existence and purpose of the corporation. Both prongs are analyzed together to determine whether the overall circumstances indicate that the corporation has disposed of substantially all of its assets.

For the quantitative analysis, the courts consider a range of measures of financial performance and value of the assets to be sold relative to remaining assets of the corporation, including book value, fair market value, revenue and earnings.

With respect to the qualitative analysis, the courts consider such factors as the nature of the corporation's business, including any history of acquisition and disposition of independent branches of its business, whether the assets were owned at the time that the corporation went public (if applicable) and whether the disposition would result in a qualitative change to the economic value of the stockholders' investment.

In practice, the application of this analysis by the Delaware courts is contextual and fairly subjective. Where the proposed disposition would (i) occur in conjunction with a significant departure from the corporation's historically successful line of business and (ii) involve assets that generated significant historical profits and a steadily increasing percentage of operating income relative to the business to be retained, the Chancery Court found that a sale of as little of 51 percent of the assets of a corporation required stockholder approval. However, the Chancery Court has also found that the sale of more than 80 percent of a corporation's assets did not involve the sale of substantially all of its assets, where the corporation in question was in the business of holding and selling investment securities and donating the profits. Further, the sale of prestige or trophy assets, even where consisting of the most valuable and important assets of a corporation, may not amount to a sale of substantially all of the assets of such corporation, where the remaining assets demonstrate significant independent viability and the economic quality of the stockholders' investment will remain the same.

To the extent that the corporation in question has engaged in other recent dispositions, advisers should also consider the possibility that a series of transactions may be aggregated for the purposes of determining whether a sale of substantially all of the assets of a corporation has occurred. While Delaware courts have not directly addressed such an aggregation of transactions in the context of Section 271, they have done so in a variety of decisions related to interpretation of the sale of "substantially all" of the assets of a corporation in the context of contractual disputes. In these cases, courts have analyzed the facts of each transaction using the "step-transaction" doctrine, which will apply if the component transactions meet one of three tests: (i) the end-result test, which will aggregate a series of transactions "if it appears that a series of separate transactions were prearranged parts of what was a single transaction, cast from the outset to achieve the ultimate results"; (ii) the interdependence test, in which separate transactions will be treated as one if "the steps are so interdependent that the legal relations created by one transaction would have been fruitless without a completion of the series"; and (iii) the binding-commitment test, "under which a series of transactions are combined only if, at the time the first step in entered into, there was a binding commitment to undertake the later steps."

Given the above, legal advisers and their clients should be aware that any substantial disposition of assets by a corporation merits careful analysis for the purposes of evaluating whether stockholder consent will be required.

Even with such analysis, practitioners may often find themselves without a definitive answer and will instead need to help their client navigate the sometimes murky "gray area" of a court's likely interpretation of Section 271 in light of the existing case law and the specific facts presented by the proposed transaction(s).

Please contact Branwen Buckley with any questions.

Upcoming Events

One Year Later: International Trade Policy in the Trump Administration

Webinar

Tuesday, February 6

2 - 3:15 p.m.

Please join us for a discussion on the state of U.S. international trade policy since the Trump administration took office and introduced its "America First" agenda. Our webinar will focus on changes that have occurred since President Trump withdrew the United States from the Trans-Pacific Partnership early in his presidency and announced that his administration would reject and renegotiate certain trade deals, crack down on countries that violate trade agreements and use every tool at the federal government's disposal to end these abuses. We will provide updates on the status of various free trade agreements, trade enforcement activities, the economic sanctions regime and other executive branch trade policy activities over the past year.

Please register by **February 5**. Visit ThompsonHine.com/events for more information or to register.

Breakfast Seminar With DRMA

International Trade & Intellectual Property – What You Need to Know

Dayton

Thursday, March 8

7:30 - 9 a.m.

Presented by Thompson Hine LLP and the Dayton Region Manufacturers Association

International trade and intellectual property issues are hot in Washington. As a candidate, President Trump said that he would protect U.S. industries, and his administration has taken actions to combat theft of U.S. intellectual property and fight unfairly traded steel and aluminum. Please join us for a robust conversation on the following topics: International Trade: What's Happening in Washington; Overview of Trade Law Regulations and Compliance; Trade Remedy Laws/Trade Remedy Cases as Investments in Increasing Profits; Patent, Trademark and Trade Secret Protection in the United States and Abroad; and Maintaining a Healthy Global Intellectual Property Portfolio.

Please register online by **March 6**. Visit ThompsonHine.com/events for more information or to register.

Spin-Offs: Key Considerations

By Faith L. Charles, James C. Koenig, Thomas J. Callahan, Jennifer A. Val and Kaoru C. Suzuki

Many public corporations utilize traditional M&A transactions and strategic partnerships to streamline operations and maximize stockholder value. Sometimes, however, these transactions are not desirable for various reasons, such as not finding the right acquisition target or strategic partner, not being able to agree on the terms of the transaction, or adverse tax consequences in connection with the transaction structure. In these instances, a spin-off transaction can be a viable alternative.

A spin-off transaction typically involves the distribution by a parent company (Parent) of all of the stock of its subsidiary (Subsidiary) to Parent's shareholders. After the transaction, Subsidiary would be owned by the same shareholders that own Parent, but would be an independent corporation, separate from Parent. Corporations pursue spin-off transactions for various specific reasons; however, the consistent theme across all spin-offs is a goal to maximize value for the shareholders of both the Parent and Subsidiary.

A successful spin-off can benefit both the original corporation and the spun-off corporation, and ultimately maximize stockholder value, by allowing them to focus on their respective principal businesses and allowing them to raise capital individually, thereby targeting certain investors that may not have invested in the prior consolidated entity.

This summary provides an overview of the principal legal issues and general timeline of spin-off transactions by publicly traded corporations.

Principal Legal Issues

- **Director Responsibilities**. Careful analysis should be conducted by Parent's board of directors and its advisers to analyze the business reasons for the spin-off transaction to fulfill its fiduciary duties.

- **Engagement of Third Parties**. Because of the complexities of a spin-off, it is often beneficial to engage a financial adviser. In addition, outside auditors for Subsidiary will need to be engaged. Depending on the nature of the business and structure of the transaction, other third party experts may be required.

- **Capital Structure**. Tax considerations are often the driving force behind decisions about capital structure. In addition, a solvency opinion may be required. Consideration should be given to post-separation liquidity of Parent and Subsidiary.

- **Asset Allocation and Transition Services**. Parent will need to determine how to allocate assets and liabilities between Parent and Subsidiary, and whether any contractual arrangements or licenses will be required. Similarly, any intellectual property that Subsidiary will use post-spin-off will need to be assigned to such Subsidiary. A transition services agreement may set forth the responsibilities of Parent to provide services to Subsidiary for a period after the separation. Care should be given to evaluating which services will be provided, as well as the pricing, time frame and tax consequences.

- **Tax Issues**. In order for a spin-off to qualify as tax-free to both Parent and its shareholders for U.S. federal income tax purposes, it must qualify under Section 355 of the Internal Revenue Code (IRC). Section 355 aims to provide tax-free treatment only to transactions that separate two operating businesses and not to transactions that resemble either distributions of cash or other liquid assets or corporate-level sales.

Attempting to summarize the numerous requirements of a tax-free spin-off runs the risk of not capturing the breadth of the requirements nor the technical nature of many of them. Nonetheless the following is a list of some of the major requirements:

- Control—Parent must own stock possessing at least 80 percent of the voting power and at least

80 percent of the shares of any non-voting class of stock.

- Active Trade or Business—Immediately after the spin-off, each of Parent and Subsidiary must be engaged in an "active trade or business" that was actively conducted throughout the five-year period before the spin-off.
- Business Purpose—There must a real and substantial non-tax purpose germane to the business of Parent, Subsidiary or both that is the motivation, in whole or substantial part, for the spin-off.
- Device—The spin-off must not be carried out as a device to distribute earnings and profits.

Even if all of the requirements of a tax-free spin-off are met, transfers of control of either Parent or Subsidiary after the spin-off can cause the spin-off to be taxable to Parent, but not to Parent's shareholders. Parent and Subsidiary should work with their tax advisers to structure the transaction to be in compliance with Section 355.

- **Contract Review**. Contracts with third parties, such as vendors, suppliers and customers, should be reviewed to determine whether they should be assigned to Subsidiary or if new agreements will need to be entered into. In addition, existing financing arrangements should be reviewed to determine whether any of the terms need to be renegotiated.
- **Employees and Compensation**. Parent must determine which employees will remain with Parent and which will be transitioned to the spun-off entity. Parent must also arrange for the transition of any benefits (including stock option plans, health plans, retirement plans, etc.) provided to employees that will work for Subsidiary. In addition, existing employment agreements should be reviewed, particularly to identify any change-of-control provisions that might be triggered by a spin-off.
  - **Corporate Governance**. As a separate entity, Subsidiary will need to have a separate board of directors from the Parent. Consideration should be given to potential director independence issues and any potential overlaps between Parent and Subsidiary's post-spin-off board members.
  - **SEC Filings**. A spin-off transaction typically requires the following filings with the United States Securities and Exchange Commission (SEC):
    - Form 10 registration statement and related information statement;
    - Form S-8 registration statement to register the issuance of equity under Subsidiary's employee benefit plan;
    - Section 16 and Section 13 filings for directors, officers and significant shareholders; and
    - Forms 8-K, in connection with announcing the transaction, the closing of the transaction and other material events.
- **Ongoing SEC Reporting and Stock Exchange Compliance**. Subsequent to the spin-off, Subsidiary will be required to comply with the reporting requirements under the Securities Exchange Act of 1934, as amended. If stock exchange listing is desired, a listing application with the New York Stock Exchange, Nasdaq Stock Market or other desired stock exchange would need to be completed.
- **Communications Plans**. Communications with key audiences should be considered to maintain relationships and comply with SEC reporting obligations. Audiences may include investors, suppliers, employees, lenders, regulators, and licensors or sub-licensors.

Illustrative Transaction Timeline

- **Month One through Month Three**. Generally, during this period, the following actions should be taken:
  - Assess the historical performance of both companies;

- Evaluate the post-separation financial viability and corporate governance structures of both Parent and Subsidiary;
- Evaluate contracts with outside parties and consider the specific property, employees, contracts, intellectual property and other assets that would be spun off with Subsidiary;
- Retain independent financial advisers and auditors for Subsidiary;
- Obtain solvency opinions from an appraisal firm in order to avoid fraudulent conveyance concerns;
- Work with tax advisers to analyze requirements under Section 355 of the IRC, and decide whether to pursue an Internal Revenue Service private letter ruling, if available, and if so, prepare and file a private letter ruling request;
- Prepare communications plans and begin communications;
- Draft and file a Form 8-K, announcing intention to conduct a spin-off;
- Prepare Subsidiary corporate governance documents; and
- Begin drafting Form 10 and information statement.

- **Month Four through Month Five**. The board of directors' focus during this period should be on the preparation of the necessary documents to effectuate the spin-off and execute asset transfers between Parent and Subsidiary. Typically, the documentation for a spin-off includes:
  - Separation and distribution agreement;
  - Transition services agreement;
  - Tax matters agreement;
  - Employment and benefits agreement;
  - Management services agreement;
  - Intellectual property agreements;
  - Form 10 and information statement;
  - Subsidiary's amended and restated certificate of incorporation;
  - Subsidiary's amended and restated bylaws;
  - Subsidiary's committee charters; and
  - Subsidiary's company policies.
- **Month Six through Month Seven**. During the final stages of the spin-off process, the following actions should be taken:
  - Finalize the spin-off agreements;
  - Finalize Subsidiary corporate governance documents;
  - Finalize the Form 10 and information statement;
  - Comply with technical requirements for listing Subsidiary's stock on a stock exchange;
  - Prepare road show materials if necessary or desirable;
  - Continue communications plans;
  - Obtain IRS private letter ruling, if applicable;
  - Execute completed spin-off agreements; and
  - Distribute the Subsidiary's stock to shareholders to effect the spin-off.

Conclusion

A spin-off transaction involves complex tax, securities and corporate governance issues. While this article identifies several key issues, it does not address all of the issues that would need to be addressed. A spin-off transaction involves significant planning, analysis and resources to complete and should be pursued only after extensive consultation with legal, tax, financial and business advisers.

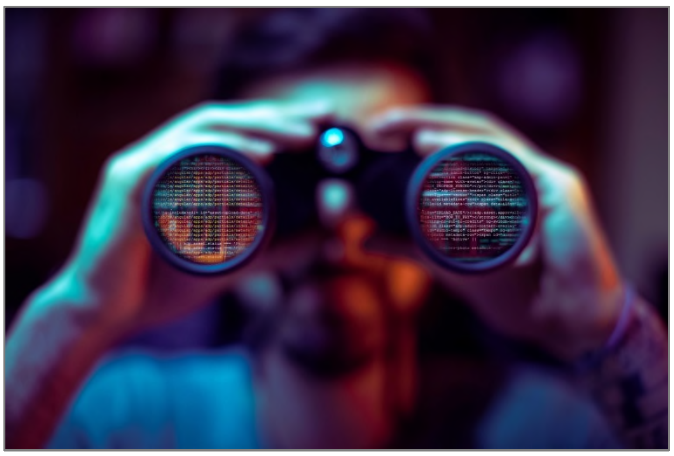
For additional information, please contact Faith Charles, Jim Koenig, Tom Callahan, Jennifer Val or Kaoru Suzuki.

Privacy & Cybersecurity

The Uber Hack, State Enforcement and Strategic Planning

By Steven G. Stransky

Much has been written about the consequences facing Uber Technologies Inc. for its cover-up of a 2016 data breach that resulted in hackers accessing the personal information of 57 million Uber users. Uber's legal troubles, however, have expanded into a new phase involving state and local law enforcement. Multiple states (e.g., Florida, Massachusetts, Illinois, Connecticut, New York, Missouri) have launched investigations into the 2016 data breach and the attorney general for the state of Washington has even filed a civil suit against Uber for its failure to notify customers of the incident. If this trend continues, Uber may find itself entangled in a multitude of state civil enforcement proceedings, each subject to a unique set of local rules and procedures.



For example, the Ohio Revised Code requires companies conducting business in Ohio to notify Ohio residents if a data breach "causes or reasonably is believed will cause a material risk of identity theft or other fraud to the resident." The Ohio law defines "personal information" broadly to mean an individual's name in conjunction with certain other unencrypted data, such as a Social Security number, a bank card number and access code, and (as is germane to the Uber hack) a driver's license number. The law requires, with certain exceptions, businesses to notify Ohio residents "in the most expedient time possible but not later than forty-five days" following the breach. Similar to the laws of Washington and several other states, the Ohio attorney general is delegated the authority to investigate any business that fails to comply with the law.

The earlier people discover that their private information has been compromised, the earlier they can take steps to mitigate the risk of identity theft (e.g., notify their financial institutions, change passwords, review purchase records). Accordingly, in order to avoid any delays in this risk mitigation process, Ohio's data breach notification law is crafted to deter businesses from covering up the unauthorized disclosure of personal information. Specifically, after the initiation of a civil action by the attorney general, the law permits Ohio courts to impose a civil penalty of up to $1,000 per day for each day the business fails to comply with the law; after 60 days of noncompliance, the penalty may be increased to $5,000 per day; and, after 90 days of noncompliance, the penalty may be increased to $10,000 per day.

The law creates a strong incentive for businesses to develop and maintain effective internal policies and procedures related to cybersecurity, including data breach response plans and strategies. With the addition of a robust cybersecurity strategy, your company will be better prepared to protect and safeguard your systems; detect and respond to an unauthorized network intrusion; and restore your capabilities and services to their normal operating level.

With any questions, please contact Steve Stransky.

Business Restructuring

Does Conversion From S Corp to C Corp Invite Creditor Risks?

By Jon S. Hawkins

The attractive feature of S corporation (S corp) status is the avoidance of "double taxation" inherent in the alternative C corporation (C corp) status, whereby the corporation pays income tax, and shareholders are taxed on their capital gains. S corps, by contrast, may elect to "pass through" the income and loss to their shareholders, such that a single level of tax is paid.

However, there are circumstances in which conversion to a C corp is required or beneficial to the shareholders, like when the S corp becomes insolvent or undergoes a bankruptcy reorganization. In such circumstances, while C corp status may benefit the shareholders, S corp status may be beneficial to the corporation's creditors because as an S corp the corporation itself does not bear the tax burden, leaving more assets available to satisfy debt.

Thus, creditors of bankrupt S corps have argued that when the shareholders voluntarily convert the corporation to a C corp, the shareholders should be liable to the corporation for the fraudulent transfer of the corporation's right to be treated as an S corp. Claims like this have been successful in lower courts within the 6th, 8th and 9th Circuit Courts of Appeal. These courts frequently analogize tax status to other rights, such as the right to carry forward net operating losses, which courts have consistently considered property of the corporation. Beyond the technical reasoning, the basic thrust of these decisions is that the revocation of S corp status creates new liabilities for the corporation, harming its existing creditor body.

The most recent decision on this subject rejected these types of creditor claims. Following 2013 precedent from the 3rd Circuit, the Bankruptcy Court for the Eastern District of Virginia (within the 4th Circuit), in *In re Health Diagnostic Laboratories, Inc.*, ruled in favor of the shareholder and against a liquidating trustee standing in the shoes of the corporation's creditors. In this case, the liquidating trustee sought to avoid the revocation of the bankrupt corporation's S corp status that the shareholder elected through a notice of termination sent to the IRS. The effect of the termination resulted in substantial tax liability for the bankrupt

corporation (to the obvious detriment of the corporation's creditors) and freed the shareholder of a commensurate liability. The bankruptcy court held that S corp status is not property of the corporation or an interest in property that the corporation itself holds within the meaning of the Bankruptcy Code. Rather, the status is controlled exclusively by the shareholders and was intended by Congress to be for their benefit. While S corp status may be valuable to the corporation, this fact is irrelevant to the property determination because, the court reasoned, the corporation cannot claim an interest in such value when the shareholders hold the power to legally revoke it. In other words, the rights given to shareholders to make or revoke an S corp election under the Internal Revenue Code neuter the Bankruptcy Code's expansive meaning of property of the bankrupt's estate insofar as such election is concerned, despite the imposition of tax liability that may result from S corp status revocation.

As noted above, however, the ability of a creditor to seek judicial avoidance of a corporation's conversion from S corp to C corp may depend on the jurisdiction. Before making such a conversion, shareholders should consider the extent to which creditor claims could arise as a result.

With any questions, please contact Jon Hawkins.

White Collar Crime

What to Do When the FBI Comes Knocking

By Sarah M. Hall

For many in-house counsel or corporate executives at small or startup companies, an active criminal investigation of their company will be their first time dealing with the criminal justice system. This can be a confusing and intimidating experience. Below is a basic guide to assist in-house counsel and corporate leadership in determining two important threshold questions: (1) Is my company under criminal investigation? and if so, (2) What should I do?

Is the Company Under Investigation?

It is important to recognize that there are a range of possible warning signs that your company is under criminal investigation – some are obvious, and some are not. Below, such signs are listed in order of the most obvious to the most subtle:

1. An employee or former employee receives a "target letter" related to the company's business. A target letter is a letter from a federal prosecutor advising the recipient that he or she is the "target" of a grand jury investigation. Such a letter informs the target that the government intends to charge him or her with a crime, but before charging, the person has the option to voluntarily testify before the grand jury to tell his or her "side of the story." Assuming that the subject matter of the investigation (which is typically generically described in the target letter) relates to company business, this is a strong indication that the company is under investigation too.

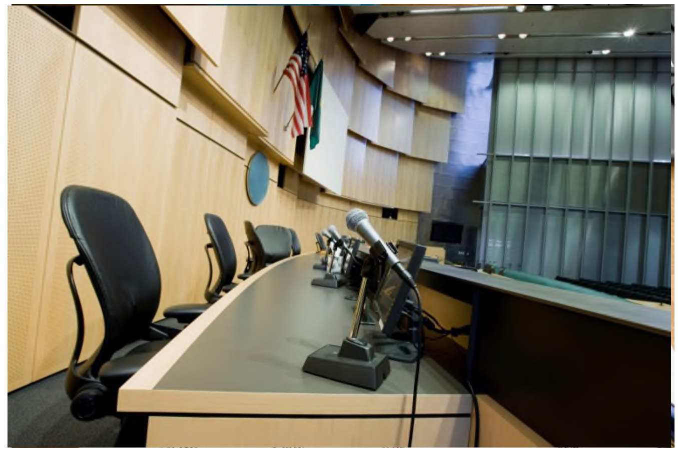
2. Law enforcement executes a search warrant at your company, or at a facility or home connected to your employee, former employee or business partner. It is an obvious sign that your company is within the scope of a criminal investigation if agents execute a search warrant at your company's offices or facilities. Less obvious is when search warrants are executed at homes or other locations connected to your employees, former employees or business partners. If you learn of a search at a location other than your company's offices, you may be able to determine if the investigation implicates your company by reading the search warrant, which agents are required to leave at the location of the search.

3. A law enforcement agent attempts to speak to your employees, former employees or business partners about your company. This is a likely sign that the company is under investigation. As in-house counsel or a member of company leadership, you may learn that your current employees were approached by agents (assuming the employees do not accede to a common request by agents to keep the interview confidential). However, you may or may not learn that your former employees or business partners were approached. A "knock and talk," or "field interview," is a common investigative technique used by federal law enforcement. Typically, agents will not approach individuals at your corporate office, but rather at their homes or other locations early in the morning (before work) or in the evening (after work) to preserve the element of surprise in hopes the individuals will talk to them. Agents must show their official badges or credentials and will often provide their business cards.

Many federal agents, including agents of a federal department's office of inspector general (such as the U.S. Department of Health and Human Services Office of Inspector General) investigate both civil and criminal violations. It may not be apparent if the agent is investigating a criminal or civil violation. You, as in-house counsel or a corporate executive, out of an abundance of caution, should assume the investigation is, or will become, criminal. Investigations that start out civil in nature can quickly "go criminal," and evidence obtained in civil investigations can readily be shared with criminal agents and prosecutors.

4. Your company receives a grand jury subpoena for documents related to the company's business. Depending on the nature of the documents requested, this could be a clear sign that the company is within the scope of the investigation. Federal Rule of Criminal Procedure 17 governs the issuance of federal grand jury subpoenas, and also provides for contempt penalties for non-compliance. A federal grand jury subpoena can be served at any place within the United States, so even if your company is located in, say, Cleveland, a federal grand jury subpoena can be validly issued from anywhere else in the country. The receipt of an inspector general (IG) subpoena could indicate either a criminal or civil investigation, but as noted above, the most prudent course is to assume the investigation is, or will become, criminal. Likewise, an SEC subpoena, HIPAA subpoena or Civil Investigative Demand (CID), while civil on its face, could later go criminal, and the documents you produce in response to it could be turned over to criminal investigators.

5. A current employee, former employee or business partner receives a grand jury subpoena related to the company's business. Again, as in-house counsel or a corporate executive, you are more likely to learn that your current employees (as opposed to former employees or business partners) have received a subpoena. If the subpoena requests documents, you will likely be able to determine if such documents relate to the internal operations of your company, or if your company is more likely a witness which merely possesses documents relating to a third party, such as a customer or business partner. Conversely, if the subpoena calls for testimony only (but not for documents), it likely will be unclear if your company is under investigation. Sometimes prosecutors will issue a subpoena to a current employee relating to alleged misconduct at his or her prior job. While technically outside the scope of the employee's work for your company, such a subpoena should be taken seriously, especially if the employee performs the same type of work for your company



as he or she did for a prior employer. Note, however, that if a financial institution receives a subpoena for your company's bank records, the institution ordinarily will be subject to a non-disclosure order and, accordingly, will not be allowed to advise you of the subpoena.

6. The company or an employee receives a legal request notice from an internet service provider. Prosecutors can issue a subpoena or serve a search warrant on internet service providers (ISPs), such as Google and Microsoft, for email subscriber information (i.e., the name, address and contact information used to set up a web-based email account) as well as content (e.g., emails, photos, address books, etc.). The policy of many ISPs is to notify their customers that the ISP has been served with legal process for the customer's data. However, if the prosecutor seeks a non-disclosure order, you will not learn that your company's or employee's emails have been collected. But if the prosecutor does not seek such an order, or if the order expires, many ISPs will notify the customer. Although the notifications may not specifically tell you the investigation is criminal, out of an abundance of caution, you should assume that it is.

The Company Is Under Investigation – What Should I Do Now?

Based on the above, you now know, or have reason to believe, the company is under criminal investigation. Here's what to do next:

1. Contact counsel before you do anything else. The most important step a company can take when it concludes or strongly suspects that its corporate activities are within the scope of a criminal investigation is to quickly contact counsel. The first few hours and days are critical. Compare this situation to a heart attack – your patient is in critical condition and what you do (or don't do) right away could determine whether the company lives or dies. This is a "bet the company" moment. Seek help now, and do it before you respond to any law enforcement inquiries.

2. Retain counsel who regularly practice corporate/white collar criminal defense. Especially within small or startup companies, there may be an inclination to turn to corporate attorneys, whether in-house or at outside firms, that the company has previously retained to handle transactional, regulatory or civil litigation matters. While contacting such trusted counsel as a first step is an acceptable approach, the stakes are too high to try to use such counsel as your criminal defense counsel. Similarly, trying to handle a criminal investigation in-house with attorneys who have no criminal law background frequently leads to missteps that cannot be undone, particularly in light of potential conflicts or privilege concerns, or if in-house counsel may be a target or a subject of the investigation. As a non-criminal practitioner, you may not think the criminal investigation is active or threatening, but think of a criminal investigation like an iceberg. You will only see a small portion of what law enforcement is doing; the rest of the investigation will be conducted without notice to you. Before you know it, the company ship could smash into the iceberg and sink like the Titanic. You want your client – the company – to be counseled about what could be happening without your knowledge, such as employees wearing wires, informants recording phone calls and agents combing through the company's bank records or preparing to arrest top executives. Experienced criminal defense counsel can advise you of many of these likely unknowns, the risks they pose and what can be done in response.

3. Retain all documents and other materials. Experienced criminal defense counsel will advise you on this important topic, but in the hours and days leading up to the company retaining outside criminal defense counsel, ensure that the company and your employees retain (and do not destroy) documents and other materials that the government may regard as evidence. If your company has an auto-delete policy for emails and other electronically stored information, or a regular document shredding schedule, the safest course is to work with your IT staff and office manager to suspend such policies (thereby preserving such materials). Criminal penalties for obstruction of justice are severe and once evidence is destroyed, the bell cannot be unrung.

Conclusion

As in-house counsel or corporate leadership, the realization that your company is under criminal investigation is a significant and sobering moment, both in your career and in the lifespan of the company. Taking the right steps immediately upon learning – or suspecting – a criminal investigation is underway can make all the difference between a successful defense strategy where risks are mitigated and managed, and handing the government a case against your client, its employees and executives on a silver platter.

Please contact Sarah Hall with any questions.

Crowdfunding

The Road to Crowdfunding in Turkey

By Kerem Bilge, L.L.M.*

Crowdfunding platforms have been active in Turkey since 2010. These platforms mostly were donation- or reward-based systems, since it was technically not possible to work with an investment-based crowdfunding system under the capital markets regulations then in place. Under the previous legislation, companies could not raise capital from the public without registration.

In December 2016, a draft bill on equity crowdfunding was submitted to the parliament, which enacted it into law on November 28, 2017. When the new bill is fully implemented, companies will be allowed to raise capital, especially for seed and early stage funds, without being subject to registration requirements such as issuance of a prospectus or registration statement. The goal, as in other jurisdictions where crowdfunding has been permitted, is to lower the costs associated with traditional methods of raising capital. The Turkish Capital Markets Board (CMB) is designated as the supervisory authority in charge of equity crowdfunding.

Regulation

The new law introduces the general framework of equity crowdfunding and appoints the CMB to issue secondary regulations for the implementation of an equity crowdfunding system within this framework. Such secondary regulations are expected to cover all the details, including, but not limited to, the requirements for operating crowdfunding platforms, the maximum amount that can be raised through equity crowdfunding, and the maximum amount any investor can invest during a defined period. The new law calls for a more flexible approach to the regulation of equity crowdfunding in comparison with other regulated markets. All crowdfunding transactions are expected to occur through approved crowdfunding platforms, which will require a license from the CMB.

Comparison With the JOBS Act

Since most of the details regarding the equity crowdfunding system are expected to be covered by the secondary regulations, we cannot yet give a full comparison with the crowdfunding regulations under Title III of the 2012 Jumpstart Our Business Startups (JOBS) Act. One apparent difference between the two countries' regulations is that Turkish regulators will allow crowdfunding transactions to occur only through crowdfunding portals, whereas U.S. regulations allow broker-dealers, together with funding portals, to facilitate transactions.

Timeline

The new law was enacted by the Turkish parliament in November 2017 and came into effect upon official publication on December 5, 2017. The CMB now has to issue secondary regulations to clarify open questions and implement the law. It is expected that equity crowdfunding will be available as a funding option in Turkey sometime in early 2018.

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