



Regulatory: The risk of cooperating with the government during an internal investigation

Without knowing it, you can become a de facto public actor

BY [JAIME GUERRERO](#)

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The Department of Justice (DOJ) provides guidance on—and incentives for—companies that cooperate with the government and self-report any alleged misconduct on behalf of the company and its employees. As a result, in order to check on alleged misconduct, companies often conduct internal investigations and provide the results to the government.

When conducting internal investigations, corporate counsel should consider if, and to what extent, the company should coordinate with the government. Such a consideration is necessary because the company's actions could rise to the level of being considered the actions of a *de facto* public actor, namely that the company was acting as an agent of the DOJ.

A finding that a company has acted as a *de facto* public actor can result in the company losing the attorney work product and attorney-client communication privileges, forcing the company to turn over documents that otherwise would be protected from disclosure.

On April 16, Stuart Carson and Hong Carson, husband and wife defendants in a long-running Foreign Corrupt Practices Act (FCPA) criminal case in Southern California, pleaded guilty to separate, one-count superseding informations charges of making a corrupt payment to a foreign government official. The ultimate charges to which the Carsons pleaded guilty were far less severe than the charges they were facing in the underlying criminal indictment.

While it may be coincidental, the favorable plea agreements closely follow the Carsons' and the other remaining defendants' filing of motions to dismiss and suppress, arguing that the company conducting the internal investigation, Control Components Inc. (CCI), was a *de facto* public actor. Indeed, the defendants produced emails between company counsel and the government discussing the status of CCI's effort to collect evidence for the government.

The motions to dismiss and suppress are still pending, but the issues being argued raise substantive questions for in-house counsel on the scope of a company's coordination with the government when conducting an internal investigation.

In the motions to dismiss and suppress, the defendants portray an internal investigation wherein CCI worked hand-in-hand with the DOJ, sharing results with the DOJ (including providing key documents and summaries of employee interviews), making employees around the world available for interviews with the DOJ, providing information in response to numerous requests and essentially providing the DOJ with a prosecution roadmap. The government argues, in response, that a company's efforts to cooperate with the government do not transform it into a *de facto* public actor, and that the benefits offered for cooperation do not equate the company with a state actor. The court has not yet ruled on the defendants' motions to suppress and dismiss.

However, in separate proceedings wherein the government and CCI attempted to quash a subpoena seeking communications between the government and CCI, the court signaled a willingness to consider the defendants' arguments. The court stated that a "finding that [counsel] was a Government agent would

have ramifications affecting the scope of permissible discovery under the subpoena as well as other rulings previously made by the Court.”

The government has incentivized corporations to cooperate when investigating potential wrongdoing, providing benefits to companies that:

- Assist in a criminal investigation
- Disclose all relevant evidence and findings
- Identify the alleged individual wrongdoers within the company, including senior executives

Such incentives, however, come with a risk for the companies who cooperate, as a court may later determine that the company waived the attorney work product and attorney-client communication privileges by acting as a *de facto* public actor.

Accordingly, when conducting an internal investigation as part of a larger agreement to cooperate with the government, in-house counsel should carefully consider the extent to which it wishes to coordinate the internal investigation with the government in order to avoid a finding that it has become a *de facto* public actor.

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