



Successfully Managing Internal Investigations

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A Broader PerspectiveSM

Presenters



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"Here come the suits."

When to Investigate?

- Government contact
- Whistleblower
- Hotline Complaint
- Auditor
- Shareholder demand
- Media report

Why Investigate?

- Compliance and controls
 - Making sure we are complying with the law
 - Tone at the top
- Possible legal obligation
- Good strategy – gives you options

Initial Factors to Consider

- Who/what is the source of the information?
- What is the nature and scope of the allegations?
- Is a government agency already involved?
- Who should control the investigation?
 - Smaller investigations can be overseen by the Legal Department
 - More significant investigations should be overseen by a Board Committee
 - Corporate governance oversight role
 - Independence from management/possible wrongdoers

Who Should Conduct the Investigation?

- Inside Counsel or Internal Audit or Compliance
 - Issue is not likely to be material or require disclosure
 - People to whom counsel/auditor reports are not implicated
 - Privilege is not critical
 - Disclosure to the government is not likely
- Outside Counsel
 - Significant issue that may be material and require disclosure
 - Senior management may be implicated
 - Independence is important
 - Experience conducting investigations is important
 - Privilege is more clearly established

Internal Investigations Can Be Expensive

- Avon spent \$93.3 million in 2011 for FCPA matter
- News Corporation spent \$104 million in 6 months investigating the phone hacking scandal
- Siemens AG spent \$1 billion including \$200 million to the lawyers to settle with DOJ and SEC in an FCPA case

Cost Drivers

- Type of case
- Volume and form of records
- Consultants
- Indemnification/Employee legal expenses

Keeping Costs Down – Work as a Team

- The inside lawyer – knows costs constraints and internal dynamics
- The outside lawyer – more objective, unique experience, ability to be more direct

Keeping Costs Down – Plan & Budget

- Require an efficient staged work plan
- Budget to avoid surprise costs?
 - But can't always anticipate where the investigation will go
- Handle some tasks in-house
- Insurance

Developing the Facts

- Document review
- Email searches
- Interviews
- Forensic experts

Protecting the Privilege

- Label communications and work product
- Issue a corporate directive
- Emphasize confidentiality
- Hire outside counsel

Document Review

- When conducted
- Electronic review
- Large-scale v. targeted collection
- Overseas (EU) collection and review

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Employee Interviews

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“At this time we have one suspect who’s been detained for questioning.”

General Considerations

- The order in which interviews are conducted
- Whether in-house counsel should participate in an interview
- What can be reported to in-house counsel about the results of interviews

Corporate Miranda Warnings

- The company is the client
- Not the employee or executive
- Interviews are conversations for the purpose of giving legal advice to the company
- The company controls the privilege and may choose to waive it

Lessons from the *Ruehle* Case

- Irell & Manella represented Broadcom and CFO in another securities matter
- Counsel interviewed CFO – discrepancy as to what was said – “done on behalf of Broadcom”
- Counsel turned over interview to DOJ and CFO charged
- Trial level: suppression of the evidence (so?) and referral of lawyer to state bar (Awk!)
- Court eventually tossed the case



Number One Question You Will Get

“Do I need an attorney?”

Practice Pointers

- Always give a full and complete *Upjohn* warning
- Properly document the warning
- Assess potential conflicts of interest early
- Avoid dual representations if possible



Reporting Issues

Internal Reporting

- Form of reports – written?
 - Benefits
 - Comprehensive record of response to the issue
 - Assists in keeping track of the investigation
 - Can be used as basis for declination memo
 - Liabilities
 - Roadmap in subsequent litigation against company
 - Government may request copies leading to waiver of privileges
 - Expense
- Content and presentation of reports
 - Retaining the privilege of the reports, but drafting in anticipation of possible release to the government

Dealing with your Outside Auditors

- When do you tell them about the concern?
- How often do you update them?
- How much detail do you provide?
- How do you protect the privilege?

Disclose to the Government?

- When do it?
 - If they will find out anyway
 - If disclosure is otherwise required
- Positives:
 - Allows you to influence how they see the evidence
 - May get “cooperation credit” or even amnesty
- Cooperation credit
 - Government agencies want you to do their work
 - Credit is official DOJ and SEC policy, but what does it really mean?
 - Impacts the Federal Sentencing Guidelines

Disclosure to the Government

- Negatives:
 - No control over their reaction
 - They always want more
 - Often requires finding someone to blame
 - Risk of waiver and third party discovery

Disclosure to the Government

- Disclose to all players at one time
- May be oral or in writing
- Must be accurate and complete
- Focus on the facts
- Try to avoid waiver or make a limited waiver
- Other available protections?

Disclosure to the Public

- Must be accurate & complete
- Don't be selective
- Get it over with



Questions & Answers

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