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Corporate Investigations in a Litigious World: *Hot Topics and Navigating the Land Mines*

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Hot Topics and Land Mines in Internal Investigations

- Trends and Statistics
- Deciding whether and when to investigate
- Conducting the investigation
 - Who should do it, and who should know
 - Scope and strategy
 - Document and data retention/collection
 - Witness interviews
 - The importance of Upjohn warnings
 - Representation and indemnification questions
 - Peripheral issues – the ripple effect
 - Reporting of findings – what, when, how, and to whom
- The Decision Whether to Cooperate
- Attorney-Client Privilege and Work Product Issues

Trends and Statistics

- Corporate fraud stats
 - Since July 2002 more than 1200 corporate fraud convictions, including 214 CEOs and Presidents, 53 CFOs, and 23 corporate lawyers
 - Dozens of companies charged or received deferred prosecution agreements (e.g., Merrill Lynch, Adelphia, HVB, ...)
- Trends in securities litigation – it remains a litigious world*
 - After a marked decline from late 2005 through 2006, class action filings have rebounded
 - 131 cases filed in 2006
 - Over 200 cases filed in 2007
 - Settlement values continue to increase
 - * Average settlement in 2006: 22.7 million
 - * Average settlement in 2007: 33.6 million

Whether and When To Do an Internal Investigation?

Whether and When to do an Internal Investigation

- Triggers:
 - Search Warrant, Government Subpoena or Voluntary Request for Information
 - Whistleblower
 - Media Reports
 - Financial Restatements
 - Shareholder Demand Letter or Civil Complaint
 - Auditor concerns
 - Part 205 Report
 - Board or Audit Committee Concerns

Whether and When to do an Internal Investigation (Cont.)

- A Fact-Driven Analysis
 - The nature and severity of the problem
 - Is a government agency investigating?
 - Is civil litigation pending or expected?
 - Considering the source(s)
 - The likelihood of eventual discovery
 - Options for remedial measures without full investigation
 - The potential benefits of discovery and disclosure

Conducting Investigations

Conducting Investigations

- Investigation Objectives:
 - Determining the facts
 - What happened?
 - Who was responsible?
 - Was there wrongdoing?
 - What is the company's potential exposure?
 - Identifying appropriate remedial measures
 - Positioning the company for quick and optimal resolution

Conducting Investigations (Cont.)

- Comprising the Team:
 - Identifying when outside counsel is necessary
 - Identifying appropriate outside counsel
 - Identifying other needed participants
 - forensic evaluators
 - technology experts
 - non-lawyer investigation services
 - Understanding respective roles
 - Understanding the importance and limitations on communication

Conducting Investigations (Cont.)

- Document Preservation and Collection:
 - Identifying the relevant universe
 - Custodians
 - Hard documents
 - Electronic data
 - Litigation holds -- the importance of quick and clear communication
 - The dangers of missteps (e.g., Anderson, Quattrone, Conrad Black)
 - Involving IT specialists
 - Whether and how to use outside vendors

Conducting Investigations (Cont.)

- Interviews:
 - Upjohn Warnings
 - The importance of context and candor
 - Common questions:
 - Do I need a lawyer?
 - Who's gonna pay? (The indemnification question)
 - Recognizing the perspective of witnesses and employees and the potential ripple effect of an internal investigation
 - The issue of notes and interview memos

Conducting Investigations (Cont.)

- Interim Communication Issues:
 - Lines of communications within the “team”
 - Interim reports to company executives
 - Interim reports to auditors
 - Keeping them in the loop
 - Access to findings, work product and documents (need-to-know and privilege considerations)
 - Interim reports to Board, Audit Committee and/or Special Committees
 - Need to show active involvement
 - Document and meeting minutes
 - Issues related to public disclosures

Conducting Investigations (Cont.)

- Final Communication Issues:
 - Written vs. Oral Reporting
 - Advantages and disadvantages
 - Anticipated purposes
 - Anticipating pitfalls
 - Determining options
 - Disclosing Findings and Recommendations
 - Disclosures to Board?
 - Disclosures to Auditors?
 - Disclosures to Government?
 - Disclosures to Public?
 - Disclosures to Company Employees?

Fixing the Problem

- Identifying and Implementing Remedial Measures:
 - The importance of case-specific corrective/disciplinary measures
 - Restatements and/or other financial representations
 - Making hard personnel decisions
 - Specific organizational fixes
 - The importance of other prospective measures
 - Re-assessing internal compliance programs
 - The fact and/or effectiveness of hot lines
 - Continuing corporate education efforts
 - Knowing your corporate culture

The Decision Whether to Cooperate

Risks and Benefits of Cooperation

- Damage Control With Prosecutors and Regulators
 - Possible non-prosecution decision
 - Possible reduced sentence or consequences if charged
 - Possible charging of lesser offense
- Other Considerations
 - Impact on Shareholders and Related Issues
 - Impact on Regulatory Issues
 - Impact on Market
- Significance of Good Corporate Citizenry
- The Human Factor in dealing with the Government – calculating the risks

The Decision to Cooperate: DOJ and SEC Policy Mandates

- The McNulty Memo
 - Shift in emphasis (i) from the stick to the carrot, and (ii) to prevent abuse in seeking blanket waivers.
 - Prosecutors can no longer consider refusal to waive in making a charging decision.
 - Prosecutor must show “legitimate need”, which includes addressing potential “collateral consequences” to the company of such waiver.
 - Prosecutors can view “favorably” a decision to waive.
- Seaboard Report and other agency guidelines

The Decision to Cooperate: Issues of Attorney-Client Privilege and Work Product Protections

- To date, few courts have recognized selective waiver. *E.g.*, *Diversified Industries Inc. v. Meredy*, 572 F.3d 596 (8th Cir. 1988), and *In re Cardinal Health Inc. Securities Litigation*, 2007 WS 495150 (S.D.N.Y. 2007)
- The trend is clearly otherwise. Recent examples: *U.S. v. Reyes* (Brocade), and *Ryan v. Gifford*, Civ. No. 2213 CC (Del. Ch., January 2, 2008)
- Proposed Changes to FRE 502

Navigating the Cooperation and Privilege Waters

- Find ways to get the prosecutor/regulator what he/she needs without revealing privileged communications
- Knowing what is and is *not* “privileged”
- Providing the historical facts
- Offering a blueprint to investigate