



Responding to Government Investigations

Association of Corporate Counsel
March 24, 2011

Richard S. Glaser
Eric H. Cottrell
Brian S. Cromwell

The Government's Initial Sources of Information

- Media Reports
- Public Filings
- Shareholder Complaints
- Shareholder Derivative Suits
- Internal Whistleblower
- Individual Defendants
- Civil Actions
- Audits
- Wildcatting
- Self-Reporting

Initiation of Investigation

- Subpoena
- Search Warrant
- CID
- AID
- Informal Request for Information
- Employee Contact
- Routine Investigation
- OTR
- Competitor Investigation
- Public Announcement

Preservation of Evidence

- Consequences: Criminal v. Civil
 - Loss of Credibility
 - Execution of Search Warrants
 - Obstruction of Justice
- Understand where relevant data is stored
 - Company servers
 - Hard copies
 - Personal storage devices and emails
- Suspend normal retention policies
- Issue Litigation Hold Memoranda

Communication with the Board of Directors

- What needs to be communicated?
 - Fact of Government Investigation
 - Status of Internal Investigation
 - Need for Corrective Action
- Method of Communication
 - Oral versus Written Reports
 - Meeting Minutes
- Lines of Reporting

Public Disclosure of Investigation

- Is there a Duty to Disclose Investigation?
 - Federal securities filings must disclose existence of material legal proceedings known to be contemplated by government authorities
 - Must disclose material information necessary to correct prior untrue statements
 - Must disclose information necessary to prevent current statements from being misleading
- Materiality: Factors to consider:
 - Will investigation materially impact performance/prospects?
 - Seriousness of allegations
 - Likely impact of any formal charges
- Other Disclosure Requirements
- Timing is everything
 - Benefits of disclosing early
 - Drawbacks

Notification of Employees

- Which Employees to Notify
 - Determine who should conduct the meeting
- Content of Notification
 - Overview
 - Company Status
 - Cooperation
 - Planned Response
- Method of Notification
 - How will the meeting take place?

Notification of Third Parties

- External auditors
 - General Rule: Must not coerce, mislead, etc.
 - May want to disclose investigation even if (a) not expected to be material; or (b) not publicly disclosed.
- Insurance carriers
 - Notification Requirements
 - Consider effects of actions on coverage
 - Privilege/Work Product
- Other Third Parties

Dealing with Employees During the Government Investigation

- Government Interaction with Employees
- Employee Representation Issues
- Employee Privilege
 - Holmes v. Petrovich Development Co., 191 Cal. App. 4th 1047 (2011)
- Employee Witness Preparation

Corporate Cooperation with the Government Investigation

- Cooperation: What is it?
 - Evolution: From Holder to Phillip
 - United States Sentencing Guidelines
- Cooperation: Is there an Alternative?
- Meeting the Government's Expectations
 - Identifying Decision-Makers
 - Initiating Dialogue
 - Narrowing the Scope
 - Disclosing Information

The Internal Investigation

- Threshold issues
 - Who should conduct?
 - What should the scope be?
- Maintaining Privilege
 - Recognize the potential for waiver
- Components of the Investigation
 - Document Review
 - Witness Interviews
 - Forensic Analysis (if necessary)

The Internal Investigation, Cont'd

- Employee interviews
 - Privilege issues
 - Interview protocol – Be firm but fair
 - Interview memos
- Stop any Illegal Conduct
- Be aware of your (Legal) surroundings
 - Understand regulatory framework
 - Other laws (data privacy, etc.)
- Managing the Investigation
 - Communicating with the Government

Resolving the Investigation

- Making Disclosures
- Remedial measures
 - Compliance programs
 - Termination of Wrongdoers
- Common resolutions
 - DPA/NPA
 - Monitors
- Consequences
 - Incarceration
 - Fines
 - Debarment

Current Trends in Government Investigations

- Focus on Compliance programs
- Expectation of Cooperation
- Enforcement Priorities
- Industry-Wide Investigations
- Prosecution of Individuals
- Dodd-Frank SEC Whistleblower Program
- Western District of NC Securities Task Force