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Corporate Internal Investigations: Key Legal and Practical Issues

CLE Presentation: DELVACCA LITIGATION INSTITUTE

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Anatomy of an Internal Investigation

- Initiating the Internal Investigation
 - Potential triggers
 - Parties involved
- Conducting the Investigation
 - Plan of investigation
 - Initial fact gathering document collection and review
 - Document collection and review
 - Witness interviews
- Results of the Investigation
 - Reporting the results
 - Remedial measures

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Anatomy of an Internal Investigation

- What is an internal investigation?
 - Discovery
 - Goals
 - "Misconduct"

Initiating the Internal Investigation

- Potential Triggers
 - External audit
 - Internal audit
 - Whistleblower
 - Sarbanes-Oxley
 - Dodd-Frank
- Government / Self-Regulatory Organization Inquiry
- Media, Watchdog Groups, or Academics

Initiating the Internal Investigation

- Whether or not to investigate: Duty to investigate and other factors
 - Regulatory inquiries
 - Factors considered by prosecutors and regulators
 - Exchange Act
 - Sarbanes-Oxley reporting up requirement
 - Caremark duties of directors
 - Other guidelines

Initiating the Internal Investigation

- Who should control the investigation?
 - Role of BOD and management
 - Identify potential conflicts of interest
- Who should conduct the investigation?
 - Whether to handle internally or retain outside counsel

Conducting the Internal Investigation

- Scope of the investigation
- Action plan and timeline
- Document collection and review
- Interviews
- Potential results and liabilities

Conducting the Internal Investigation: Key Issues

- Initial fact gathering
- Document retention
 - Identifying categories of documents
 - Retention memoranda
 - Spoliation
 - Sarbanes-Oxley criminal liability
- Document collection and review
 - Identifying key personnel
 - Chain of custody
 - Identifying most relevant documents

Conducting the Internal Investigation: Key Issues

- Interviews
 - Potential interviewees
 - Order of interviews
 - Representation issues
 - Individual counsel
 - Privilege issues and sharing documents
 - Advancement issues
 - Upjohn warnings
 - Parameters
 - Decision to waive privilege
 - Former employees

Conducting the Internal Investigation: Key Issues

- Protecting privilege
 - Steps to protect attorney-client and work product privileges
 - Retention of consultants and experts
 - Waiver and government authorities
 - Selective waiver
 - Waiver and cooperation
 - Communications with employees and their counsel
 - Joint defense agreements
 - Waiver to other third parties
 - Standards for external auditors

Conducting the Internal Investigation: Cross-Border Issues

- Differing degrees of protection outside of the U.S.
 - Privilege issues
 - Differing scopes of attorney-client/work-product privilege
 - Other available privileges
 - Data Privacy Issues
 - "Blocking Statutes"
- Social/Cultural Issues

Result of the Internal Investigation

- Reports
 - Oral versus written reports
 - Consideration of objectives
 - To whom reports are delivered
- Potential responsive actions
 - Remediation
 - Market disclosure
 - Self-reporting

Other Key Issues

- Other parties (e.g., underwriters and public relations experts)
- Employment issues
- Dodd-Frank Bounty Program

Dodd-Frank Bounty Program

- Program under which whistleblower who provides "original information" about securities law violation leading to penalty of more than \$1 million can receive 10% - 30% of penalty collected in SEC and "related actions"

Dodd-Frank Bounty Program

- Rules seek to prevent individuals with compliance obligations from benefiting from their roles
- Information generally cannot form basis for an award if it was:
 - Obtained through attorney-client privileged communications or a whistleblower's legal representation of a client
 - Received by a person with legal, compliance, audit, supervisory or governance responsibilities, where the information was communicated in expectation of responsive action
 - Obtained from or through an entity's legal, compliance, audit, or other functions for identifying, reporting and addressing potential non-compliance

Practical Steps to Consider

- Importance of rapid response team in light of heightened risk of being blindsided with enforcement inquiry
 - Procedures should take account of potential that inquiry originated with whistleblower (e.g., increased care to avoid actions that could appear to be retaliation)
 - Benefits of “drills” simulating actual enforcement inquiries

Conclusion: Be Prepared

- Develop a clear and thoughtful investigation protocol
 - Need for prompt and consistent decision-making on investigation, to expedite self-reporting decisions
 - Facilitates a systematic, efficient process
 - Provides framework for resource determinations (internal / external / co-sourced)
 - Consider categorization of matters for “ownership” by appropriate internal group (e.g., compliance, legal or HR)

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