

American College of Trial Lawyers
Recommended Practices For Companies
and Their Counsel In
Conducting Internal Investigations

Presentation to the SEC Luncheon Group
May 12, 2008

LATHAM & WATKINS

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Purpose of Program

- Internal investigations are an important tool of corporate governance for companies doing business in the United States and increasingly globally.
- Recently, the American College of Trial Lawyers issued a landmark report of the conduct of internal investigations, and made over 40 recommendations for the conduct of investigations by public companies and their outside counsel.
- The Recommendations are focused largely on the conduct of independent internal investigations involving allegations of significant misconduct by senior managers.
- As a firm, Latham & Watkins does not necessarily endorse each of the Recommendations, but believes that that they offer a unique perspective, and form an important contribution to the growing body of literature on internal investigations.

What is the American College of Trial Lawyers?

- The American College of Trial Lawyers (“ACTL”) invites to become Fellows those “experienced trial lawyers [in the United States and Canada] who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility, and collegiality.”
- “The College is...able to speak with a balanced voice on important issues affecting the administration of justice.”
- “The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.”

The Background to the Recommendations Regarding Internal Investigations

- The ACTL's Federal Criminal Procedure Committee, consisting of over fifty lawyers and judges from more than twenty-five States and Provinces, formed a sub-committee in 2007 to study the conduct of internal investigations.
- The subcommittee focused on the methods used in internal investigations in matters where senior management was suspected of wrongdoing and where independent counsel, overseen by independent directors, conducted the inquiries.
- The resulting draft of recommendations was then reviewed by other committees of the ACTL, the Board of Regents, and a select group of former Presidents of the ACTL with particular expertise in internal investigations.
- The Recommendations were adopted by the Board of Regents in February 2008

When To Conduct An Internal Investigation?

- There are many reasons a public company may undertake an internal investigation, and include:
 - Government Subpoena or Voluntary Request for Information
 - Whistleblower Complaint
 - Media Report
 - Restatement Scenario
 - Shareholder Demand Letter or Civil Complaint
 - Auditors inform of a possible illegal act – 10A
 - Part 205 Report by Inside or Outside Counsel
 - Board or Audit Committee Concerns

How to Conduct and Document an Internal Investigation

- External factors, such as the existence or anticipated existence of a parallel government investigation or shareholder lawsuit, must be considered
- Every effort should be made to conduct an investigation so as to maintain the corporate attorney-client privilege.
- However, counsel and the Company should anticipate that all documents created, facts uncovered, and witness statements made to them, may be disclosed to the government or regulator, and also may be discoverable by a private plaintiff.

The Roles of the Board and Management in Conducting and Overseeing the Investigation

- Facts of each situation will govern who oversees the investigation.
- Where the conduct of senior management is under review, it is important that management, usually defined to include the General Counsel's office, not be, and not be perceived to be, in charge of the internal investigation.
- In appropriate cases, the Board of Directors should delegate the task of overseeing the conduct of the internal investigation and retaining counsel to conduct the investigation to the Audit Committee of the Board, or alternatively, some group of independent Board members forming a Special Committee.

The Role of the Independent Committee in Conducting and Overseeing the Investigation

- The goals of the Independent Committee should be:
 - to seek to determine the truth of the underlying allegations,
 - to safeguard and act in the best interests of the shareholders, and
 - to prevent the internal investigation from impairing the reputations of employees, officers, and directors of the Company not found to have engaged in wrongdoing.
- The Board should pass a resolution broadly authorizing the Independent Committee to retain counsel and their agents, conduct an investigation, and report its ultimate findings to the Board.

When Independent Counsel Is Necessary

- In cases where independence is critical, outside counsel which has not had a substantial prior relationship with the Company and its senior management should be retained to conduct internal investigations (“Special Counsel”).
- The Independent Committee should retain the Special Counsel in writing.
- The Special Counsel should be instructed to engage in investigative tactics designed to get at the truth of the underlying allegations of wrongdoing, and not to show either favoritism or hostility to incumbent management.

Hot Button Issue #1: Attorney-Client Privilege and Work Product Protections

- The attorney-client privilege and work product doctrine provide important benefits to the Company and its officers and directors.
- The internal investigation should be conducted in a manner best designed to preserve the ability to assert such protections.
- The possible waiver of these protections is a major decision that requires full and frank discussion of the benefits of these privileges and the impact of a waiver on prosecutorial, regulatory or parallel proceedings.
- The Board or Independent Committee should determine whether and to what extent Special Counsel may waive the Company's attorney-client privilege or its own work product protections in its dealings with regulators or other third parties.

Hot Button Issue #2: Employee Cooperation

- All officers, directors, and employees are expected to cooperate with an internal investigation.
- It is desirable that the Independent Committee explicitly communicate what constitutes “cooperation” of an employee during an internal investigation, and that an employee’s refusal timely to cooperate in this regard may result in dismissal.
- The cooperation of employees should include: (1) the provision upon request of all documents related to company business wherever kept; (2) strict compliance with all document hold and retention notices; and (3) submission to interviews.

Hot Button Issue #3: Indemnification

- Companies have indemnification policies in their charters or by-laws, usually as broad as the relevant state law provides, and usually broad enough to cover all relevant personnel whose activities might come under scrutiny in an internal investigation.
- On occasion, persons outside the scope of normal indemnification policies, such as consultants, independent contractors, or acting officers, may be drawn into internal investigations by dint of their corporate roles.
- When that occurs, it is appropriate, at the outset of an investigation, for the Independent Committee to recommend, and the Board to consider, adopting a written policy regarding the scope of indemnity and advancement to include others who may have performed corporate functions and would not otherwise be covered by its indemnification policies.

Hot Button Issue #4: Witness Interviews: Preliminary Warnings

At the outset of the interview, Special Counsel should advise each witness that

- (1) the Special Counsel represents the Independent Committee,
- (2) Special Counsel is not the employee's lawyer and does not represent the employee's interests;
- (3) statements made to the Special Counsel should be truthful;
- (4) the interview is protected by the attorney-client privilege, but the privilege belongs to the Company; and
- (5) the Independent Committee can unilaterally choose to waive its privilege and disclose what the employee has told Special Counsel to external auditors, the government, regulators, or others.

Witness Interviews: Preliminary Warnings (cont'd)

Special Counsel should also advise employees whether the Company has made a decision

- to waive the attorney-client privilege and work product protections, or is likely to do so, and
- to disclose the memorandum of interview to governmental agencies.

In appropriate jurisdictions, Special Counsel should also consider telling each witness of the position of the DOJ that an employee can be indicted for obstruction of justice, if he or she lies to private counsel conducting an internal investigation, where it is known that witness statements may be shared with a government agency.

Witness's Right to Counsel

Special Counsel should not advise an employee whether he or she should seek the advice of individual counsel.

Special Counsel should adjourn the interview for a short time to allow consultation with an attorney, and, if previously authorized by the Independent Committee, to provide recommendations of counsel.

Witness Interviews: Preparation by Witnesses

Absent special circumstances,

- Special Counsel should make available to witnesses or their counsel the topics and documents that will be covered in the interview, and allow employees to obtain copies of their documentary files, including calendars and electronic data.
- Special Counsel should not generally interview witnesses before they have had a reasonable opportunity to review relevant documents.
- Special Counsel should resist attempts by prosecutors or regulators to require the Special Counsel to interview a witness who has not been given an opportunity to refresh his recollection as to prior events.

Special Counsel's Work Product: Documenting Interviews and Reports

Absent special circumstances, to insure accuracy, Special Counsel should

- memorialize the substance of each witness interview immediately after the interview;
- orally review with counsel for witnesses the substance of memoranda so as to avoid misstating or mischaracterizing a witness's statements; and
- if a final written report is to be prepared, share tentative conclusions with counsel for any present or former employees whose conduct is under examination.

Requests for Work Product by Auditors

- Increasingly, independent auditors are seeking privileged materials and the work product of Special Counsel to assist them in their audit of financial statements and rendering of opinions.
- If such a request is received, the Board should first explore all other alternative courses of action and should attempt to enter into a common interest agreement with its auditors so as to maximize the opportunity of protecting the material from scrutiny by third parties.
- The Independent Committee should not decide the issue on its own.
- Neither the Independent Committee nor the Special Counsel should share information with the Company's independent auditors without the written consent of the Board.

Requests for Work Product by Regulators

- In the late 1990's and early 2000's, regulators and prosecutors demanded or expected access to privileged materials and the work product of Special Counsel to show cooperation with the authorities.
- In the wake of criticism by Congress, bar associations, and corporate groups, regulators and prosecutors have become more restrained in their requests, as well as being mandated not to draw adverse inferences against companies who refrain from such production.
- Under certain circumstances, companies may well be advised to make available such materials to regulators and prosecutors so as to maximize the inference of cooperation.
- Before undertaking such step, the Board and Independent Committee should first explore all other alternative courses of action.
- Neither the Independent Committee nor the Special Counsel should waive privilege or share information with regulators or prosecutors without the written consent of the Board.

Updating the Independent Committee

- Special Counsel should regularly update the Independent Committee on the course of the investigation.
 - In the early stages of an inquiry, updates should generally be made orally.
- Upon the completion of the investigation, Special Counsel should report its findings and the conclusions, and the bases, to the Board, the Audit Committee, or the Independent Committee.
 - Special care should be given to protect the privilege and work-product protections in such presentations to the full Board.
- Special Counsel should be careful to remind the governing body that the report's conclusions are ultimately that of the Independent Committee, and that the Board members have fiduciary responsibilities to draw their own conclusions as to the evidence presented.

After the Investigation

- If Special Counsel has been appointed to conduct an internal investigation, such Counsel should not also be used as Company defense counsel in civil or criminal litigation or investigations that follow the internal investigation.
 - Independent auditors, regulators and prosecutors may well consider the Special Counsel's independence to be compromised by Special Counsel's dual role.
- Absent genuine concerns regarding obstruction, the database of documents and selected work product should be made available for use by any Special Litigation Committee, counsel to the Company, and where consistent with the interests of the Company and the preservation of the privilege, to counsel for present or former employees.

Conclusion

- Internal investigations are a vital tool of companies, seeking to maintain a strong culture of compliance with applicable laws and regulations.
- Boards and Independent Committees should play active roles in the supervision of independent Counsel's work.
- The interests of companies may extend beyond rigid adherence to regulators' concerns to include the long-term best interests of the shareholders and the value of certain officers and employees to maintaining those long-term interests.

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