Best Practices for Internal Investigations

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Triggering Events

• Compliance Hotline Report

• Subpoena for documents is served

• Civil Investigative Demand is issued

• Whistleblower has provided confidential information and documents to the Government
Internal Investigations – General Processes

• Intake
• Triage of Issues
• Identification of appropriate stakeholders
• Announcing the Investigation – tips and best practices
• Investigation
• Documentation of the investigative steps
• Corrective measures and closure

Intake Process

• Departments designated as the point of contact for reports that trigger internal investigations:
  o Compliance
  o Office of Special Counsel – responsible for coordinating the effort for internal investigations
• Outside issues that trigger internal investigation:
  o State or federal investigation alleging that the company/client has committed a crime or engaged in fraudulent activities
  o Responses to OIG subpoenas or CIDs
• Common ways to receive information internally:
  o Compliance Hotline
  o Through personnel on the ground (operators in the markets, finance and accounting, auditors, etc.)
  o Other counsel (e.g. Operations Counsel, Regulatory Counsel)
  o Direction from leadership to pursue an investigation
Triage Process

• Is the matter truly one that involves the potential for fraud, waste or abuse?
• Does the matter involve a large scale systemic issue or is it just a one-off issue?
• Does the issue potentially involve government reporting or overpayment repayment?
• Should the matter be handled in-house? Or should outside counsel be retained?
• Is it truly a legal issue or a billing or employment issue?

Once an Issue has been identified:

• Identification of Status and Engagement of Counsel
  o Status in Investigation; possible violation of Federal Criminal law?
    • Target, Subject, Witness of Investigation
      • A “target” is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.
      • A “subject” of an investigation is a person whose conduct is within the scope of the grand jury’s investigation.
      • A “witness” is a person who possess information essential to an investigation.
  • The organization’s Point Person should immediately contact in-house counsel and consult outside counsel when he/she is alerted to an investigation.
Outside Counsel Role

- Engagement of Counsel considerations
  - Historical engagement
  - Capacity
  - Jurisdictional
- Once Outside Counsel engaged, the Point Person should work with the legal team on the following:
  - Identified privileged documents
  - Working with investigators on narrowing the scope of the inquiry (if applicable)
  - Discuss E-Discovery concerns
  - Employee interviews
  - Document production

General Steps

- Set investigative priorities/objectives
- Determine the deciding authority
- Identify Point Person
- Review what is known
- Identify persons/employees to be interviewed
- Obtain relevant documentation and financial information if applicable
- Set timeline needed to complete investigation
- Discuss report guidelines
- Take corrective actions
Important Communication

• Announcement of investigation to the relevant stakeholders – at direction of counsel (high level summary of the issue, establish privilege, records retention and treatment of papers).

• Opening Memo – provides a framework for the investigation and more detailed instruction on process.

• Closing Memo – Summary of investigation (key information, witnesses, recommendations on corrective action).

• Training and Policies and Procedures

E-Discovery Concerns

• Point Person should work with legal team to consider electronically stored information (ESI) concerns early, including:
  o Identifying custodians/departments that may have relevant information
  o If necessary, issuing a litigation hold/record retention notice to key individuals
  o Working with outside counsel of a list of key terms (often this will also involve working with government agents)
  o Be wary of HIPAA concerns
  o Engage the IT department early and often
  o Protect metadata, even if a formal request for information has not been issued
Privilege Pointers

- Beware of acting as the “privilege fairy”
  - Document is privileged only if sent for the purpose of obtaining or delivering legal advice; copying a lawyer or writing “privileged” is not enough
  - Marking everything as privileged creates a host of problems
- Work Product
  - Only applies to work performed in anticipation of litigation
  - Can be dangerous to mark something as work product w/o issuing a legal hold.
- Putting your name, or the name of your outside counsel on a document helps in a privilege fight
  - Best practice is to use an email signature that identifies you as a lawyer or legal professional
- Be mindful of subject matter privilege waivers
- Be mindful of who owns the privilege (company, not individuals)

Working with Vendors

- Vendor engagement can keep audits and other investigations organized from an early moment
- Consider engaging vendors through outside counsel to preserve attorney/client privilege and foster communication
- Point Person should provide vendors with a point of contact for information collection and metadata preservation concerns
Remediation Post-Investigation

- Repayment
- Stark self-disclosure
- OIG Voluntary Disclosure
- Internal remediation – instituting policies and procedures
- Implementing ongoing monitoring and audit by compliance personnel

Hot Topic – Parallel Investigations

- A parallel investigation means there are simultaneous criminal, civil and administrative investigations
- These are increasingly popular given the long-standing policies that promote collaborations and the OIG/DOJ Joint Task Force (Health Care Fraud Prevention and Enforcement Action Team - HEAT Initiative)
- Requests for information could related to more than one investigation
- Implications for internal investigations if a parallel investigations is suspected or confirmed
Questions?

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