

# Getting Your Internal Investigation Done Right

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# Agenda

- Getting Your Internal Investigation Done Right
  - Pointers for In-House Counsel, Contracts and Compliance
- Protecting the Attorney-Client Privilege
- Investigative Trends
  - Self-Reporting
  - Requests from Outside Auditors

# Conducting Your Internal Investigation

# Internal Investigations

## Why Conduct an Internal Investigation?

- To ensure compliance with laws and regulations
- To respond to government subpoenas and requests for information
- To respond to internal allegations of potential wrongdoing
- To promote adherence to company goals, missions and values

# Internal Investigations

## Getting Counsel Involved

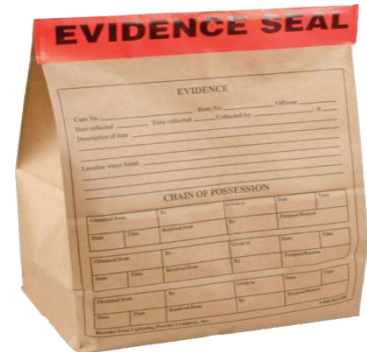


- Consult in-house counsel before taking any investigative steps
- Attorney-client privilege and work product protection can help to shield investigation from future discovery by the government or third parties
- Privilege cannot be applied retroactively
- Position company to respond to potential requests for information from government and third parties

# Internal Investigations

## Time is of the Essence

- Legal duty to investigate promptly
- Early detection and remediation may result in lower penalties for the company
- Witnesses' memories fade
- Witnesses may leave the company and no longer be available for interviews
- Documents may get lost or destroyed



# Internal Investigations

## Document Collection

- Consider whether to issue a document preservation notice
- Decide whether to suspend some electronic data destruction protocols
- Identify potential document custodians and document locations
- Determine whether to collect documents prior to commencing witness interviews

# Internal Investigations

## Conducting Witness Interviews

- Involve in-house or outside counsel
- Consider the order of interviews
- Have at least two interviewers attend to ensure integrity and accuracy of interview
- If interview is conducted by counsel, provide Upjohn warnings; be mindful of tension between Upjohn warnings and whistleblower rules and regulations
- Decide whether to confront witnesses with documents



# What to Do with the Results of Your Internal Investigation?

# Internal Investigations

## Mandatory Disclosure Rule

- FAR 52.203-13, 9.406-2, 9.407-2
- Contractors required to disclose credible evidence of
  - Violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations in Title 18
  - FCA violation
  - Significant overpayment(s)
- Failure to timely disclose may result in
  - Suspension or debarment
  - Contract breach
  - Nonresponsibility

# Internal Investigations

## Consider Self-Reporting

- Fact-specific inquiry
  - Who is involved?
  - Is cooperation credit important?
  - Do you have a whistleblower?
- If making a mandatory disclosure, early engagement with agency Suspension and Debarment Official may be advisable

# Protecting the Attorney-Client Privilege and Work Product Protection During an Internal Investigation

# Protecting the Privilege

## Maximize the Privilege Protection

- Privilege must be protected from the outset
- Subject matter waiver rules can result in total loss of privilege; appropriately label communications and documents with "Attorney-Client Communication" disclaimer
- Involve counsel as early as possible; ensures investigative steps are conducted at direction of counsel

# Protecting the Privilege

## Nonprivileged Information

- Nonprivileged communications include
  - Underlying facts
  - Client's name and fees
  - Retention and purpose for which attorney is retained



# Work Product Protection

## Opinion vs. Fact Work Product

- Opinion work product
  - Capturing the mental impressions, conclusions, opinions or theory of an attorney
  - Virtually guaranteed protection
- “Fact work product” or “ordinary work product”
  - Materials gathered by or compiled at the request of an attorney
  - Conditionally protected

# Protecting the Privilege

## What to Do with the Results of an Internal Investigation?

- If your goal is to maximize ability to claim privilege
  - Consider avoiding written reports, which could become discoverable
  - Present findings orally
  - If you must present written findings or disclose documents
    - Consider presenting documents through a Web-X or other screen-sharing platform
    - Supplement with an abridged written report to limited audience
- Risks of not memorializing findings in writing
  - No documented findings
  - Potential loss of information over time



# Investigative Trends

# Investigative Trends

## Good News for Contractors

- DOJ guidance suggests potential decrease in FCA cases
  - Granston Memo
  - Brand Memo
- Increased declinations by the DOJ

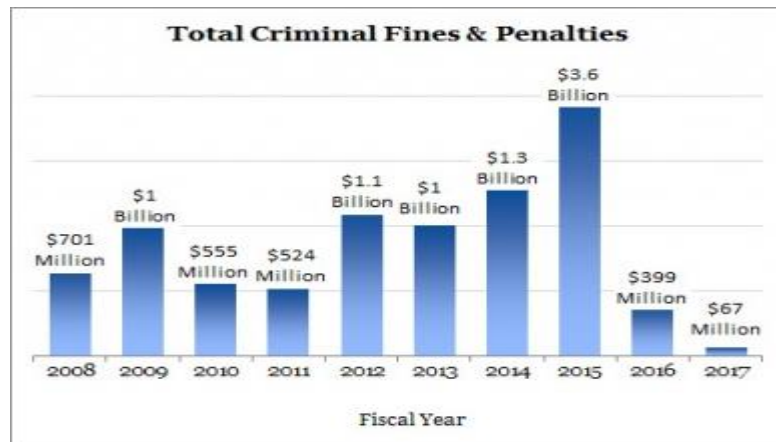


DOJ Criminal Enforcement Trends

# Investigative Trends

## Voluntary Disclosure

- Foreign Corrupt Practices Action (FCPA) Voluntary Self-Disclosure Pilot Program: expanded leniency for self-reporting
- Increased focus on individual wrongdoers: Yates Memo
- Expansion of policy to non-FCPA cases



DOJ Enforcement Trends

# Investigative Trends

## Requests from Outside Auditors

- Increasing number of requests relate to internal investigations
- Safest course of action is not to share privileged or protected information
  - Waiver of attorney-client privilege
  - Potential waiver of work product protection
- But, failure to respond to requests may hamper auditor's ability to provide an audit opinion



# Investigative Trends

## Requests from Outside Auditors (cont.)

- Prior to disclosing contents of investigation to auditors, consider
  - Jurisdiction
  - Disclosure to government
  - Likelihood of government or third-party action
- If the company chooses to disclose
  - Consider whether to disclose documents or contents of witness interviews
  - Distinguish between attorney-client privilege and work product
  - Minimize disclosure

# Investigative Trends

## Key Takeaways

- Involve counsel (in-house or outside) early and often
- Take steps to protect attorney client privilege and work product protection
- Consider self-disclosure
- Develop a plan to respond to auditor requests for privileged or protected material

# Questions?