

- ▶ Lead internal investigator needs specific industry expertise
- ▶ To avoid legal risk, general counsel must scan horizon
- ▶ General counsel struggle to negotiate dual role as compliance officers
- ▶ 'Water cooler talk' at high risk when it comes to information leaks
- ▶ Document preservation can help vindicate companies

By Janine Armin

Safe keeping

The second discussion in the *Foley-Corporate Secretary* webcast series was a heated one given current investigatory hype: 'Rethinking the internal investigation: What to do when general counsel is in the hot seat'. Prompted by the numerous backdating scandals, Foley & Lardner white collar defense and corporate compliance partner Cheryl Wagonhurst and Altria Group's assistant general counsel, Dawson Horn III, offered advice on internal controls, governance, compliance and risk hotspots in a discussion moderated by *Corporate Secretary* editor Brendan Sheehan.

Horn focused on the increased role of auditors as stipulated by Sarbanes-Oxley Section 301, and how SOX has made it unlawful for corporate officers and directors to influence auditors' attestation. Whistleblowers are another concern, he said, analogizing them to 'the fourth estate', adding that whistleblowing is now a 'laudable activity'. As such, Horn said, 'One cannot have any retribution against the whistleblower.'

Increased state government interest is largely attributable to Eliot Spitzer's vigor and track record, according to Horn. Power shifts in Washington also play a role. 'Historically, a Democratic Congress has been more investigatory than a Republican Congress,' making it important to monitor legislators' activities, he added.

Each industry has its own unique peculiarities, which may shape how a company staffs an investigation. 'Not only will your lead person need to be a lawyer, but they will have to have some experience

in that industry,' said Horn.

General counsel have often been casualties in the over 100 options-backdating investigations launched to date. Horn gave an evolutionary account of investigatory procedures from Federal Sentencing Guidelines to the Seaboard Report. Now corporations are dealing with the McNulty memorandum, which rewards or penalizes them according to their 'willingness to cooperate,' he said.



Multiple responsibilities

The general counsel's role has been reformed as a result, Horn pointed out. There's the lawyer role to make sure documents are filed in a timely manner, and the business role, requiring that general counsel have strategic input. General counsel are still gatekeepers too, the first to detect and defend against fraud. So coordinating with others is crucial. 'He or she is not only a chief compliance officer, but also a chief ethics officer,' said Horn.

The American Bankers Association suggests general counsel should oversee compliance. Wagonhurst commented that those with ethics programs often see general counsel doubling as compliance officers. A better approach, though, may be to separate general counsel and compliance officer roles. 'Oftentimes the general counsel is too close to employees to make an effective compliance officer,' she said.

Do you have a problem?

Wagonhurst illuminated several areas that general counsel should consider during and prior to an investi-

gation. Noting triggers that derive from internal processes like auditing and hotlines, she said employee complaints should not 'automatically be referred to the HR department.'

Horn posed a hypothetical crisis where a company is surprised by an article suggesting its product poses a risk; she reminded companies to 'know your area' and to 'continue to scan the horizon.'

Conducting an internal investigation is advisable to help 'identify and end improper/illegal practices,' Wagonhurst said. But she cautioned, 'Whatever you try to do internally cannot be viewed as obstructing the external investigation. You must have an appropriate compliance program in place.'

The structure of an investigation is also important, and should consider the question: 'Who is the client?' The answer determines who conducts the investigation, if it's conducted under attorney-client privilege and whether general counsel is implicated. Wagonhurst said the compliance officer can conduct non-privileged investigations, but consider that he or she should be viewed as 'the good guy.' In-house counsel is in a similar situation, in that 'business people feel comfortable reporting issues to [them].' Outside counsel is needed when there's an 'independent investigation' and would 'help demonstrate the thoroughness of your investigation,' she said. Most webinar respondents said they would use members of the in-house team, outside counsel and other resources during an investigation.

Implementing an investigation

'Consider getting the audit committee of the board to engage outside counsel to conduct the investigation,' said Wagonhurst, who also advised giving prompt notification to auditors, which, if they're one of the Big Four, could have a 'shadow auditor' come in. This supplement can 'ensure that an appropriate and thorough investigation has taken place,' she said.

'Constant communication and constant coordination,' are key, she added. Horn agreed, advising insurers' prompt involvement as policies can be revoked.

Then there's the legal obligation to preserve documents. 'If you conduct an investigation, you will hopefully come up with material you can use in defense,' Horn said, so general counsel should take advantage

of the attorney-client privilege. Horn cited 'the distribution list' as the biggest footfall in this area because if 'attorney-client privilege is to apply to the communication, it must be one that is confidential.' He warned against long email cc lists and FYI notifications and said joint defense agreements 'should be used very, very carefully' because 'the touchstone is commonality of interests,' and privilege must be assured.

Good flow

Wagonhurst brought up the challenges of difficult-to-control information flow. 'You want to avoid the water cooler talk,' she said. 'There is a high degree of risk of that type of information leaking out of the organization.' Employees 'must be reminded not to discuss the investigation... You can't just say it once, you have to say it a lot.'

'Make sure you have people who really understand the system,' said Wagonhurst. Consider costs, interview locations, memos versus rough notes, and 'retain necessary expert consultants to assist, retrieve and organize relevant and key documents,' she continued.

When all is said and done

When disclosing the final report, 'consider the recipient' and exercise caution issuing written instead of oral reports, said Horn, stressing PowerPoint, which combines the two methods. Once results are received, press releases need to go out, files preserved and amendments made.

Horn consoled listeners in saying the SEC will rarely ask for 'work-product protections'. With that in mind, he suggested considering whether you need a full or limited privilege waiver. 'If you use a privileged document to prepare witness, that may work a waiver of the privilege,' he noted.

To avoid an investigation, or at least make one smooth, Horn said employees 'have to have an eye toward ethical concerns.' Wagonhurst concurred: 'To avoid problems in the first place ... make sure that you have an effective compliance program.'

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▶ Janine Armin is assistant editor for Corporate Secretary magazine.

