



**CORPORATE WAVELENGTH**  
*The Corporate Governance, Risk, and Compliance Web Series*

Brought to you by Corporate Secretary and Foley & Lardner LLP

## Rethinking the Internal Investigation: What to Do When the General Counsel is in the Hot Seat

September 5, 2007

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## Today's Speakers

**Cheryl Wagonhurst**  
 Partner, Foley & Lardner LLP

- Member of White Collar Defense & Corporate Compliance Practice Group and Health Care Industries Team
- Member of Advisory Board Society of Corporate Compliance and Ethics, Board of Directors of Health Care Compliance Association and Editorial Board of Compliance Today
- Experienced in designing and implementing compliance programs, conducting internal investigations and designing and implementing efficient systems to manage complex litigation and investigations.



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5

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## Today's Speakers

**Dawson Horn, III**  
 Assistant General Counsel, Altria Corporate Services, Inc.

- Primary responsibilities include product liability and civil RICO litigation work
- Recently managed defense of multi-billion dollar RICO law suit by the DOJ against major cigarette companies
- Previous positions include litigator with Pepper Hamilton & Scheetz, counsel to Scott Paper Risk Management Department where he was responsible for coverage issues, procurement counsel for Campbell Soup Company and leading corporate transactions for UnitedAuto Group and Dannon



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## Today's Moderator

**Brendan Sheehan**  
 Executive Editor, *Corporate Secretary*

- Editorial mission: To provide innovative and insightful analysis for corporate secretaries, general counsel and compliance officers
- *Corporate Secretary* is the leading source of information on matters relating to the SEC, Sarbanes-Oxley, D&O insurance, shareholder communications, proxy solicitation and voting, director education and compensation, listing requirements and entity management



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## Overview

- Increased pressures for internal investigations present new role and challenges for the General Counsel
- How these challenges impact the commencement and implementation of an internal investigation
- Managing the results of the internal investigation

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9

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## Increased Pressure – Auditor’s Increased Focus

- SOX (2002):
  - Section 301: Requires Audit Committees (AC) to establish procedures for the receipt and retention, and treatment of complaints regarding accounting, internal accounting controls or auditing matters. Also requires that the AC have the authority to engage independent counsel and other advisers, as necessary to carry out its duties, and be provided with appropriate funding to pay said advisers.
  - Section 303: Made it unlawful for officers or directors of an issuer or any other person to take action to fraudulently influence, manipulate or mislead any independent accountant performing an audit.

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## Increased Pressure - Whistleblowers



**PERSONS OF THE YEAR**  
**TIME**  
**The Whistleblowers**  
CYNTHIA COOPER OF WORLDWIDE COLLEEN ROWLEY OF THE FBI SHERRON WATKINS OF ENHON

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## Increased Pressure – Government Investigations

- Increased state activity – Elliot Spitzer
- Healthcare industry – billing, coding, quality of care and kickbacks to referral sources
- Pharmaceutical industry
- Financial industry
- Energy industry
- Subprime lenders/marketing

  12

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## Increased Pressure – Government Investigations (cont'd)

- Backdating stock options
  - Over 100 companies under investigation by SEC,DOJ or both
  - Approximately 15 General Counsel nationally have been forced out of their positions

  13

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## Increased Pressure – SEC Actions Against General Counsels

- Failing to furnish material information or providing false information to company auditors
- Preparing and/or filing false and misleading public financial information
- Distributing unregistered securities
- Issuing improper legal opinions

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## Increased Pressure – Legislative, Regulatory and other Government Actions

- SOX
- Federal Sentencing Guidelines
- Seaboard Report
- McNulty Memorandum

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## The General Counsel's (new) Role

- General Counsel's role as:
  - Facilitating the meeting of business objectives
  - An important gatekeeper in the prevention and detection of fraudulent activity;
  - Defending the organization; and
  - Coordinating with others in the organization to reduce risk and ensure compliance–
    - Chief Compliance Officer
    - Chief Ethics Officer
    - Chief Risk Officer
- Ethical considerations for the General Counsel

  16

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## General Counsel as Chief Compliance Officer

Pros

- Chief legal officer of organization should have oversight and responsibility for assuring the implementation of an effective legal compliance system under the oversight of the board of directors. (ABA Task Force)

Cons

- Too much emphasis/resources devoted to putting out fires and not enough focus on proactive preventative measures
- Lack of independence from management
- One Iowa Senator's view – “It doesn't take a pig farmer from Iowa to smell the stench of conflict in that arrangement” of the General Counsel and Chief Compliance Officer wearing two hats ....”

  17

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## General Counsel as Chief Compliance Officer

Helpful resource document – OIG/AHLA “An Integrated Approach to Corporate Compliance: A Resource for Health Care Boards of Directors” July 1, 2004

  18

## Live Meeting Poll

### Polling Question 1

**To ensure appropriate governance and compliance in today’s environment, your organization is reconsidering the respective roles of general counsel (GC) and chief compliance officer (CCO). Which of the four choices makes the most sense:**

- **No need for a CCO. The GC’s role is to provide a legal compliance system under the oversight of the board**
- **The CCO and GC should be separate positions with the CCO reporting to the GC. Both have a dotted line to the board**
- **The GC and CCO should report to the CEO and both the GC and CCO should have a dotted line to the board**
- **The CCO should report directly to the board. The GC should report to the CEO with a dotted line to the board**

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## How do these new challenges for the General Counsel impact internal investigations?



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## 1. What triggers an internal investigation?

- Internal audits & monitoring
- Hot line calls; Internal complaints
- Other non-compliance (e.g., cost accounting, quality of care, etc.)
- Third-party complaints/accusations
  - Legal proceedings
  - Subpoenas
  - Outside audits & reviews
  - Suppliers/vendors
  - Third-party billing
  - Patients/beneficiaries
  - Competitors
  - Former employees

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## ***The New York Times***

### **Iraq Weapons Are a Focus of Criminal Investigations**

By JAMES GLANZ and ERIC SCHMITT

Published: August 28, 2007

BAGHDAD, Aug. 27 — Several federal agencies are investigating a widening network of criminal cases involving the purchase and delivery of billions of dollars of weapons, supplies and other matériel to Iraqi and American forces, according to American officials. The officials said it amounted to the largest ring of fraud and kickbacks uncovered in the conflict here.



## **2. What factors influence the scope of an investigation?**

- Number of complaints
- Reliability of sources
- Control systems
- Seriousness of complaint
- Likelihood and scope of wrongdoing

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### 3. Why is it advisable to conduct an internal investigation?

- Element of an effective compliance program and fulfills board's duty to investigate
- Determine if federal/state liability before government or whistleblowers
- Identify and end improper/illegal practices
- Minimize criminal and civil exposure to extent possible
- Minimize sanctions
- Public relations

  24

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### 4. How is an internal investigation organized and structured?

- Who is the client?
- Who should manage and oversee the investigation?
  - Cost and impact of the issues – striking the right balance
  - But, if the person leading the investigation is NOT an attorney, then the investigation is not ordinarily privileged
  - Un-privileged investigations can be subpoenaed by government agencies

  25

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## 5. Who should conduct the investigation?

- Who should conduct the investigation?
  - Compliance officer
  - In-house counsel
  - Internal audit or other multidisciplinary team
  - Outside counsel
  - Special counsel
- When is it necessary to formally retain outside counsel?
- Is it always necessary to have an investigative plan?

  26

## Live Meeting Poll

Polling Question 2

**What is the best use of resources in order to carry out an internal investigation involving serious allegations?**

- **Use in-house counsel to conduct the investigation and outside counsel at the conclusion to advise on disclosure**
- **Use outside counsel to conduct the internal investigation and in-house counsel to assist with the results, such as corrective action**
- **Use a combination of in-house and outside counsel and other resources as necessary**
- **Use “independent” outside counsel**

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## 6. How should the internal investigation be implemented?

- Initial notification and communication Issues
  - Auditors, audit committee and shadow auditors, if necessary
  - D&O and other insurance carriers
  - Regulators
  - Public Relations – talking points
  - Internal employee communications
  - Relevant employees
  - Contractors and vendors
- Benefits to drafting a written investigative plan

  28

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## 7. What additional steps should be taken to implement the internal investigation?

- Preserve documents
  - Rationale
  - Document preservation memorandum
- Preserve ability to assert the company's attorney-client privilege
- Resolve conflict issues
- Employee/officer indemnification
- Joint defense agreements
  - Use caution
  - Not available unless counsel is making the agreement – extension of the attorney-client privilege

  29

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## 8. How do you control the flow of information during the investigation?

- Critical to identify from the beginning who may learn and who may not learn about the progress of the investigation
- Strong pressure from supervisors to be kept “in the loop”
- Courts and prosecutors pay close attention to this issue
- Lack of control over the flow of information can torpedo an expensive and time-consuming investigation
- Have a plan and stick to it – no exceptions
- Enforce “no comparing stories” admonitions
- Briefing groups of employees on “what is going on” is a recipe for problems

  30

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## 9. How is the investigation commenced: document analysis, interviewing and documenting witnesses interviews?

- Understand the system and consider cost efficiencies up front!
- Retain necessary expert consultants to assist
- Retrieve and organize relevant and key documents
- Use documents to identify current and former employees and third parties to interview
- Consider order of interviews and setting
- Upjohn warnings and avoid giving legal advice
- Documenting the interview

  31

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## 10. What steps should be taken to report and disclose the results of the investigation?

- First, consider the recipient of the report
- Oral vs. written report
  - Truly oral
  - Power point aided
  - Written report
- Dissemination of report
- Mandatory disclosure
- Voluntary disclosure – pros and cons and key elements of a voluntary disclosure

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## 11. You have the results of your investigation, what do you do now?

- Dismiss/reinstate employees
- Update public filings, as necessary
- Issue press statement
- Work with appropriate corporate resources and/or outside counsel to implement all additional corrective action, as necessary
- Preserve investigation file

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## 12. When to waive attorney-client & work product protections?

- McNulty considerations
- Full vs. limited waiver
- Crime/fraud exceptions for communications made in furtherance of contemplated criminal/fraudulent conduct
- Shareholder litigation
- Use of privileged documents to prepare witnesses
- Waiver in civil litigation

  34

## Live Meeting Poll

### Polling Question 3

**Your internal investigation and found that the “serious” allegations have been substantiated as events “material” to the organization. Disclosure to the public would likely cause a stock tumble with shareholder litigation. Your first course of action is to**

- **Disclose results to regulators immediately because the risk of info leaking through a whistleblower is too great.**
- **Obtain advice from outside counsel on the risks and benefits of waiving the privilege and disclosure.**
- **Bring the matter to the board and the external auditors and let them decide.**
- **Resign. The pressure too great, your stock options are likely to become worthless and ski season is just around the corner.**

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## Conclusion

- Internal investigations can be very healthy and necessary for an organization
- The General Counsel must rethink his/her role in the process of considering and conducting the internal investigation

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## Thank you for your participation

For more information on the Corporate Wavelength web conference series, visit  
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