

NATIONAL
DIRECTORS
INSTITUTE

NDI Executive Exchange

What's on Your Mind?

Join Our Continuing Peer-to-Peer Exchange Exploring the Latest Corporate Governance Trends

Board-Directed Internal Investigation

November 14, 2012

9:15 a.m. – 10:30 a.m.

FOLEY
FOLEY & LARDNER LLP

CO-SPONSORS

AON

D. F. King

 EVERSHEDS

 **FTI**
CONSULTING

 **KPMG**

IN-KIND SPONSORS

 Boardroom Bound
Reinventing Corporate America One Board at a Time

 inFORUM
BOARDACCESS[®]
Women Enhancing Corporate Boards

NASDAQ OMX

Internal Investigations and the Board: A Glitzy Hypothetical

November 14, 2012

Panelists

- Haydee Olinger – Vice President and Global Chief Compliance Officer, McDonalds Corp.
- Pam Johnston – Foley & Lardner LLP
- Joseph Alesia – Managing Director, Stroz Frieberg LLC
- Graham Murphy – Principal, KPMG LLP
- Neill Blundell – Eversheds LLP
- Bryan House – Foley & Lardner LLP

The Players

- Glitz, Inc. is a U.S. public company (NYSE: GLIT) in the entertainment business with subsidiaries worldwide. Glitz has a whistleblower hotline monitored by a third-party provider.
- Witt Blower is Glitz's conscientious controller, who reports to the CFO, Joe Money, at headquarters in Los Angeles.
- Tom Boss is Glitz's imperial Chairman and CEO.
- Wise Sage is Glitz's General Counsel.
- Sage is concerned about the new SEC whistleblower rules, but Boss does not think that Glitz needs to do anything further in light of the new rules.

Questions:

- What should Sage think about with respect to whether to implement new policies and procedures in light of the new whistleblower rules?
- Should Glitz's Board of Directors be made aware of complaints made to the hotline?

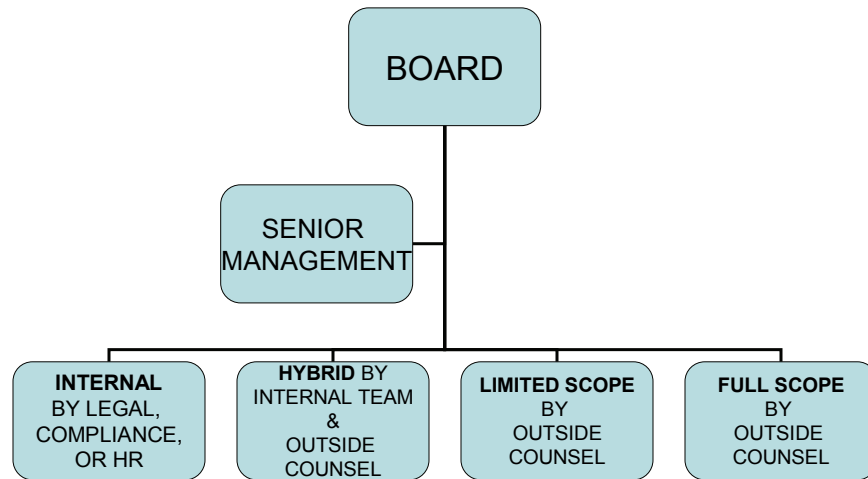
The Problem

- In 2012, Blower hears concerns regarding accounting issues at its London subsidiary, Glitz's most profitable subsidiary. Blower travels to London to assess the situation.
- After reviewing the situation, Blower thinks there are serious accounting problems, including potential bribery. He learns that Boss may have directed the misconduct. Blower asserts that action should be taken promptly to address the situation.
- Boss, Money and Sage have discussed the issue and Boss asserts that Blower is making a mountain out of a molehill. Boss threatens to fire Blower.

Questions

- Does Sage know enough to start investigating?
- If there is going to be an investigation, who should investigate? Should outside counsel be brought in?
- Does the Board need to be involved or updated about the situation?
- What should Boss's role be in the investigation?

TYPES OF INVESTIGATIONS



©2012 Foley & Lardner LLP

Review Begins

- Sage talks to a law firm that proposes a wide-ranging investigation in several countries that will take three months. Sage decides to have internal audit review the alleged accounting and bribery issues.
- After a two-day review in London, internal audit finds certain accounting entries concerning, but cannot conclusively confirm whether any monies were used to pay bribes.
- Blower continues to make his allegations.
- Boss tells Sage he is fed up and wants to fire Blower.

©2012 Foley & Lardner LLP

Questions

- What should Sage do now?
- Should Sage tell the Board now?
- Should outside counsel be hired?
- What should Glitz do with respect to Blower? Should Glitz consider a severance package, with a strong confidentiality clause, to exit Blower from Glitz?

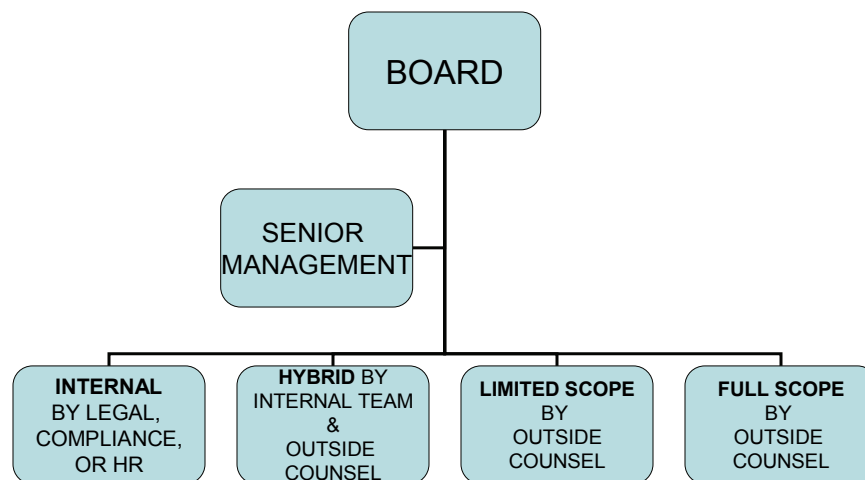
Employment Dispute

- Boss prevails over Sage and others and fires Blower with no severance.
- Blower sues Glitz and Boss for wrongful termination and retaliation in violation of Dodd-Frank. Blower's complaint provides considerable detail regarding Boss's purported knowledge of the accounting issues and improper payments.
- The Hollywood Reporter picks up the "whistleblower" story and writes a long article.
- Sage wants Glitz's regular U.S. counsel to do a thorough review of the situation in London.

Questions

- Which counsel should be retained?
- Who should lead the investigation?
 - Audit Committee? Special Committee?
- Should senior management be kept apprised of the investigation? How?
- What should Glitz be thinking about with respect to document collection and review?
- Is it time to call the SEC or DOJ (or Serious Fraud Officer) and self-report?

TYPES OF INVESTIGATIONS



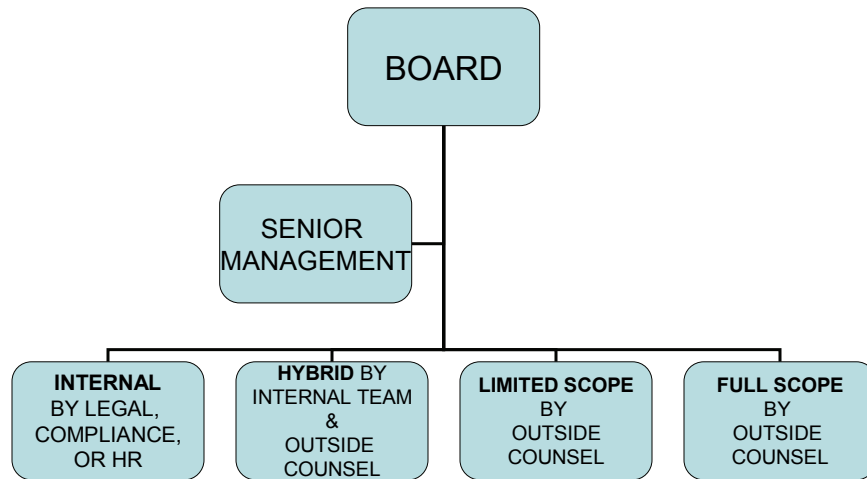
Outside Counsel Takes Control

- Outside counsel conducts a thorough investigation of London/UK operations.
- The foreign evidence is collected and analyzed in the U.S. to save costs.
- Outside counsel finds evidence of improper accounting entries and improper payments of \$250,000 to an English politician.

Questions

- Should Glitz expand the scope of the inquiry? What criteria should be evaluated?
- Is it time to revisit whether Glitz should self-disclose violations? Who decides whether Glitz should self-report?
- Should Glitz add a public relations consultant to the team?

TYPES OF INVESTIGATIONS



©2012 Foley & Lardner LLP

Expanded Internal Investigation

- Glitz expands the internal investigation to other countries
- Evidence of bribes is coming to light in several countries. It appears \$5 million in bribes were paid just from looking at 3 more countries
- Investigation will take 6 more months to finish in the various countries at issue.

©2012 Foley & Lardner LLP

Questions

- Should Glitz self-report now?
- What should the Board do about Boss?

Government Subpoenas Arrive

- The LA U.S. Attorney's Office sends Glitz a grand jury subpoena tracking the allegations in the Hollywood Reporter story and the civil lawsuit
- SEC sends a similar subpoena.

Questions

- Any change in direction?
- Can you settle the civil lawsuit?
- Does the investigation need to continue?
- What media strategy is needed?

Take-Aways

- Take all whistleblowers seriously.
- Be flexible and prepare to scale up and down, depending on the facts being learned.
- Don't surprise your Board.
- Invest in good email archiving technology – speeds up an investigation and reduces discovery costs.
- Consider predicative coding to review the volume of relevant emails and documents.

Take-Aways

- If you are in a high-scrutiny business, assemble a government investigations crisis team ahead of time and have a plan for major internal investigations.
- Have a PR response team in place if necessary.