

RESPONDING TO SEC AND DOJ INVESTIGATIONS

Charles R. Parker
Gregory C. Hill

INTERNAL AND GOVERNMENT INVESTIGATIONS

LOCKE LIDDELL & SAPP LLP
Houston, Texas



What Triggers an SEC Investigation?

- n Whistle-Blower
- n Risk Based Investigations
- n SEC “Wildcatting” for Fraud
- n Industry Wide Investigations
- n Affiliation with Executives, Shareholders, or Corporations under Investigation
- n Insider Trading
- n Self Reporting

The New Cooperation

- n Thompson Memorandum
- n SEC Enforcement

Cooperation – What's Required?

- n Audit Committee
- n Independent Internal Investigations
- n SEC and DOJ Want Immediate, Accurate Reporting of Misconduct
- n Terminate Responsible Wrongdoers
- n Remedial Measures (Monitor)
- n Compliance

Cooperation – What's Required?

- n Providing results of Independent Investigation to the SEC and DOJ
- n Written Report vs. Powerpoint
- n Request for Notes and Witness Interviews
- n Waiver of Attorney – Client Privilege

Fired CFO Wins Early Sarbanes Claim

- n Whistle-Blower Wanted His Own Lawyer at Internal Hearing

PCC Flow Technologies (2006)

- n Whistleblower is protected –
 - n Even if they are not the first to raise issue about potential wrongdoing; or
 - n They do not believe they are reporting “fraud” under the Securities and Exchange Act
- n SOX Protection applies to the provision of any “violation of...any rule or regulation of the Securities and Exchange Commission.”

TONE AT THE TOP

COMPLIANCE PROCEDURES

Why Cooperate?

- n FCPA cases
- n Number of Reported Cases by DOJ
- n As many in 2002-2005 as the previous six years
- n Penalties from 2002-2005 equal \$56MM
- n Legal Costs are 4 to 5 times the Penalties

SEC FINES LUCENT \$25 MILLION FOR FAILING TO COOPERATE

- n Non-Cooperative Actions:
 - § Incomplete and untimely document production;
 - § Comments from outside counsel that undermined the settlement; and
 - § Expanding the scope of employees that could be indemnified.

CORPORATIONS FACE THREE PRONG ATTACK

- n SEC

- n DOJ

- n Civil Suits

 - n Aiding and Abetting

 - n “Creator Test”

 - n Manipulative or deceptive device or contrivance

Process

- n Knowledge of Investigation, Informal Inquiry by SEC, or Receipt of Subpoena
- n Provide Prompt Notice to All Employees to Retain Relevant Documents
- n This Notice Should Require the Retention of All Relevant Electronic Data
- n Document Management Policies, such as Routine Destruction, Should be Suspended.

Determine Scope Of...

- n Paper and Electronic Documents Available
 - n Subpoena might require that information from blackberry and home computer be retrieved.

SEC SUPBOENA

- n Review Order of Investigation, if available
- n Contact SEC office regarding subpoena
- n Rolling Production
- n Costs
- n D & O Coverage Issues

CHARGES BY THE SEC and DOJ

- n Who can Represent the...
 - n Corporation
 - n Officers
 - n Directors

Disclosure in SEC Reports

- n Q: When is Disclosure Required or Otherwise Appropriate?
- n A: Disclosure is necessary or appropriate when the results of an investigation are material to the company.
- n Examples of Matters Requiring Disclosure?
 - n Underlying facts require a restatement of financials
 - n Investigation discovers a material weakness in internal controls
 - n Misconduct by senior management or directors
 - n Violation of laws
 - n Formal Investigation by SEC or DOJ

Disclosure in SEC Reports (cont.)

- n Appropriate Form of Disclosure
 - n Press Release
 - n Form 8-K
 - n Form 10-Q or 10-K

Disclosure to Auditors

- n Importance of Prompt and Full Disclosure
- n Principal Areas of Concern
 - n Impact on financial statements – restatement
 - n Fraud
 - n Credibility of Management
 - n Internal controls over financial reporting
- n Attorney-Client Privilege

The Foreign Corrupt Practices Act

- n It is a crime to give anything of value to a foreign official
 - n To obtain or retain business
 - n for the purpose of obtaining an improper advantage
- n Primary components
 - n Anti-bribery provisions
 - n Books and records
 - n Unlike SOX, there is no materiality requirement

FCPA (cont.)

FCPA Applies to:

- n Issuer – essentially any company whose stock is traded in the U.S.
- n Domestic concern – U.S. citizen, national, resident, or a U.S. company or a company with its principal place of business in the U.S. or officers, directors, stockholders, employees, and agents of such an entity
- n Any person, if acting in U.S. territory
- n Any U.S. national or U.S. company acting outside the U.S. – does not require use of interstate commerce

FCPA Compliance

- n FCPA Compliance Program
 - n Training
 - n Representations and warranties
 - n Certifications
 - n Due Diligence

Not Prohibited by FCPA

- n Payments permitted by local law
- n Facilitating Payments
- n Gifts/promotional expenses – but must be:
 - n Customary and reasonable
 - n Not directly tied to obtaining/retaining business