

# Overview of Trends and Best Practices Internal Investigations

# The Decision to Conduct an Internal Investigation

- Internal investigations can be triggered by one or more factors, including
  - Government Subpoena or Voluntary Request for Information
  - Search Warrant
  - Whistleblower
  - Media Report
  - Financial Restatements
  - Shareholder Demand Letter or Civil Complaint
  - Board or Audit Committee Concerns

# The Decision to Conduct an Internal Investigation (Cont'd)

- Factors to consider include:
  - The nature and severity of the problem
  - Is a government agency investigating?
  - Is civil litigation pending or expected?
  - The source(s) of allegations
  - The likelihood of eventual discovery
  - Options for remedial measures without full investigation
  - The potential benefits of discovery and disclosure

# Managing the Investigation

- Internal investigation objectives include:
  - To determine the facts objectively
  - To identify appropriate remedial measures
  - To satisfy auditor requirements
  - To satisfy regulator requirements
  - To avoid unnecessary disruption and exposure
- An internal investigation may be “Exhibit A” in a government investigation or prospective litigation
  - Done right, it can be *your* “Exhibit A,” demonstrating the Company’s integrity and honesty
  - Done poorly, it can be an opponent’s “Exhibit A,” suggesting a culture of deception

# Managing the Investigation (Cont'd)

- The investigation team should consist of stakeholders who can:
  - Maintain investigation's independence
  - Resist attempts to unduly influence how the investigation is conducted
  - Ensure that the investigation is conducted pursuant to the highest standards of professionalism
- The investigative team can be limited to internal stakeholders, or expanded, as appropriate to include:
  - Outside counsel
  - Forensic accounting experts
  - Technology experts
  - Non-lawyer investigation services

# Managing the Investigation (Cont'd)

- Communications between the investigative team and others must be closely controlled throughout the process
  - Interactions with management
  - Interim reports to auditors
  - Updates/communications with regulators
  - Interim reports to Board, Audit Committee and/or Special Committees
- The investigative team can better achieve its objectives and level-set the expectations of internal stakeholders by understanding the regulatory and legal landscape in which the business operates

# Impact of the Investigation

- Internal investigations, and investigative reports, can have wide-ranging and long-lasting impacts, particularly where there is a waiver of privilege
- The case of *SEC v. Herrera, et al.*, No. 17-20301 (S.D. Fl.), is a recent example where a court has held that the verbal disclosure of the substance of interview memoranda waives work product protection for the memoranda themselves
  - In December 2017, a federal magistrate judge found that a law firm waived privilege over its interview memoranda and interview notes from an internal investigation by providing the SEC with “oral downloads” of the interviews, which the Court described as the “functional equivalent” of disclosing memoranda and notes
  - The Court found that the law firm did not waive work product privilege for the interviews for which it did not provide “oral downloads” to the SEC or the PowerPoint presentation it delivered to the SEC containing only facts, and not attorney mental processes
  - The law firm has since produced work product in accordance with the Court’s order
- Takeaway: In-house and external counsel can better avoid waiving the privilege by limiting its communications with those outside of privilege to facts and high-level conclusions or impressions