INTERNAL INVESTIGATIONS
A GENERAL COUNSEL’S VIEW

C. Ernest Edgar IV
General Counsel, Atkins North America
SCCE South Atlantic Regional Conference
March 15, 2013

Role of the General Counsel

- Conscience of the Corporation
- Principal Legal Advisor to the Board, the CEO, and the Company’s Executive Leadership
- Monitors/manages/coordinates all outside legal matters
  - Strategic decisions in cases
  - Use of outside legal resources and outside legal spend
  - Use of internal legal resources
- Corporate Secretary (therefore, corporate governance)
- Chief Ethics Officer (therefore, compliance responsibility)

Role of the Ethics Officer

- Oversee compliance systems and training
- Conduct internal investigations when appropriate
- Relationship to CEO, General Counsel, CFO, Human Resources and the Board
  - Potentially a team of local ethics officers (LEOs) throughout the company
- As a separate role, the position generally only makes sense for large corporations with large compliance responsibilities
  - Otherwise, dual-hatted with General Counsel; or
  - As a part time duty to another employee
Choosing Inside or Outside Investigators

- Depends on the scope and severity of the allegations
  - Allegations of criminal wrongdoing?
  - Involvement of corporate officers?
- Subject to available resources within the Department
  - Internal counsel
  - Trained local ethics officer staff
- For example, garden variety ethics complaints = internal resources
- Alternatively, complex or high risk complaints = outside resources

Outside Investigations: Who is the Client?

- Obvious answer: the Company
- Practical answer: the General Counsel
  - No one else in the company structure is trained to understand the legal process and risk points an investigation presents
- What if there is no General Counsel?
  - Often the case for small companies
  - Next best option is the CEO or CFO

Role of the General Counsel During Investigations

- Manage investigations similar to outside litigation
- Retain outside counsel
  - Scope the investigation for outside counsel
  - Monitor/manage outside legal spend
  - Point of contact for gathering the information outside counsel requires
  - Hold notices for documentation
  - Witness interviews of employees
- Make strategic decisions with outside counsel as investigation proceeds
- Periodically report to company leadership and the Board (if necessary)
Feedback From Outside Counsel to the General Counsel

- Substance of the investigation’s progress and cost
- Progress:
  - Need to balance speed with thoroughness
- Part of that equation is cost:
  - Attorney’s fees and costs
  - Electronic Discovery
- Fiduciary Responsibilities
  - Public disclosures?
- Voluntary Disclosures to enforcement authorities?

Treating Employees During the Investigation

- Disclosing the purpose of the interview/investigation
- Counsel represents the Company, not the employee
  - Under Florida law, employees in certain circumstances are entitled to representation at company expense
  - In that case, need to decide if separate counsel should be retained
  - Have to balance additional expense against (potentially diverging) client interests and the posture of the investigation/ongoing case
- Terminating employment vs administrative leave
  - Administrative leave is appropriate when an employee’s conduct is in doubt
  - Termination decisions should be made in the ordinary course of business
  - There might be a tactical advantage to hold an employee on administrative leave, but this should be measured in days—not weeks or months

Role of the Board

- Company management must report material events to the Board
  - CEO, CFO, General Counsel, Ethics Officer, Internal Audit
  - Audit Committee (and other Board committees) have an increasingly active role and responsibility
  - In most cases, they should receive information and issue guidance
- Active Audit Committee investigations should be for rare and high profile events
  - If the Board retains separate counsel:
    - Potentially pits the Board against management—distracting from ongoing business
    - Potential for disputes between the Board and management over scope and cost of investigation—no easy way to resolve
    - Separate counsel should be answerable to both the General Counsel and Board
    - Someone has to have daily oversight of investigation scope, strategy, developments and expenditures
    - The Board and its Committees are inherently NOT structured to do this