

# 2017 Corporate Counsel and Trade Regulation Seminar

**Internal Corporate Investigations**

**11:15 a.m. - 12:00 p.m.**



**Presented by**

Nick Klinefeldt

Faegre Baker Daniels LLP

801 Grand Ave., 33rd Floor

Des Moines, IA 50309

Phone: 515-447-4717



**Friday, September 22, 2017**

# Internal Corporate Investigations

Iowa State Bar Association

September 22, 2016

Nick Klinefeldt

# INITIAL CONSIDERATIONS

# When to conduct an investigation

- ▶ Notice of government investigation
  - ▶ Government subpoena
  - ▶ Search warrant
  - ▶ Regulatory inquiry
- ▶ Civil lawsuit
- ▶ Media report
- ▶ Employee complaint
- ▶ Whistleblower complaint

# Why conduct an investigation

- ▶ Stop/prevent future wrongdoing
- ▶ Limit legal exposure
- ▶ Get ahead of problem
- ▶ Ability to cooperate – Yates Memo
  - ▶ Cooperation is all or nothing
  - ▶ Must include relevant facts about individuals
  - ▶ Proactive Cooperation/“Yates Presentations”

# IMPORTANT STEPS

# Representation Considerations

- ▶ Who to have conduct the investigation?
  - ▶ In-House Counsel vs. Outside Counsel
  - ▶ Knowledge about potential legal exposure
  - ▶ Credibility
- ▶ Who does that attorney represent?
  - ▶ Company
  - ▶ Board or Committee
  - ▶ Individuals

# Collecting & Producing Documents

- ▶ *First step: Litigation Hold*
  - ▶ Recipients
  - ▶ Scope
  - ▶ Directions to employees to hold documents
  - ▶ Directions to IT Dept. to stop deletion of emails



# Collecting & Producing Documents

- ▶ *Next considerations:*
  - ▶ ESI Protocol of subpoena or future discovery request
  - ▶ Taking advantage of metadata
    - ▶ Advanced searches
    - ▶ Search term reports
  - ▶ Contract reviewers
  - ▶ Budgets
  - ▶ Clawback agreements – Fed. R. Evid. 502(b)

# Conducting the Interviews

- ▶ *Upjohn* Warning:
  - ▶ We represent the company, and not you.
  - ▶ We are here to gather information for the purpose of providing legal advice to the company, and therefore, our conversation with you is protected by the attorney-client privilege.
  - ▶ The privilege is between the company and our law firm, not you and our law firm.
  - ▶ The company controls the privilege, and the company may decide to waive the privilege and reveal the content of this conversation to the government or other parties, without your permission or notice to you.
  - ▶ We request you keep this conversation confidential.

*Upjohn Co. v. U.S.*, 449 U.S. 383 (1981)

# Memorializing the Interviews

- ▶ Have a second attorney take notes and prepare a memo
- ▶ Memo is protected by attorney-client privilege and attorney work product
- ▶ Document basis for attorney work product
  - ▶ Not a verbatim transcript
  - ▶ Contains thoughts, mental impressions, and conclusions of attorney
- ▶ Document *Upjohn* warning as given and witness acknowledgement of warning

# Additional Considerations

- ▶ Joint Defense Agreements (a.k.a. Common Interest Agreements)
  - ▶ Oral vs. written
  - ▶ Conflict waivers
  - ▶ Control of privilege
- ▶ Third parties & experts
  - ▶ Must be necessary to attorney's ability to provide effective legal advice
  - ▶ Must be under supervision and control of attorneys
  - ▶ Carefully set up w/ written engagement setting forth basis

# REPORTING THE RESULTS

# Reporting to the Client

- ▶ Written Report
- ▶ PowerPoint Presentation
- ▶ Oral Report