



CONDUCTING AN EFFECTIVE INTERNAL CORPORATE INVESTIGATION: BEST PRACTICES, PITFALLS TO AVOID

THE BENEFITS OF THE EFFECTIVE INTERNAL CORPORATE INVESTIGATION

We are in an age of intense scrutiny of corporations. This scrutiny is coming from many directions: from government agencies like the U.S. Department of Justice, the U.S. Securities & Exchange Commission, state attorneys general, and scores of other agencies on the federal, state, and local levels; from an aggressive, opportunistic, and well-financed plaintiffs' bar; from competitors or potential acquirers seeking to capitalize on the stumbles of their peers; and from current and former employees with first-person knowledge of the inner workings of the organization. Facts and events that did not see the light of day in the past are being hauled to the surface by constituencies with interests very distinct from that of the company. Beyond the more routine attention paid to companies by investors, analysts, and the press, in the current era corporations are on notice more than ever before—particularly public companies—that they are being watched.

More and more, the spotlight focuses on the company's response, or lack thereof, to evidence of potential wrongdoing by a person or entity affiliated with the organization. What can a company do when confronted with this increasingly familiar scenario? Sometimes the best way to defend and protect the company's interests is to conduct an internal corporate investigation. When conducted effectively and under the right circumstances, an internal corporate investigation can bring several benefits to the company:

- **Facts Revealed:** An effective internal corporate investigation provides the company with all available, relevant facts (including witness statements, relevant documents and emails, and even physical evidence) so that the company can make the best-informed decision regarding how to proceed.
- **Stop the Bleeding:** Even where wrongdoing has occurred within the organization, an effective internal corporate investigation helps the company to identify the source of the problem and to ensure that it does not continue or get any worse.

- **Memorialize Good-Faith Response:** An effective internal corporate investigation memorializes the company's appropriate, good-faith response to allegations of wrongdoing within the organization.
- **Potential Insulation/Mitigation Against Corporate Liability:** Although the doctrine of *respondereat superior* makes the company liable for certain acts of its agents, an effective internal corporate investigation can insulate against and/or mitigate the company's liability for the wrongdoing of its employees or affiliates.
- **Promote Ethical Behavior:** An effective internal corporate investigation can deter future bad acts by employees by demonstrating that the company will take seriously, and get to the bottom of, any evidence of wrongdoing within the company.

THE COMPONENTS OF AN EFFECTIVE INTERNAL CORPORATE INVESTIGATION

In this age of scrutiny for companies, the internal corporate investigation has become a well-recognized tool for achieving the benefits described above. While a full-blown investigation may not be required or prudent in response to *any* allegation of wrongdoing in the company, senior management and boards of directors should understand that an appropriately designed internal review can bring these benefits. But what are the components of an “effective” internal corporate investigation? What steps can a company take to ensure that it is getting the full benefits of this protective measure?

In sum, a good investigation has three basic components: (1) the right investigator; (2) a well-designed, reasonable, and flexible work plan for the investigator to follow; (3) and effective implementation of the work plan through tested practices to extract, understand, and utilize on the company's behalf the information obtained.

Who Should Investigate? Choosing the Right Investigator. It is often preferable for an internal corporate investigation to be conducted or directed by an attorney, whether in-house or outside counsel. This is because the attorney's work on behalf of the corporate client will be protected from disclosure—at least in the first instance—by the attorney-client privilege and work product protections. While there are various ways that outsiders can seek to obtain privileged communications and attorney work product (some of them more successful than others) at least these privileges create an initial barrier to the disclosure

of the information to the outside world. Indeed, the Supreme Court made clear more than 25 years ago that receiving privileged advice in the setting of an internal corporate investigation is one of the best ways to ensure that corporations comply with the law. *Upjohn v. United States*, 449 U.S. 383 (1981).

Determining whether the investigation should be conducted by inside or outside counsel can be a more difficult strategic question. The benefits of using in-house counsel can include reduced expense and more intimate knowledge of the company's business and people. Outside counsel may have more knowledge, familiarity, or expertise with the particular laws or legal structure at issue, or with the inner workings of the government agency that ultimately will be interested in the results of the investigation. Outside counsel may be viewed as more independent by regulators or prosecutors. Outside counsel may also be better equipped to deal with sensitive or embarrassing issues; employee witnesses may be more willing to speak with an outsider whom they don't see regularly in the workplace. In other instances, it makes sense for the investigation to be conducted jointly with inside and outside counsel.

If outside counsel is selected, it is helpful to clarify who within the corporation will be the contact person to direct the work of outside counsel and to receive reports regarding the progress of the investigation.

In some investigations, inside or outside counsel will need to retain an expert to assist in understanding certain information. In complex cases involving accounting issues, for instance, counsel will sometimes retain a forensic accountant to provide expert assistance to help the attorney-investigator understand the facts uncovered through an accountant's eyes. Where an expert is necessary, the expert should be retained by the attorney-investigator directly to bring the expert's work within the attorney-client privilege.

Developing an Effective Work Plan. Once the investigator is selected, it is important for the investigator to develop (in close consultation with the client) a carefully designed work plan. The work plan should have the following components: (1) the work plan must identify the scope of the review by clarifying the issues to be considered and addressed as well as any limitations on the investigator; (2) the work plan must identify (in as much detail as is reasonable) the anticipated methods of data collection including email collection and review, hard copy document collection and review, and

witness interviews; and (3) the work plan should make clear whether a final report, written or oral, is contemplated.

Developing a work plan is both an art and a science. The work plan should be narrow enough to address only the issues that require attention from the investigators but broad and flexible enough to permit exploration of unexpected facts that may be important to the company. A overly broad work plan will result in unnecessary work and expense for the corporate client, but an overly rigid and narrow work plan may miss key issues.

Implementing the Work Plan Effectively. Once the work plan is developed and approved by the corporate client, it must be implemented effectively. Each step in the investigation requires the exercise of judgment and attention to detail.

Evidence Preservation. At the outset of the investigation, an evidence preservation memorandum typically should be issued to relevant persons in the company. The memorandum should make clear that all relevant documents, including hard-copy and electronic files as well as emails, must be retained by the employee for the entire scope of the investigation. When the company has received an official request for information, such as a subpoena from the DOJ or SEC, circulating a prompt evidence preservation memorandum to all relevant persons is a necessity

When to Review Documents. The attorney-investigator should determine whether to conduct document and/or email review before conducting witness interviews. It is often helpful to conduct at least limited document and email review in advance of witness interviews so that the documents or emails at issue can be discussed with key witnesses during the course of their interview. In other cases where a quick answer or explanation is necessary, it may be more helpful to conduct witness interviews first and then conduct follow-up interviews if new issues are raised by the documents.

How to Collect and Review Documents. The attorney-investigator should determine a client-approved method for collecting and reviewing relevant hard-copy documents and emails. Sometimes it is useful to meet with relevant witnesses early in the investigation to ask them to gather relevant hard-copy documents that they have stored in their files, offices, or even homes. Sometimes it is helpful to ask witnesses to pull and print documents from their computers that may be stored in relevant email files or folders. Once collected, the

attorney-investigator should determine the appropriate personnel and process for completing the document review as efficiently and cost-effectively as possible.

With respect to emails, the attorney-investigator should determine at the outset of the investigation precisely how, if at all, emails will be collected, reviewed, and coded during the course of the review. Typically, it will be helpful for the attorney-investigator to consult with the company's information technology staff to determine what type of data is available and how it is stored.

It is sometimes necessary to retain an outside electronic discovery vendor to assist in the collection of emails and to facilitate the review of emails by the investigation team. In such cases, the attorney-investigator should make sure that the client approves the vendor in question and that the fees for such services are as low as possible to satisfy the needs of the investigation and the corporate client.

Once the relevant documents are collected, they should be reviewed by competent persons to assist the attorney-investigator in understanding the chronology of key events at issue. Sometimes it will be helpful to create a factual chronology document that surveys the development of the issue in question over time.

Witness Interviews. Witness interviews are usually the centerpiece of an effective internal corporate investigation. Witness interviews should be conducted with at least two persons: one person to focus on asking the questions and the other person to observe the interview and take notes. Having two persons present for interviews also provides an additional witness as to what the interviewee stated in the event there is a later disagreement.

There are pros and cons to using a recording device in witness interviews, as there are a host of issues that result from the creation and existence of a recorded witness statement. Recording generally is not favored, at least for initial interviews. Companies certainly should refrain from surreptitiously recording witness interviews without first consulting with counsel on the details and legality of such a recording in the jurisdiction in question.

Instructing the Witness. At the outset of the interview, the attorney-investigator should provide certain instructions to

the witness to clarify the purpose and context of the interview. These instructions should be reflected in the notes of the interview. Most importantly, the attorney-investigator must make clear who he or she represents in connection with the interview, and the attorney-investigator should satisfy himself or herself that the witness understands the instructions.

Typically, the attorney-investigator will make clear that he or she represents the company only and not the witness personally in connection with the interview. The attorney-investigator should also be prepared to answer questions from the witness, such as “Do I need a lawyer?” If the attorney-investigator is representing the company only, the attorney-investigator should be careful not to provide legal advice to the witness on this issue, although the company and the investigator may decide to allow the witness at his or her election to be separately represented for purposes of the interview.

If the interview is conducted in a privileged setting (e.g., between an attorney for the company and an employee of the company), the attorney-investigator should make clear that the interview is covered by the attorney-client privilege, but that the privilege belongs to and may be waived by the company in its sole discretion. The witness should be made to understand that he or she will have no right to object to the company’s decision to waive the privilege and to share the substance of the interview with third parties, including government agencies, if the company chooses to do so in the future. The attorney-investigator should be prepared to answer questions about the nature of the privilege and any future waiver of the privilege by the company.

Interview Memoranda. After the conclusion of the interview, it is typically advisable to reduce the notes of the interview into a privileged memorandum summarizing the discussion. The memorandum should provide details as to who was present and the instructions given to the witness at the outset of the interview. Depending on the circumstances, it may be useful to attach as exhibits to the memorandum those documents that were discussed during the interview. The memorandum should be labeled as a “privileged and confidential” document and should include a qualification that the memorandum was drafted by counsel based on counsel’s impressions

and recollections and does not constitute a verbatim transcript of the interview.

Interim and Final Reports. The investigator should keep the client well informed of developments in the investigation throughout the process. Interim reports can be oral or written, depending on the circumstances. Final reports also should be oral or written and only as detailed as necessary to serve the client’s needs.

CONCLUSION

The practices described above are relatively straightforward. But the most important aspect of conducting an effective internal corporate investigation is to exercise good judgment in making key decisions throughout the review. Counsel should work closely with the client to talk through the options available at each turn as the investigation unfolds, to make sure that relevant facts are being unearthed fully and efficiently without getting lost down irrelevant rabbit holes. Careful analysis and thoughtful discussion with the client are the best ways to keep the investigation on the right track. If done well and thoroughly, an internal corporate investigation almost always leaves the company better positioned than it was at the start.

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