Maintaining the Integrity of Corporate Internal Investigations:
What Corporate and Legal Officers Should Know

A corporate internal investigation is typically undertaken following a serious allegation of wrongdoing, be it from a company insider, industry watchdog, or government investigator. When such an allegation is made, the company should:

- learn if there is a problem;
- if one exists, identify the nature and scope of the problem;
- fix the problem and put measures in place to prevent it from happening again; and, if necessary,
- be able to show that a proper investigation was conducted.

To best protect the company, the investigation must be conducted carefully and with integrity. A well-conceived and well-executed investigation will allow a company to take the right corrective action and mitigate the company's civil or criminal exposure. But a poorly planned or poorly executed investigation can create even more problems for the company, including potentially exposing it to civil litigation or, worse, criminal charges.

Internal investigations are rife with pitfalls, particularly in high-profile and sensitive matters. The most important thing corporate and legal officers can do is ensure the investigation is conducted in the right way, by the right people. Below are our top tips for protecting the integrity of the investigation and, by extension, the company.

1. **Put the right people in charge.** For an internal investigation to have maximum effect and credibility, it is important at the outset to determine who is in charge of the investigation, i.e., who determines the nature and scope of the investigation and who chooses the investigators. In some instances, it is appropriate for management to maintain control. In others, a special board committee of independent directors should be created to retain outside counsel and oversee the investigation. In others still, the board of directors or the audit committee of the board might be in charge. *The key is this: the person or entity retaining counsel –and ultimately responsible for the size and scope of the investigation –should not be someone conflicted (that is, potentially involved in the conduct under investigation).* Not only is it untenable for investigating counsel to answer to someone who does not want the investigation to uncover the truth, the investigation will be deemed worthless by any outside entity assessing its credibility. To avoid that, the reporting line should always be "clean" and the person in charge and giving directions day-to-day should always be legal counsel.

2. **Choose the right investigators.** Deciding who conducts the internal investigation is crucial. *If possible, all internal investigations, whether low- or high-risk, should be initiated and supervised by in-house counsel in order to protect the confidentiality of the investigation through the attorney-client privilege and the work-product doctrine*. Where the allegation is especially serious, or where there is potential for government enforcement or criminal sanctions, the company will be better served retaining experienced outside counsel—who were not involved in the matter at hand—for several reasons.

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First, outside counsel will be free from conflicting interests, thereby protecting the integrity of the investigation and allowing investigators to ask difficult questions without undermining key relationships.[1] *Second*, utilizing outside counsel will help ensure that the investigation itself remains privileged and confidential. Often in-house counsel are assigned non-legal, as well as legal, duties and maintain reporting responsibilities to company constituencies and outside parties that are not part of the investigation (e.g., auditors or government regulators). Utilizing outside counsel avoids the risk of waiver of the attorney-client privilege or the loss of attorney work-product protections by ensuring that counsel is acting solely in a legal capacity. *Third*, outside counsel will be experienced in conducting internal investigations and familiar with the areas of law, government agencies, and processes involved (and ideally, but not necessarily, even the government personnel involved in the matter). Moreover, in criminal matters, prosecutors will sometimes divulge information to outside counsel but not to internal lawyers, in part because of their view that internal lawyers wear multiple hats, serving as both legal and business advisors.

3. **Preserve evidence right away**. Whether the investigation involves a civil or potential criminal matter, it is key to preserve evidence right away. Documents are important to finding relevant information and to establishing an evidentiary trail of information, communication, and knowledge among persons involved in the alleged misconduct. It is therefore crucial at the start of any investigation to ensure that all potentially relevant documents are preserved and are not inadvertently or intentionally destroyed. Because of the importance of relevant documents and e-data, it is essential that the company do two things at the start of the internal investigation: (1) prevent the destruction of potentially relevant information; and (2) identify what documents and e-data are or might become relevant to the investigation.

And because it is sometimes difficult and time-consuming to identify relevant documents and data at the beginning of an internal investigation, and because what is relevant may change as the investigation progresses, it is generally a best practice—especially when a government subpoena has been issued or litigation has started—to immediately suspend routine document destruction policies until further notice. After the investigation has become more focused and an understanding of what is relevant is more certain, some limited routine document destruction policies may be reinstated. The company should also implement a litigation hold.[2] Note that in a criminal investigation, the government is likely to view the destruction of *any* relevant documents as either criminally reckless or obstruction of justice.

4. **Understand and protect the company's attorney-client privilege**. Recent high-profile cases have highlighted the importance of understanding the nature and scope of the attorney-client

[1] The appearance of improper influence on an investigation may fatally compromise its integrity to the government, thereby destroying its utility and credibility. The appearance of internal management influence on counsel conducting the investigation can also result in avoidable civil litigation.

[2] In some districts, courts impose a duty on *counsel* to make certain that all potentially relevant electronic data are identified and placed "on hold." This places a heavy duty on counsel. The company and its counsel (in-house or outside) can be sanctioned for failing to perform this duty. For more information on Document and Data Preservation and Collection, see Corporate Compliance Answer Book, Q 6.10.

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privilege in corporate settings. While the privilege analysis in any given case will depend on the facts, there are some basic rules corporate and legal officers should know:

- In an internal investigation, the attorney-client relationship generally exists between the entity that retained counsel (e.g., senior management, an audit committee, or the board) and counsel. This is important and officers/employees should understand that counsel conducting the investigation are not their personal lawyers, nor can they (the officers/employees) assert privilege over their communications with counsel. The privilege belongs to the client (i.e., the entity that retained counsel), and it is the client's privilege to assert or waive.

- The essential element in establishing attorney-client privilege is that the communication with counsel is made for the purpose of securing legal advice. Thus, in every step of an internal investigation, there should be a record of the purpose of the internal investigation activity, which should be to enable counsel to gather the necessary information to provide legal advice to the company concerning the events and conduct under investigation.

- When conducting officer/employee witness interviews, counsel should remind witnesses that they represent the company and are not the witness's lawyer.[3] They should also maintain a record that such a warning was provided to the witness. This reduces the risk of a witness later claiming that the warning was not complete or clear and trying to prevent the company from utilizing the interview report in whatever fashion the company deems appropriate.

- The attorney-client privilege and the work-product protection can be waived either intentionally or inadvertently. Should the company choose to voluntarily waive the privilege—as part of settlement or plea negotiations with the government, for instance—it should understand that such waiver could be considered a complete waiver, opening previously protected information to civil discovery.

5. **Message appropriately with employees.** An investigation—particularly in a high- profile or sensitive matter—can impact employee productivity and morale and can lead to the circulation of rumors and misinformation within the company, causing more damage than perhaps even the truth. While the company will not be able to (and should not attempt to) tamp down every rumor, it should give careful consideration to how it communicates with its employees about the investigation.

Depending upon the scope of the internal investigation and the size of the company, counsel should consider notifying appropriate employees that the investigation has begun. The notice

[3] This is known as an *Upjohn* warning and it is discussed in depth in Q 6.11 of Corporate Compliance Answer Book.

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should be sent to the appropriate managers, who should in turn distribute it to the appropriate employees under their supervision.[4]

If the matter involves a grand jury subpoena or a criminal or regulatory investigation, the notice should briefly and clearly explain in a neutral fashion that the company has received a subpoena or is under criminal or regulatory investigation without editorializing on the validity of the investigation or the facts involved. While the company may consider stating that it is confident no wrongdoing has occurred (if that is the truth), and that it is complying with the subpoena or with the government's investigation (if that is the truth), it should refrain from any aggressive statements like characterizing the subpoena or investigation as being "illegitimate," "illegal," or a "witch hunt." Any statements characterizing a government subpoena or investigation will accomplish little other than causing acrimony and distrust with the government and may reduce the company's credibility inside the company and with the government.

The notice should also inform employees of who is conducting the internal investigation; that the company expects their *full and truthful* cooperation with the investigation; that all documents and electronic data should be preserved in accordance with the litigation hold; that employees' loyalty must be to the company and not to any particular individual, colleague, supervisor, or group; and that the matter should not be discussed outside the company or with any person inside the company who does not have a need to know.[5]

The company's words and actions during an investigation matter a great deal. If framed correctly, the company's messaging will demonstrate to insiders and outsiders that it took the investigation seriously, comported itself professionally and ethically, and was committed to getting to the truth.

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In conducting and overseeing an investigation, companies should be mindful that the integrity of the investigation is key. A properly conducted internal investigation is often the only way to determine the facts, prepare an effective defense, and minimize or avoid potential criminal punishment, civil or regulatory liability, and reputational damage to the company. In addition, a properly conducted internal investigation can enable a business, in conjunction with its compliance

[4] The "appropriate" managers and employees include those who may have any potentially relevant documents, emails or other electronic documents in their possession, custody, or control, and those who may be interviewed during the investigation.

[5] If the company itself is involved in a criminal investigation, it is likely that law enforcement agents will either ask the company to make certain employees available for interviews, or that law enforcement agents may directly contact certain employees for interviews. Under these circumstances, employees should be warned that this may occur. In giving such notice, the company should stress that it is imperative that all employees be entirely truthful with law enforcement and that providing false information may be a crime. In addition, employees *may* be advised by the company of their rights, *in a neutral fashion*, if they are approached by law enforcement agents for an interview. The company should consult carefully with counsel before providing any explanation of employees' rights, as it does not want to be seen as in any way impeding or obstructing the government's investigation. *See* QQ 6.12.5, 6.12.6, and 6.12.10 of Corporate Compliance Answer Book.

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program, to take proper corrective action to halt any ongoing misconduct and prevent it from happening again. This can be critical in reaching a palatable resolution with the government and other parties.

More detailed and in-depth guidance on conducting and navigating internal investigations can be found in *Corporate Compliance Answer Book*, published by Practising Law Institute (www.pli.edu).

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