

10 Must Dos When Conducting an Internal Investigation

Corporate Counsel Women of Color
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1. Consider the impetus to conducting the investigation

The “Why” of the Investigation . . .

- Hot line tip
- Customer complaint
- Competitor complaint
- Request for information from the US Government
- Subpoena
- Routine internal audit
- Media inquiry
- Whistleblowers



2. Initial business considerations

Taking into account business considerations . . . what is the goal?

- Discover the facts
- Discover the cause
- Maintain privileged investigation/associated work product
- Implement corrective actions
- Minimize disruption to the business
- Minimize scope of enforcement action
- Determine disclosure obligations
- Avoid criminal referral/prosecution
- Minimize effect on any parallel private civil litigation

3. Determine the nature of the investigation/investigator

Critical threshold considerations

- Privilege issues
- In-house investigations/security, in-house counsel v. outside counsel
- Choose the right investigator
- Credibility and viability as witness if testimony is needed

4. Develop the investigation plan

Building blocks for the investigation

- Building and managing a team
- Information gathering and scoping
 - Preserving, collecting, and reviewing documents
 - Conducting interviews
 - Background research/reports
 - Legal research and analysis
- Client management
- Public relations

Other considerations

- External claims / regulators
 - Criminal, civil, administrative regulators
 - Whistleblowers
 - Shareholder / derivative / civil suits
 - Auditors
- Disclosures
 - Public company filings
 - Mandatory / voluntary disclosures
 - Loan covenants, contracts
- Remediation
 - Personnel
 - Policies, procedures, controls

5. Preserve documents

Document preservation

- Distribute Hold Notice ASAP
 - To all holders of potentially relevant information
- Evaluate IT Dept capabilities and develop most cost-effective means of preserving and producing responsive information
 - Electronic data challenges – volume, metadata, “imaging” of computers, devices
- Keep records to show what you produced, when you produced it, and how it was produced

Document preservation (cont.)

- Destruction of documents/data is a worst-case scenario
- Obstruction punishable by up to 20 years in prison (18 U.S.C. § 1519)
 - “Anticipatory” obstruction – “in contemplation of ...”
- Destruction can be used to establish intent for underlying crime
- Adverse inference in civil litigation
 - Recent Boeing example



6. Collect and review key documents

Documents can be outcome-determinative

- Identify types and custodians
- Consult with e-discovery professional
- Triage and review
- Forensic capture and analysis

7. Interview witnesses

Interviews .. Maintain the Privilege

- Performed by attorneys
- Performed by non-attorneys at the direction of attorney(s)
 - Should document
- Must be active direction
- Be careful in foreign jurisdictions
 - Not always privilege for in-house counsel

Interviews – Preserving the Privilege

- *Upjohn* warning
 - Everything said is confidential
 - Should not discuss with anyone
 - Can discuss underlying facts
 - Represent the company not the individual
 - Company can choose to waive
- Document interview and that warning was provided
- Document that not an exact transcription and contains mental impressions
- Impact of Yates memo

8. Research and analyze

Now step back...

- Legal research
- Applicable standard of proof
- Meet with client before preparing final report
- Identify exposure to company – best case/worst case
- Reporting obligations and other implications

9. Draft investigation report

The Investigation Report

- Competing interests of privilege and transparency
- Purpose = to provide legal advice/analysis
- Limit distribution of privileged report
- Development of sanitized “facts only” secondary report
 - Shared with prosecutors and regulators

10. Make recommendations/close out

Disclosing the Investigation Results

- Disclosures to Government
 - Principles of Federal Prosecution/U.S. Sentencing Guidelines
 - SEC Seaboard Standards/Incentives
 - Potential Government intervention in qui tam actions
 - SOX: public company + material = disclosure mandatory
 - FAR mandatory disclosure requirements
 - Sanctions/export controls disclosure requirements
 - SAR filings for AML violations
- Other disclosures
 - Board of Directors
 - Outside Auditors

What Prosecutors/Regulators Expect

- Responsiveness
- Candor
- If company states it's cooperating
 - Full disclosure of the facts
 - Facts about Individuals (Yates memo)
 - Mitigation/Restitution
 - Remedial Efforts

Rules to live by