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Conducting Effective Internal Investigations: A Checklist for In-House Counsel

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Every general counsel over the course of his or her career will face the need to conduct an internal investigation into events at the company. Many of these may be routine in nature, such as matters dealing with individual employees or human resources issues. But at times the company may be required to examine issues affecting the core of its business, with potential serious impact on its financial performance or with regulatory exposure. The most serious issues—such as those involving the accuracy of the financial statements or misconduct of senior management—will be investigated at the board level. Even in board-level investigations, a prudent general counsel should take steps to help ensure the integrity and success of the investigation. A properly conducted investigation may help protect the company—as well as its in-house lawyers—from the potential fallout from instances of corporate misconduct. Here is a checklist of ten issues every general counsel should consider in any internal investigation.

1. Understand Your Role

The general counsel should play a central role in any internal investigation. Even in board-led investigations



where independent outside counsel has been retained, the general counsel is likely to be a primary source of contact for the investigation team. This is an important function, and one that allows in-house counsel to facilitate and centralize the flow of information to the investigation team. By being in the middle of the information flow, in-house counsel can help ensure that requested materials are being provided promptly and that company employees are making themselves reasonably available to the investigators. It also

allows the general counsel to track that various responsibilities related to the investigation (maintaining timeline, documenting process, controlling legal spend) are being met.

2. Create a Working Group

As part of ensuring the efficient flow of information to the investigation team, the general counsel should identify at the outset a working group to be the contact points for any investigation-related issues or requests for information or interviews. The working group

could be formed from members of the legal department but likely would benefit from representatives of appropriate business units of the company. Any persons on the working group must clearly be free from any past involvement with the issues investigated. One role of the working group will be to ensure that all requests for information and interviews come through the working group only, and that information provided to the investigators (other than perhaps IT data pulls) comes from the working group. Maintaining this discipline will allow the working group to keep accurate records of what information has been provided, working as a helpful backstop on the investigators.

3. Document the Process

The need for this may not seem obvious, but in-house counsel should help ensure that the investigatory procedures are properly documented. In large investigations, which by necessity are often conducted at frenetic pace, this basic aspect of lawyering can slip. We have been brought into ongoing investigations conducted by other firms where the blocking-and-tackling of adequately recording information has broken down. This is an area where the working group—with its disciplined record keeping of information provided to the investigation team—can help. Keep in mind that in dealing with regulators, auditors, or other stakeholders, not only the findings of an investigation but also the fact an investigation was conducted and

how it was conducted can help the company in reaching favorable resolutions. There is no excuse for not having excellent records.

4. Preserve Evidence

While it seems axiomatic that steps must be taken at the outset of an investigation to ensure relevant evidence is preserved, it bears repeating. Time and again we have come into matters where companies have failed to take adequate steps to suspend regular document retention programs and document the steps that were taken to maintain necessary files. The maintenance of electronic record systems is particularly important. In cases where timely preservation notices were not put in place, a company can find itself having to prove a negative to regulators or private litigants that relevant information was not lost.

5. Control Scope

Investigators must be given latitude to conduct necessary procedures to determine the facts and make accurate findings. But outside legal counsel need not be given a warrant to investigate the company writ large. An investigation should be focused and directed in scope, with a clear time horizon for when it is expected to be concluded (understanding, of course, that new issues can arise and scope expand). An investigation is like any other large and expensive project at the company; it benefits from project management. The general counsel can help keep investigations on pace

by tracking workflows to see that deliverables are being met.

6. Control Legal Spend

Investigations must be pursued to completion with necessary resources committed to see that the investigation is properly supported. Senior management or the board will often give instructions to the general counsel to do “whatever it takes” to get things right. But getting things right need not bankrupt the company. In retaining outside investigation counsel, the same principles of prudent fiscal management should apply as with any other project requiring outside legal expertise. In-house counsel should be able to negotiate budgets or pursue alternative fee structures with investigation counsel as with other legal vendors to the company.

7. Know When Outside Expertise Is Required

While some problems at the company can be investigated capably with existing legal or compliance personnel, significant investigations almost invariably will require the assistance of outside subject matter experts. The most common type of expertise companies require in such circumstances is independent counsel. As with hiring lawyers to work for the company on any other matter, the general counsel should ensure that proposed outside investigation counsel has the necessary expertise for the project at hand. For investigations of issues that may have regulatory exposure, the company ideally should choose investigation

counsel with experience in dealing with those same regulators (SEC, DOJ, etc.) at high levels. Other types of outside experts, such as forensic accountants or persons with industry-specific knowledge, may also benefit the investigation.

8. Understand Limits of Privilege

The law is generally well settled that communications between counsel for the company and its current employees regarding information the employees obtained during their employment, and that is relevant to the legal advice that counsel is providing to the company, is covered by the attorney-client privilege. The Supreme Court clarified this principle for matters determined under federal common law in *Upjohn v. United States*. Since *Upjohn*, more than 30 states have adopted this standard, and only a handful have diverted from *Upjohn* to any degree. While the court in *Upjohn* limited its decision to apply to current employees, Chief Justice Burger expressed in a concurring opinion that the same principle should apply to former employees as well. Since that time, the majority of states—and virtually all courts interpreting federal common law—have found that the *Upjohn* standard should apply to former employees.

In an investigation, the same standards of attorney-client privilege apply as in any other legal matter for the company. But some perils can exist. Executives of the company will often come to the general counsel asking for direction as to whether they should hire their own lawyer and, if so, who that should be. These discussions can place the general

counsel in a sensitive position between the investigation process and the persons being investigated. The role of the general counsel as an attorney only for the company must be made clear. Such conversations between the general counsel and executives—and any comments that are made in those conversations—may also be discoverable in later litigation or government inquiries.

9. Understand When to Self-Report

One of the most important decisions the company will make during the pendency of an investigation is whether to self-report instances of misconduct to regulators. This is never an easy decision, and it is one that will have a significant impact on the course of the company in the years that follow. These issues should be discussed with outside counsel with expertise in the subject area and brought to the attention of senior management and (where applicable) the board.

10. Notify Your Constituencies

Lastly, an internal investigation can discover issues affecting the company in significant areas, including in its financial reporting. For public companies, the general counsel should consider notifying the company's outside disclosure counsel of the investigation and the issues under review. Depending on circumstances, sometimes even the existence of an investigation can raise disclosure obligations under the securities laws. The company's auditors and board should be similarly kept informed.

A well-organized and well executed internal investigation provides the foundation for the company to

make informed decisions on how to correct problems that arise and mitigate the potential institutional harm from corporate misconduct. The more robust and fulsome the response to problems that occur, the stronger the company will be able to argue to regulators that appropriate steps were taken to remediate wrongdoing. Making sure investigations are conducted properly and completed in a timely manner benefits everyone at the company, not the least of whom is its chief legal officer.

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