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Internal Investigations: Start Off on the **Right Foot**

Key structural decisions will determine reliability and credibility.

BIGSTOCK

BY JONATHAN S. SACK

INTERNAL INVESTIGATIONS are typically undertaken in response to possible employee misconduct. The objectives of the investigation are to put the matter to rest by determining whether wrongdoing occurred and, if it did, the appropriate corporate response, ranging from sanctions on the employee (up to and including termination), to disclosure to one or more government agencies and shareholders, and remedial actions to deter and detect such misconduct in the future.

To achieve these vital objectives, one touchstone above all others should guide the internal investigation: it must be reliable and credible, and must appear so, to the various audiences who will judge and rely on its conclusions. Depending on the issues considered, these audiences include the company's senior executives and directors, the shareholders and debt holders, lenders and outside auditors, and regulatory, civil and criminal authorities.

The decisions a company makes at the start of an investigation, decisions on basic structural issues, may very well determine whether the investigation succeeds and puts the matter to rest or fails and is merely one more challenge for the company to overcome.

The key structural decisions to make carefully at the outset consist chiefly of the following:

(a) the nature and scope of the investigation;

(b) who the client should be for purposes of the investigation, or, phrased differently, who should oversee the investigation and ultimately decide what the conclusions of it should be;

(c) who should conduct the investigation; and

(d) what basic practices should be followed in regard to the collection of evidence, both in the gathering of documents and the conduct of interviews.

What makes these and related decisions especially challenging is that, as critical as they are to a successful internal investigation, they must be made quite early, before many of the important facts are known. Accordingly, from the outset of an internal investigation, directors should satisfy themselves that it is structured to successfully resolve the underlying misconduct.

Directors should also periodically ensure that these structural decisions are modified as necessary as new facts emerge during the course of the investigation.

Scope of the Investigation

Once a company decides that an investigation is warranted, it must decide how to investigate the matter at issue sufficiently to satisfy those parties who will judge the quality of the investigation without going to such lengths

JONATHAN S. SACK *is a principal of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, and was formerly chief of the criminal division of the U.S. Attorney's Office for the Eastern District of New York.*

as to risk undue disruption and expense.

Much depends on the specificity and apparent merit of the complaint or issue being investigated. If the allegations under review are very specific and credible, then an investigation can be tailored to identify the witnesses who must be interviewed and documents that must be reviewed in order to investigate adequately.

More difficult is the situation of a vague or amorphous complaint. Under these circumstances, a company may find it appropriate to conduct a preliminary inquiry, focusing on the witnesses and documents most likely to reveal any possible wrongdoing, and only then making a decision as to whether a fuller inquiry (and, if so, of what scope) is justified.

Just as it would often be a mistake to refuse to conduct an investigation in the case of a vague complaint, it would similarly be unwise to conduct a wide-ranging investigation before a complaint is well understood. Such a two-step approach has the merit of being responsive to a complaint without prematurely committing to an investigation that turns out to be unnecessary.

Who Is the Client?

Several parties may be appropriate to oversee an internal investigation or, to put it differently, may be the appropriate "client," including company management, a committee of the board of directors (such as the audit committee or special committee formed for purposes of the investigation), or the board of directors as a whole.

Especially in public companies, the choice of client raises corporate governance issues that may have to be addressed by the company's corporate and securities counsel, as well as by counsel handling the investigation.

For purposes of the investigation, the central issue is whether the allegations under review encompass senior management, such as the CEO and CFO, or whether the allegations are confined to mid- or lower-level employees.

In the former case, it would most often be inappropriate for one or more members of senior management to oversee the investigation since investigating one's boss or close colleagues would not be, and would not appear to be, independent; at a minimum, a committee of the board, with independence from management, would most likely be the appropriate client.

In the case of alleged lower-level wrongdoing, senior management, such as the general counsel, could oversee the investigation, though it would be prudent at a minimum to report the findings, even findings that nothing improper occurred, to others in management and the board of directors.

Who Conducts the Investigation?

It is now customary for attorneys to conduct an internal investigation.

In matters that appear to involve mid- to lower-level employees, it may be appropriate for in-house counsel to conduct interviews and review documents. In such instances, the attorneys' obligations to report wrongdoing under the rules of professional conduct and, if applicable, the Sarbanes-Oxley law, provide a legal framework for conducting and reporting the results.[1]

In matters touching directly or even indirectly on the conduct of senior management, especially in a public company, it would be imprudent for anyone but outside counsel to lead the investigation. In many cases, it must be highly independent outside counsel.

Government agencies and auditors now commonly expect and even insist upon investigative counsel without extensive ties to the company. As a practical matter, this means that regular outside counsel, for corporate or litigation matters, may not be a wise or even acceptable choice to conduct an investigation. Such counsel may more appropriately continue to represent the company while other outside counsel, who have done little or no prior work for it, conduct the investigation and report to the client.

Best Practices

In a brief overview, one cannot address all of the sound practices that should be employed in an effective and credible internal investigation. Three aspects of such an investigation stand out and merit special mention.

First, it is imperative to preserve and gather documents sufficiently to understand the relevant issues; while it is appropriate to limit any document hold to the affected individuals and areas of the company, and to phrase any communications in as mild language as possible, an inadequate hold or poorly executed document collection and review could taint the investigation from the outset as well as raise difficult questions of obstruction of justice and spoliation.[2]

Second, it is imperative when conducting interviews that investigative counsel state clearly that he or she represents the company (or another client, as discussed above) and not the individual employee, and that the information provided by the witness may be disclosed to the government pursuant to a waiver of attorney-client privilege and work product protection, the so called *Upjohn* warning derived from *Upjohn Co. v. United States*.[3]

Although the importance of such warnings on practical and ethical grounds should be well known by now, disputes still arise in which law firms arguably fail to provide employees with the necessary warnings, giving rise to charges of unethical conduct and imperiling the information provided by a company to the government.[4] If a company goes to the length and expense of conducting an investigation, the attorneys conducting it must take reasonable steps to insure that the investigation is not subject to attack for failing to follow basic rules governing its proper conduct.

Third, investigators often believe that it is more conducive to gathering truthful information to refuse requests of employees to be represented by counsel at interviews or to advance funds for the retention of counsel for employees.

In the experience of many participants in the investigative process, this is often shortsighted. Witnesses left to their own devices often dissemble, for many reasons other than fear of disclosing criminal behavior, and sometimes cannot articulate clearly what they did and why, again, for any number of reasons. In such cases, companies can end up investigating too much or too little, or the wrong topics altogether.

Conversely, companies often find that employees represented by counsel are more likely to provide a coherent narrative and clarify the matters under review without any heightened risk of false testimony. Counsel for witnesses can reduce the messiness of what is inevitably a somewhat messy process, and may very well help achieve the goal of conducting a thorough investigation that yields clear and well-founded conclusions.

1. See, e.g., New York Rule of Professional Conduct 1.13; 17 C.F.R. §205.3.
2. See, e.g., 18 U.S.C. §§1517-20.
3. 449 U.S. 383 (1981).
4. See, e.g., *United States v. Nicholas and Ruehle*, 606 F.Supp.2d 1109 (C.D. Cal. 2009) (suppressing statements obtained by company counsel from employee, and subsequently disclosed to the DOJ and SEC, on grounds that counsel failed to adequately advise employee prior to questioning that they represented his employer and not him). The Ninth Circuit Court of Appeals subsequently reversed the district court's decision, holding that because the employee knew that the company intended to disclose the statements to the government before he made them, he did not intend the statements to be confidential. See *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009).