

## **Conducting Effective Corporate Internal Investigations**

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## **DESIGNING AN EFFECTIVE INTERNAL INVESTIGATION PROCESS**



## Overview

- Since Sarbanes-Oxley, companies include internal investigations as key component of Compliance, Ethics and Legal plan
- Magnified by more recent government enforcement and prosecutions
- According to recent study by CSO Executive Council and Association of Certified Fraud examiners:



## Overview (cont'd)

- 65% of reported allegations required investigation
- 46% of investigations resulted in finding and corrective action
- Majority (51%) of allegations concern personnel issues
- Fraud and corruption represented 11% of reports
- 14.9 incidents are reported per 1,000 employees
- 71% of employees filing complaints did not notify management before making a report

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## Why Conduct Internal Investigations?

- Legal reasons
  - Sarbanes-Oxley, Section 301
    - Audit committee must establish procedures for "the receipt, retention and treatment of complaints relating to accounting, internal accounting controls or auditing matters"
    - Procedures for confidential and anonymous treatment of complaints
    - Approaches include adopting policies that are part of a larger compliance program
  - Non-discriminatory enforcement of Code of Conduct
  - Mitigate against corporate liability
  - Defense to certain employment claims or criminal defense
  - Labor contract requirement

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## Why Conduct Internal Investigations? (cont'd)

- Corporate culture
  - Helps create ethical climate and "tone at the top"
  - Key component of effective Compliance Program ("raise your hand")
  - Holds employees accountable
  - Allows employee participation
  - Promotes non-retaliation policy

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## Why Conduct Internal Investigations? (cont'd)

- Good business
  - Weeds out problem employees
  - Uncovers practices that impact bottom-line (i.e., fraud, self-dealing)
  - Reduces litigation
  - Preserves evidence
  - Puts company in better light with shareholders, public, and government
  - Identify and limit harm to the company

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## Who Should Direct the Investigation?

- The Audit Committee or Compliance Committee
- A special committee of independent directors
- A "Qualified Legal Compliance Committee" under SOX (a committee formed to consider and investigate allegations of a material violation of the federal securities laws)
- Legal Department
- HR
- Compliance & Ethics

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## Who Should Conduct the Investigation?

- Investigator with proper skill set
- Objective and unbiased; no conflict of interest
- Appropriate expertise (include experts)
- Consider privilege issues – in-house vs. outside counsel
- Outside counsel retained specifically to conduct the investigation (i.e., not the company's regular counsel)
- The company's regular outside counsel
- Internal investigation function

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## **Risks of Conducting an Investigation**

- Inadvertently waive attorney-client privilege
- Fail to preserve evidence
- Facts are wrong
- Raises questions about motive for investigation (i.e., retaliation)
- Leaks create publicity
- Unnecessarily expensive
- Will likely learn the truth ("You can't handle the truth...")

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## **Principles of Investigation Process**

- Design a process (policies and procedures) that includes jurisdictional statement (what will be investigated) and step-by-step process
- Apply consistent standards
- Complete in a timely manner
- Avoid conflicts and appearance of conflicts ("fox guarding the hen house")
- Retain qualified investigative team—internal or external

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## Principles of Investigation Process (cont'd)

- Develop and document facts through traditional methodologies – don't forget "e-evidence"
- Maintain confidentiality
- Enforce non-retaliation
- Reach conclusions based on facts – "merits-based"
- Take action and follow-up

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## Essential Elements of Internal Investigation Policy and Procedure

Ten design requirements:

1. Effective intake process
2. Determination of scope and potential conflicts
3. Use case and/or document management system
4. Assignment to investigators and other experts
5. Preliminary review
6. Investigation — fact finding
7. Reach preliminary and final findings and conclusions
8. Make decision and determine actions
9. Document final decision and action
10. Reporting and follow-up

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## EXECUTING AN EFFECTIVE INTERNAL INVESTIGATION

### Developing a Game Plan

- Define scope of investigation
- Determine databases to be searched and documents preserved
- Identify individuals to be interviewed
- Protect information at every stage
- Make decisions on proper notifications
- Consider written game plan and timetable
- Be flexible – follow evidence where it leads

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## Triage the Allegation

- Determine the nature of the allegation
- Assess seriousness (stealing pencils vs. backdating stock options)
  - Title, role and responsibilities of supposed wrongdoers
  - Dollar value and public relations exposure
  - Nature, length and scope of purported wrongdoing
- What are the consequences, if true?
  - To the company and its policies?
  - To an employee?
- Level of law enforcement activity or awareness

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## Preserving Documents

- *Document Hold Notice*: Should immediately distribute memo to employees instructing them not to destroy relevant documents
- Notice should instruct employees to search for certain documents and identify specifics concerning the time frame of allegations and substance of allegations
  - Err on the side of inclusion and update as necessary
- Engage IT department to ensure preservation

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## Protecting the Investigation

- "Upjohn Warnings" at all interviews
  - Consider providing warnings in writing (*see United States v. Ruehle* (C.D. Cal.) SA CR 08-00139-CJC)
- Protect privilege at every stage
  - Courts have recently upheld work product and attorney-client privileges (*see Sandra T.E.*, 2010 WL 1191170, 7<sup>th</sup> Cir.)
  - Even language of engagement letter is important

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## Protecting the Investigation (cont'd)

- Privilege Waiver Issues
  - Change in DOJ Policy – Filip Memo:  
Government generally cannot require waiver of privilege for company to obtain cooperation benefits
    - SEC Adopted Same Policy
  - Consider How Investigation is Documented
    - Fact based vs. opinion based information

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## Ground Rules for Interviews

- Upjohn Warnings at the outset
  - Counsel represents the company, not the employee
  - Privilege is held by the company
  - It is the company's decision alone to waive the privilege
- Interview should be kept confidential

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## Ground Rules for Interviews (cont'd)

- Notes should document **facts** (which may be produced to the government) as opposed to **opinions** (which probably will not be produced to the government)
- Do not share information with interviewee (for instance, about what others have said)
- Do not say anything that you do not want repeated to third parties or government investigators

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## **Addressing Employee's Questions: Do I have to talk to you?**

- Potential repercussions of refusing to talk:
  - Most companies have "talk or walk" policies
- What if employee is willing to talk, but wants to delay interview?
  - Fairness concern
    - Employee says reviewing documents will refresh recollection
  - Risks of agreeing to delay
    - Destruction or removal of evidence

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## **Addressing Employee's Questions: Am I under investigation?**

- Witness vs. Subject Distinction
  - Investigator should consider employee status pre-interview
  - Depending on stage of investigation, there may not be clear line between witness and subject
  - Typically, witnesses should be interviewed prior to subjects being interviewed
  - Additional precautions should be taken with known subjects (e.g., at least two interviewers should be present)

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## **Addressing Employee's Questions: Do I need a lawyer?**

- If question asked, investigator should:
  - Make clear that the investigator cannot provide the employee with legal advice
  - Document that the investigator did not provide advice on the matter
  - If unclear whether employee is invoking "right" to counsel, seek supervisory guidance

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## **Addressing Employee's Questions: Do I need a lawyer? (cont'd)**

- Whether represented or not, employee has obligation to provide accurate, complete and truthful information
- If employee requests counsel, investigator should consider setting appropriate deadline for procuring counsel

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## **Should You Ever Recommend Counsel?**

- When interests of employee and company diverge, company may recommend employee retain separate counsel
- Timing of referral should be considered
- Who pays? Indemnification of legal fees is governed by state law and the company's articles of incorporation or by-laws

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## **Addressing Employee's Questions: What will I get for my cooperation?**

- Without making promises, how can investigator make progress with suspected wrongdoer?
  - Job concerns
  - Prosecution concerns
  - Personal and public embarrassment concerns

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## **Addressing Employee's Questions: Can we do this "off the record?"**

- "Off the record" approach is inconsistent with investigator's obligation to document all material facts
- In the real world, how can investigators obtain information while complying with professional obligations?
  - Importance of gaining the employee's trust

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## **Addressing Employee's Questions: Will I lose my job?**

- What can you say to encourage employee to speak?
  - Appeal to employee's sense of loyalty
  - Understand the difference between a whistleblower and a wrongdoer who is not volunteering information

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## **Addressing Employee's Questions: Will I be prosecuted?**

- No promises can be made to employee in exchange for cooperation
  - Company will make decision whether to provide information to law enforcement
  - Law enforcement will independently decide whether to prosecute
  - Law enforcement will independently decide what benefit, if any, of cooperation

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## **Protecting the Investigation . . . From the Outside Investigators**

- 2006 HP "pretexting" scandal arose out of conduct of outside investigators
- Responsibility for conduct of outside investigators imputed to the company
- Scandal resulted in legal, reputational, and financial damage to company and employees

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## **Post HP: Is All Pretexting Illegal?**

- If not illegal, virtually all pretexting is inadvisable
- Potentially legitimate pretexting (e.g., any form of a sting operation) runs counter to most corporate policies

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## **The HP Case: Lessons Learned**

- Understand that outside investigator is agent of the company in virtually all respects
- Clearly define scope of engagement in written engagement agreement, particularly in foreign jurisdictions
- Secure written agreement to comply with the company's policies and applicable laws
- Supervise work of outside investigator closely to monitor compliance with company policy

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## Concluding the Investigation

- Finish the investigation – don't permit perpetual investigative mentality; saps morale and is counter-productive
- Written or oral report – pros and cons
- Consider government disclosure
  - Any statutory or regulatory obligation?
  - Any incentive to disclose (leniency policy)?
  - Is government already investigating?

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