A Most Delicate Task: Investigating Allegations of Company-Internal Misconduct

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Lawyers are not acrobats. But the series of balancing acts internal investigations require is unique even among legal professionals. True, the search for the truth (or, at least, an approximation thereof) is usually the most immediate goal of any internal investigation. But that observation offers little more than spotting the pig in the python. In the complicated real world occupied by today's companies, the search for the truth finds itself in constant tension with other important, and often outcome-determinative, considerations. And this pressure is felt by all involved from the day the investigation is launched.

As practitioners whose daily job it is to investigate allegations of wrongdoing of all types (bribery, fraud, breach of fiduciary duties, theft, hostile work environment, cybercrime, sexual harassment, etc.), your authors have learned most of their lessons while on the front lines. But our at-times hard-knocks experiences are (we hope) your gain. Our goal here is to mine our collective experiences so that you will be prepared to answer the most common questions when facing the tricky task of investigating claims that an employee—and, not infrequently, someone at or near the top of the company— may have engaged in wrongdoing.

Why Investigations Are Worth the Cost (and Headache)

Unquestionably, investigations can be resource-intensive, not to mention expensive. But when facing claims of misconduct—especially claims of misconduct leveled against members of the board or management—it is critical that companies conduct appropriately scaled, appropriately overseen investigations. And for those who because of past bad experiences (or, more often, because they have insufficient experience with internal investigations) believe that internal investigations serve little more than as a last resort, consider the benefits of internal investigations:

- **Shore up employee/company morale**. When allegations of wrongdoing are overlooked by company leadership—or are perceived as having been overlooked or even worse, brushed under the rug—company morale inevitably suffers. This is especially true where the allegations of wrongdoing concern members of company leadership, such as those in the C-Suite. Conversely, when companies appropriately and swiftly address such allegations, the message to company personnel and other stakeholders is that they are working at a place where compliance, good judgment, and accountability are not only valued, but also even-handedly enforced no matter on how high up the corporate ladder the wrongdoing may have occurred.
- **Safeguard your brand: Protect your company's hard-earned reputation**. Public relations experts will tell you that getting ahead of a developing problem/scandal is the most important step a company can take. It, therefore, follows that a company which, with deliberate speed, launches a professional investigation into allegations of wrongdoing will be best positioned to protect its brand and address the important public relations/reputational issues that may arise. On the flip side of the coin, jumping the gun and making a public announcement before the company has a true understanding of the scope of the problem can also be dangerous. So, our bottom line is that a properly-conducted, carefully-calibrated investigation in which the interim results are shared with the public relations/human resources/management teams is the best way to protect what for most companies is the one asset they can't afford to lose, namely, the public's and their customers' (and, as noted above, their employees') trust and respect.
- **Potential liability—Get ahead of it.** If, say, a whistleblower makes claims of wrongdoing against members of management and threatens to take those claims public, the best thing a company can do is conduct an internal investigation to (1) know more than the whistleblower, and (2) as appropriate, seize any first-mover advantage by preemptively announcing the investigation to the public or the applicable enforcement agencies or regulators. This, in turn, puts the company in the best position to control exposure to a myriad of legal risks such as governmental/regulatory enforcement actions, shareholder derivative suits, and civil lawsuits and whistleblower claims. As experience has taught, whistleblowers and plaintiffs' attorneys, no matter how genuine their concern, often only know one piece of the pie, meaning, they rarely know the "whole story." By developing the full factual picture and determining the scope of any

potential liability, the company will find itself more able to effectively frame and contextualize the issues in the public sphere and outmaneuver the opposition in the case of threatened or filed lawsuits.

- **Remove problem actors to reduce risk of future issues (and demonstrate meaningful remediation)**. One central benefit of investigations is that they more often than not help root out problem actors within the company. Taking an active role in disciplining removing such individuals sends the right message to stakeholders and allows the company to "do the right thing" (and, of equal importance, to be seen doing the right thing), while reducing its risk of repeat problems in the future.
- **Signal and pursue constant improvement**. In most investigations, the client-company will learn of weaknesses in the company's internal controls, processes, and/or governance structure that can be improved. These improvements not only reduce future legal risk, but also result in more efficient and streamlined operations within the company.
- **Show board ownership of issues and reflect an appropriate "tone at the top."** An appropriately handled investigation sends a message that the board has its hand firmly placed on the ethical tiller. It also reflects a promising "tone at the top," because the board demonstrates substantive engagement and oversight.

BALANCING INVESTIGATIVE OBJECTIVES WITH BUSINESS REALITIES

So far, we have painted a fairly rosy picture of why investigations are important and beneficial to companies. But in the typical case, the objectives of the company's management, in-house legal department, internal audit committee, board, outside auditors, and outside counsel vary, even if the internal investigation is properly managed. Most commonly, and by way of example, conducting an internal investigation can cause conflict with the day-to-day realities of effectively running a business (see table at end).

A FEW PRELIMINARY WORDS ON THE ROLE OF THE BOARD WHEN MANAGEMENT (OR A BOARD MEMBER) IS IMPLICATED

We all understand that the fundamental obligation of any board is to ensure that company management is acting in the long-term best interests of the corporation and its shareholders. The natural result of this understanding is that credible allegations of misconduct by management require prompt attention, particularly when (as is often the case) the accused members of management also sit on the board. When such a potential role-based conflict of interest exists, the board's independent directors must be actively involved in the investigation. Generally, this means creating a special committee of the board comprised of independent directors to direct and oversee the investigation.

Under the standard established in the Delaware Chancery Court's landmark 1996 decision of *In re Caremark International Inc. Derivative Litigation* (later adopted by the Delaware Supreme Court in *Stone v. Ritter* and the U.S. District Court for the District of New Jersey in *Palkon v. Holmes*), directors have the responsibility to do more than passively receive information. Instead, the expectation is that directors will actively monitor the business of the corporation, including overseeing the creation and implementation of internal controls and any internal investigations.

If directors fail to meaningfully implement reporting or information system or controls, or, having implemented a system of controls, fail to appropriately monitor or oversee the system's operation, they may face liability for a failure of oversight. In contrast, the board, by having a committee investigate a particular matter, will demonstrate that it is monitoring risk and discharging its fiduciary obligations.(See *Stone v Ritter*, 911 A.2d. 362 (Del. 2006); see also *Reiter ex rel. Capital One Fin. Corp. v. Fairbank et al.*, No. 11693-CB, 2016 WL 6081823 (Del. Ch. Oct. 18, 2016) (dismissing claims of personal liability against the board, finding that they did not consciously disregard their responsibility to oversee compliance with the Bank Secrecy Act and related anti–money laundering laws)).

. . . . ON TO THE MAIN SHOW: THE BASIC INVESTIGATIVE STEPS

Assume that someone inside your company has made an allegation of company-internal misconduct—what next? The following practical steps are adaptable to almost all internal investigation contexts, no matter the subject matter, scope, or geography.

1. FROM DAY 1, HANDLE COMPLAINTS (AND COMPLAINANTS) APPROPRIATELY.

How a company handles the initial complaint and complainant, including how the complaint is escalated and evaluated, can have a tremendous impact on the company's potential legal risk exposure. It is crucial, therefore, that companies develop an effective process to recognize complaints, "triage" or assess which complaints require escalation, and then evaluate whether, and to what degree, an investigation is required.

Handling Complaints the Right Way—Evaluating Sources of Information

Complaints do not always come through formal channels. Instead, they can come through a variety of sources, including:

- Anonymous letters
- Reports to supervisors
- Whistleblower emails, hotlines, and media reports

Realize also the following about complaints:

- They are not always in writing
- No "magic words" are required to trigger an investigation
- Knowledge of potential misconduct may be enough to prompt the need to investigate
- Not all complaints require investigation
- A robust "intake and triage" process should be in place to identify complaints for which an investigation will be appropriate
- Credibility of source and nature and seriousness of allegations are key
- To gauge seriousness, consider whether the complaint appears to involve:
    - Government, regulatory, ethical, or safety violations (e.g., corruption/bribery/FCPA/trafficking/child labor)
    - The company's Code of Conduct/Handbook
    - Harassment, discrimination, retaliation, or violence
    - Conflict of interest (e.g., financial, administrative)
    - Misappropriation of trade secrets/confidential information
    - Breaches of contractual agreements
    - Violations by an executive officer

2. HIRE OUTSIDE COUNSEL CAREFULLY.

Once a company determines that an investigation is justified—whether because of a credible whistleblower complaint, internal complaint, audit findings, or some other source—the company must select an appropriate investigator and legal advisor. Although many complaints warrant investigation by company-internal functions such as human resources, internal audit, or the in-house legal department, for other matters, the company (sometimes through the audit committee or a special committee of the board) should look to hire experienced and independent outside counsel to conduct the investigation. Counsel's independence (in the sense of not having very close personal or business relationships with management) can be particularly important where the allegations involve management or board members. In those cases, counsel's ability to demonstrate that they have little prior involvement with the company or the board can help stave off later questions about whether counsel's own potential conflicts of interest (in protecting a long-term client) may have influenced the results of the investigation or the path that it took. That said, on the other side of the investigative coin, familiarity with a company's operations and culture can

give outside counsel a head start. In short, although there are no hard and fast rules about who to hire (and when), company counsel and potential outside counsel should always have an open and honest discussion about how prior experience with the company may help or hinder the ultimate objective of conducting a defensible and effective independent investigation, the results of which will stand up to scrutiny.

Choosing an Investigator

Things to consider:

- Type of complaint being investigated
- Positions, personalities, and backgrounds of the people being investigated
- Number of investigators

Possible investigators/escalation decision:

- Human resources
- In-house legal counsel
- Internal auditors
- Outside investigators

Board investigation is required:

- If allegations involve conduct of senior management who could have influence (or the appearance of influence) over an internal investigation
- If allegations may be material to the company
- If needed to satisfy external auditor, government regulators, prosecutor, stockholders or some other audience
- Outside counsel generally involved when the board or a committee oversees the investigation

3. STRATEGICALLY DEPLOY ENGAGEMENT LETTERS.

For investigations that require board or committee oversight, the committee should enter into a separate engagement letter with counsel for the investigation. The engagement letter should clearly define who the client is (e.g., the board, a special committee of the board, etc.) and specify to whom outside counsel reports (generally the chair of the committee), as blurring lines in that area can lead to an unintended waiver of legal privilege. In addition, internal counsel and investigators may also be directed to report directly to the chair of the committee with respect to this particular matter, to give the committee additional control over the independence of the investigation.

4. CLEARLY DEFINE OBJECTIVES.

To avoid any ambiguity concerning what falls within the investigator's purview, the company should work with outside counsel to clearly define the investigatory objectives, both in terms of the scope of the issues to be reviewed and the type of investigative tasks to be performed.

5. BRIEFING THE COMMITTEE: COMMITTEE AND CHAIR UPDATES.

When a board committee is involved, inside and outside counsel and the committee chair should decide on a plan for keeping the committee abreast of the investigation. This will generally involve frequent (perhaps weekly) updates to the committee chair, and less frequent briefings of the full committee (when there are material issues to report). Counsel should work with the committee chair to ensure that materials are sent in a way that preserves privilege and screens them from anyone at the company who could be a possible subject (or target) of the investigation. This will often mean that the materials should be delivered to directors not through the regular board portal, but directly from outside counsel.

6. FOR PUBLIC COMPANIES: AUDITOR SECTION 10A REVIEW.

The committee chair and outside counsel should, in the context of a public company, also work with the company's outside auditors, who will have an obligation under Section 10A of the Securities Exchange of Act of 1934 (the "Exchange Act") to review any potential illegality or impropriety. Under Section 10A of the Exchange Act, auditors who detect or otherwise become aware of information that an illegal act "has or may have occurred" must undertake certain prescribed actions. These actions include determining (1) whether it is likely that an illegal act has occurred, (2) whether that act is material to the company, and (3) the possible effect the act may have on the company's financial statements. Auditors generally look to the company and its counsel to investigate and evaluate any suspected wrongdoing. Because Section 10A requires the auditors to determine whether management and the board have taken "timely and appropriate remedial action," the auditors will also expect (at least at some level) to "shadow" the company's investigation, and will expect the investigation to be independent from those who may be found responsible for any wrongdoing or shortcomings in controls or procedures. In this process, the auditors will work closely with outside counsel and expect to have access to non-privileged information in connection with the Section 10A review. That said, as a "starting position," outside auditors will typically ask for what amounts to everything related to the investigation (investigative work plans, search term lists, memoranda of interview, interview outlines, etc.). It is outside counsel's responsibility to help the outside auditors fulfill their Section 10A requirements, while concurrently guarding against privilege waiver/forfeiture and any potentially adverse impacts on the integrity of the investigative process. This goes back to the balancing act we first mentioned at the beginning of this whitepaper.

7. DEMONSTRATED OBJECTIVITY RIGHT OUT OF THE GATE.

Everyone involved in an investigation must be prepared in advance for the reality that any allegation involving a director or member of upper management must be addressed with complete objectivity. As with any investigation where the stakes are high, start by assuming nothing—let experienced investigators follow the facts, remain appropriately involved without getting in the way, and then address the implications of what, if anything, has been found. Put bluntly, investigators must steel themselves against effort to influence them and must steadfastly pursue an appropriate investigative process and will yield defensible results.

Effective Investigations—Maintaining Credibility & Confidence

- Neutrality and fairness of approach are key touchstones
- Necessary witnesses are interviewed and properly advised
- Appropriate follow-up conducted with all relevant parties
- Confidentiality and discretion are maintained
- Investigation has (and is viewed as having) integrity and independence—results are reliable and evidence-based
- Any remedial actions are supported by evidence (e.g., documents, facts)
- Effective and measured remedial actions are taken to address conduct and deter similar conduct

8. AVOIDING THE DREADED "RUNAWAY INVESTIGATION"—MAINTAINING DISCIPLINE IN THE FORM OF A CAREFULLY DEVISED INVESTIGATIVE WORK PLAN.

We have all seen investigations that appear to be all thrust and no vector. So it is not surprising that a company's management or board may have misgivings about unleashing independent counsel on an investigation. Fortunately, those concerns can largely be addressed through a bit of advanced planning and proper oversight. To ensure alignment within the investigative team, and to ward off unpleasant surprises, a critical first step in any investigation is to design a practical and appropriately detailed investigative work plan and budget. The tone and level of granularity for such a work plan will differ based on (1) the nature and scope of the allegation(s), (2) whether vendors such as forensic accountants are involved, and (3) the level of experience the company has with investigations generally.

Preparing for an Investigation—Ensuring Alignment

Written investigative work plans define scope; ensure alignment

A work plan should include:

- Summary of the issues being investigated
- Scope and scale of investigation—consider date range, corporate entities, employees/vendors of interest
- Sources of evidence—consider document custodians and forms of evidence
- Plan for preserving, collecting, and reviewing evidence
- Potential interviews
- Work product that might be generated
- Process and format for reporting findings
- Need for experts or other service providers
- Having counsel hire experts or other service providers to maintain privilege over their work and work product
- Confidentiality/privilege

A work plan should also establish a tentative investigation schedule and budget

- Budget can be developed out of work plan
- Board Committee can approve work plan and budget
- Work plan can be revised as investigation progresses and modifications become necessary

9. THE NUTS AND BOLTS OF INTERNAL INVESTIGATIONS, PART I—SCOPING INTERVIEWS AND EVIDENCE COLLECTION AND REVIEW.

Once the investigative work plan is in place and initial *scoping interviews* have taken place so that the investigative team understands the contours of what is involved and who likely has relevant information, the next step in any investigation is to collect and review potentially relevant evidence. Naturally, evidence can take many forms, but in larger investigations or sensitive investigations such as those alleging misconduct by a board member or senior management, employee emails and communications stored on company-issued computers and mobile devices are often a prime source of relevant information. Companies anticipating an investigation should take appropriate steps to preserve these and other sources of evidence, such as issuing document preservation notices or interrupting the company's regular data retention/deletion practices.

Evidence Collection and Review

Identify potential sources of data

- Data custodians who have relevant information—consider current/former employees, assistants, supervisors
- Sources of data—consider company email, text messages, share files, voicemail, company-issued computers/mobile devices, hard-copy files
- Also consider policies/procedures, internal audit files, vendor due diligence files, contracts, personnel files, expense reports/invoices/other accounting data

Data preservation

- Is a legal hold/document preservation notice needed? (consider nature of issues and likelihood of data loss or litigation)
- Interrupt regular data retention practices

Data collection

- Who will perform collection—is vendor assistance needed?
- Where will data be hosted?
- Permission—Will any local data privacy laws (such as those of the European Union) limit access to data?

Data review

- Target potentially relevant data—use keyword search terms for electronic records
- Prepare and follow review protocol to ensure consistency between reviewers
- Develop method of tracking/summarizing/flagging key evidence
- Document everything—what was reviewed, when, by whom, any technical issues, etc.

10. THE NUTS AND BOLTS OF INTERNAL INVESTIGATIONS, PART II—(DOCUMENT-BASED) INTERVIEWS.

Experienced investigators typically divide interviews into (1) "scoping" interviews and, thereafter, (2) document-based interviews. In an ideal world, even during the scoping phase you will have at least some documents (perhaps maybe just the allegations) in hand to run by your witnesses to gain a better understanding of the context of the allegations/conduct and narrow the focus to those persons with whom you should be talking. Once the scoping phase is complete and document review has commenced, you can start getting down to brass tacks by preparing for the more in-depth document-based interviews.

Effective Interviewing—Preparation

Determine who to interview:

- Only people with relevant information (minimize business disruptions)
- Include management/gatekeepers
- Beware of privilege risks if interviewing former employees/vendors

Determine order of interviews:

- Most important witnesses to least important? Background witnesses first? "Scoping" phase interviews?
- Consider witness availability

Address interview logistics:

- Format—In person? Phone?
- Location—On company premises? Offsite? (private setting needed)
- Interviewer—Proper pairing based on personality/cultural considerations
- Prover—almost always a good practice to have more than one interviewer present for the interview in the event there is a dispute as to what was or was not said (and so that this person - often an associate - can testify to what was said if and when that might become necessary)
- Notice period—May be a benefit to have the element of surprise

Prepare an interview outline:

- Outline should identify key topics to be covered, key documents, key questions
- Not a script
- Listen and adapt to what witness is saying

Anticipate pre-interview issues:

- Accuser abandons complaint
- Witness refuses to do interview, or appears but refuses to answer questions (any fiduciary/contractual/employment obligation with which to cooperate?)
- Witness wants time to prepare (do not permit delay)
- Witness retains counsel who demands info/updates or insists on being present for interview

Effective Interviewing—Structure and Approach

Do not record the interview or allow audio or video recording.

Initiation of interview:

- Explain purpose of meeting (only necessary facts)
- Provide "Upjohn advisements"—represent the company, privilege, etc.
- Reference "no retaliation" policy
- Confirm that interviewee understands advisements
- Be prepared for "Do I need a lawyer?" and other questions

Body of interview:

- Start with employee background—establish comfort
- Ask open-ended questions (who, what, where, when, why, how?); don't assume facts
- Get precise answers to questions—do not permit evasion
- Use documents to corroborate or impeach
- Allow interviewee to explain documents/facts; avoid pre-judgment; probe answers that seem suspect and circle back for inconsistencies—use interviewee's answers
- Avoid confrontation or hostility—maintain neutrality

Conclusion of interview:

- Ask if everything relevant has been covered
- Request suggestions of people to talk to, evidence to obtain
- Inform interviewee the company is working to resolve issue
- Reassure employee regarding lack of retaliation
- Encourage witness to contact you with additional comments or additional information they might remember later ("face-saver")
- Thank witness for his/her time
- Remind witness of confidentiality and discretion

Effective Interviewing—Memorializing What You Learned

During the interview:

- Take clear and copious notes
- Note time of interview, length, people present, location
- Observe and note witness behavior (e.g., evasion, delays, discomfort, profuse sweating)
- Note use of documents

After the interview:

- Promptly after the interview, prepare written summary (formal or informal)

Basic elements of a memorandum of interview:

- Circumstances and logistics (i.e., time, location, purpose, attendees, Upjohn advisements)
- Facts gathered (chronological or by subject)
- Wrap-up
- Attachments/exhibits

AVOIDING INVESTIGATION PITFALLS (DATA PRIVACY, WHISTLEBLOWER STATUTES, AND UNCOOPERATIVE EMPLOYEES)

- **Understanding Data Privacy Regimes Outside of the United States**. Notions of an individual's right to privacy are hardly new. U.S. courts have long ensured the constitutional right to privacy, and beyond U.S. borders, the right to privacy is enshrined in both the Universal Declaration of Human Rights (which was adopted by the United Nations General Assembly in 1948) and the European Union's Charter of Fundamental Rights (which became legally binding in 2009 as part of the Lisbon Treaty and included the right to respect a person's "private and family life, home and communications''). That said, today's means of storing, duplicating, accessing, and distributing information pose very real challenges to our ability to protect sensitive information. Put another way, simply locking a file cabinet or setting up basic internal security controls will not do it. In response, recent years have seen a proliferation of data privacy regimes across the globe. As of this writing, more than 80 countries have devised comprehensive national data privacy laws. What is more, U.S. laws tend to be relatively lenient compared to the strict data regimes of many of the countries in which U.S. companies do business. Therefore, it is a general non-starter for investigative counsel to take a blanket approach to obtaining company data from foreign jurisdictions. Instead, investigative counsel must from Day 1 educate themselves about local data privacy laws in the jurisdiction(s) involved to avoid costly missteps. This is where having team members with unique subject-matter expertise in such areas can be tremendously valuable and cost efficient.

- **Complying with Whistleblower Protection Statutes**. Whistleblower protection statutes—like data privacy regimes—are increasingly gaining currency outside of the United States. Understanding what statutes exist in the jurisdictions in which you do business is, therefore, a critical early step in any cross-border investigation.

- **Taking Preemptive Steps to Encourage Cooperation and Access to Evidence—Some of our "Biggies**." In many investigations, the investigators will encounter a board member, CEO, CFO, or other employee-witness who, for whatever reason, is reluctant or outright refuses to cooperate with the investigation, meet with counsel, be interviewed, etc. Some preemptive steps companies can take to ensure they are well-positioned to address such objections when, and if, they arise, include the following:

    - **Ensuring Cooperation through Service Agreements**. One of the best ways to avoid (or combat) refusals to cooperate is for companies to implement corporate governance guidelines stating that all board members and management, consistent with their fiduciary duties, are expected (if not required) to cooperate with investigations. Indeed, it is even better if this clause appears in the individual manager, employee, or board member's service agreement. Ideally, the guidelines/agreement will include simple, direct language requiring the individual to fully cooperate in any internal or external investigation involving events occurring during the individual's tenure with the company or of which he or she has personal knowledge. The agreement should also specify that cooperation includes expeditiously turning over any requested documents and communications within the individual's possession, custody, or control, including personal phone records, email account information, text messages, and so forth. The company should also specify that the duty to cooperate remains even after an individual resigns or is terminated from the company. Of course, the individual employee, board member, or member of management may push back against such language, but this can be managed, in part, by including a reciprocal duty by the company to cooperate. Companies may also wish to explain, as part of a director training program, the benefit each individual derives from indemnification, advancement of legal fees, the business judgment rule, insurance, and any other protections specific to the company. Put another way, the company can send the message to the director/manager that it is not asking the individual for more than the company itself is willing to provide.

    - **Informing Reluctant Management-Level Employees of the "Free-Standing Duty to Cooperate**." Although having language in service agreements mandating cooperation with investigations is consistent with best practices, many companies may not have thought of that (or thought it necessary) until it is too late. So what should those companies do when a board member, manager, or employee simply refuses to cooperate with an investigation? In the face of such a refusal (which is, in fact, fairly common), it can be helpful to politely point out to the individual or his or her counsel that board members, managers, and even employees owe a fiduciary duty to their companies, including a duty of care and a duty of loyalty. These duties, in turn, have been judicially interpreted to include a duty to cooperate with an internal investigation. It is important to note, however, that such a duty to cooperate is not explicit in the Model Business Corporation Act ("MBCA"), nor is it settled as a matter of law. (Also note that Section 302 of the Sarbanes-

Oxley Act—codified at 15 U.S.C. § 7241—lends support to the argument that officers' fiduciary duties include a duty to cooperate with investigations. Section 302 imposes upon officers a responsibility to ensure that they have accurately reported to the company's auditors and to the company's audit committee any fraud, whether or not material, that involves (1) directors, (2) management, or (3) other employees who have a significant role in the issuer's internal controls. In short, these provisions incentivize (or, at least, *should* incentivize) CEOs and CFOs to diligently investigate any known or suspected wrongdoing brought to their attention, and a failure to do so may subject them to liability.) As a result, this tactic is best used as a second line of defense. It is always preferable to include duty-to-cooperate language in service agreements before any allegations arise.

- **Thoughtfully Devising Company Data Policies and Considering the Use of Company-Issued Communication Devices (Laptops, Phones, Tablets, Etc.)**. Companies should also consider whether to issue company-owned communication devices (laptops, phones, etc.) and company email addresses to board members, and to require directors to use these devices for all company business. This requirement can be included in procedures adopted by the board or in individual service agreements, and would give the independent investigators access to these communications in the event of an internal investigation. (This presumes that the company has data privacy policies in place that explicitly state that all information stored on, or transferred through, a company-owned device is company property and subject to review at any time without notice to the board member. Such policies, although ubiquitous among U.S. companies, may not be in place in foreign companies or subsidiaries.) This requirement has two additional benefits: (1) it can provide an independent ground for removal if a board member fails to follow company instructions about using the designated communication services or devices, and (2) it may prevent the inadvertent waiver of privileged information. For instance, if a board member communicates with the company's outside counsel using a non-company email account (such as one that is monitored by his or her employer), there is a risk that the attorney-client privilege otherwise applicable to that communication may be deemed waived.

That said, a muted word of caution is in order: although requiring the use of company-issued communication devices or email accounts may be helpful when investigating a recalcitrant board member, it also puts a greater burden on the company in the event of an external investigation. Specifically, the company will be required to maintain and preserve the information and may be subject to sanctions if, for instance, it does not take steps to preserve text messages once litigation is reasonably anticipated. Additionally, board members may reject any service agreement that allows the company unlimited access to their communications.

CONCLUDING AN INVESTIGATION

Inevitably, the most challenging and time-consuming stages of any investigation are evidence collection and review and interviews. But when that process is complete, clients want to know, "So, what did you find?"

- **Collecting, Analyzing, and Sharing the Investigative Findings**. As discussed above, the investigative work plan should dictate when, and in what format, investigative findings will be conveyed to the client. In any investigation, it is important to ensure that findings are factually accurate, appropriately limited, and conveyed in a manner that maximizes protection of legal privileges.
- **Reporting to Committee and Board**. In board- or committee-led investigations, counsel's final task will be to brief the committee and its chair on the results of the investigation and the recommended remediation steps. The committee should have ample opportunity to raise questions. Counsel and the committee chair should work to ensure that outside experts, including forensic accountants or internal audit personnel as needed, are available for the committee meeting. Minutes of the meeting should be privileged and maintained separately, in the company's books and records, from those that will be reviewed and reviewable by auditors.
- **Briefing the Auditors**. At the conclusion of the investigation (and, typically, also during the course of the investigation), counsel will brief the company's independent auditors on any non-privileged outcome of the investigation. This Section 10A briefing should be verbal and carefully calibrated to ensure that privilege is maintained. For example, counsel should take care not to share with the auditors the search terms or other key elements that counsel used in the investigation, which could be privileged and could jeopardize the maintenance of the privilege if disclosed.

Relaying Findings & Protecting Privilege

Determine form of reporting (privilege):

- Written report, verbal readout, or presentation—written reports should avoid legal conclusions
- Do results warrant readout to auditors, shareholders, creditors, regulators?

Substance of report—are facts in dispute?

- Corroborate, corroborate, corroborate
- If facts conflict, be ready to present mixed, well-documented findings

Use best judgment to assess witness credibility:

- Timing of complaint
- Motivation of complainant
- Veracity and motivation of witnesses

Final report (regardless of format) should address:

- Parties involved in the investigation and their roles
- What was, and was not, collected and reviewed (limitations to the investigative scope)
- Create a chronology of tasks—complaint, preparation, evidence review, interviews, findings, remediation

Design an Effective Remediation Plan. Assuming the investigation corroborated the initial complaint or identified other misconduct or a failure of internal controls, a key final step in any investigation is to prepare and implement an effective remediation plan. Remediation plans can take many forms depending on the nature and severity of the misconduct and the company's goals for punishing wrongdoers or deterring similar acts in the future. They may be part of the final reporting, or they might come in the form of a stand-alone document or presentation. Either way, an effective remediation plan may also help reduce corporate fines or damage awards in regulatory actions or litigation brought against the company related to the underlying misconduct.

Designing an Effective Remediation Plan

Did the investigation identify misconduct or governance/internal control issues?

If yes, consider:

- Desires of complainant (and reaction of authorities/board members/management/jurors)
- Risk of regulatory action or civil litigation
- Existence of similar or past violations within the company/industry
- Client goals (deterrence, punishment, restitution)

Structure the remediation plan around existing company policies and procedures.

Possible remedies:

- Written warnings/reprimand
- Acknowledgement of wrongdoing
- Administrative leave
- Reduction/elimination of bonus
- Additional training
- Transfer or demotion
- Suspension

- Termination
- Reporting to authorities
- Findings Short of "Cause"—options for replacing nonfunctioning director and manager(s).

Even if the conduct identified during the internal investigation does not support a for-cause termination, the board may still decide that the investigation has shown that a particular board member or manager is no longer right for the job. To the extent a board or nominating and governance committee, in fulfilling its responsibility to nominate and evaluate directors, determines that a director needs to be removed, it has only a few tools at its disposal. Both Delaware law and the MBCA follow the general rule that shareholders (acting by majority vote), rather than the board, have the power to remove a director.

In short, although directors may have a responsibility to monitor board health, shareholders have the primary power to remove directors or elect replacement directors. A company and its board have many tools to deal with and address a director who needs to be removed. Note that, for many companies, removing a director will likely trigger an obligation to file a current report on Form 8-K with the Securities and Exchange Commission ("SEC"). Under Item 5.02 of Form 8-K, a company must file a Form 8-K when a director retires, resigns, is removed, or refuses to stand for reelection. If the director's resignation or removal results from a disagreement with the management of the company, or is for cause, the filing is made under Item 5.02(a); all other disclosures fall under Item 5.02(b). A company must file a current report on SEC Form 8-K within four business days after a disclosable event has occurred. As relevant here, a disclosable event includes a notice, written or verbal, from the director to the company of his or her decision to resign, retire, or refuse to stand for reelection. But, because decisions such as this require time, thought, and discourse, the mere discussion or consideration of resignation, retirement, or refusal to stand does not necessitate disclosure.

PARTING THOUGHTS

Conducting any type of internal investigation into allegations of employee misconduct can be tricky, and the stakes (and sensitivities) only get higher when the allegations are focused on board members or members of management. As outlined above, the key to tackling these challenges is to break down the meta-tasks into individual, digestible process steps. With a well-defined plan and an investigative team that remains independent and focused on the ultimate goal, companies can achieve robust and reliable investigative findings that will stand up to scrutiny and help the company move forward.

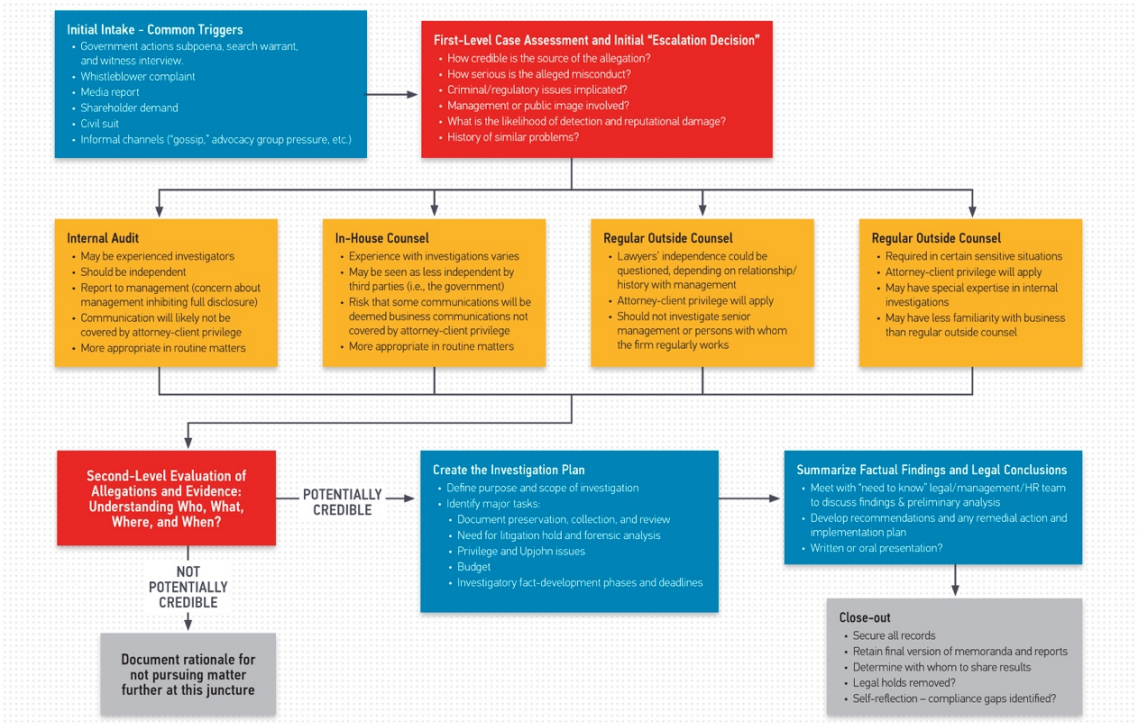
This article had been modified and adapted, with permission, from a chapter that will appear in the forthcoming book, *From Bribery to Baksheesh: Examining the Global Fight Against Corruption* (TM Funk and A Boutros, eds., Oxford University Press, 2019).

The following pages include a table that, by way of example, explains some of the most common areas where investigative objectives and business realities may be in conflict, and two flowcharts explaining key internal investigation steps and steps to protect privilege.

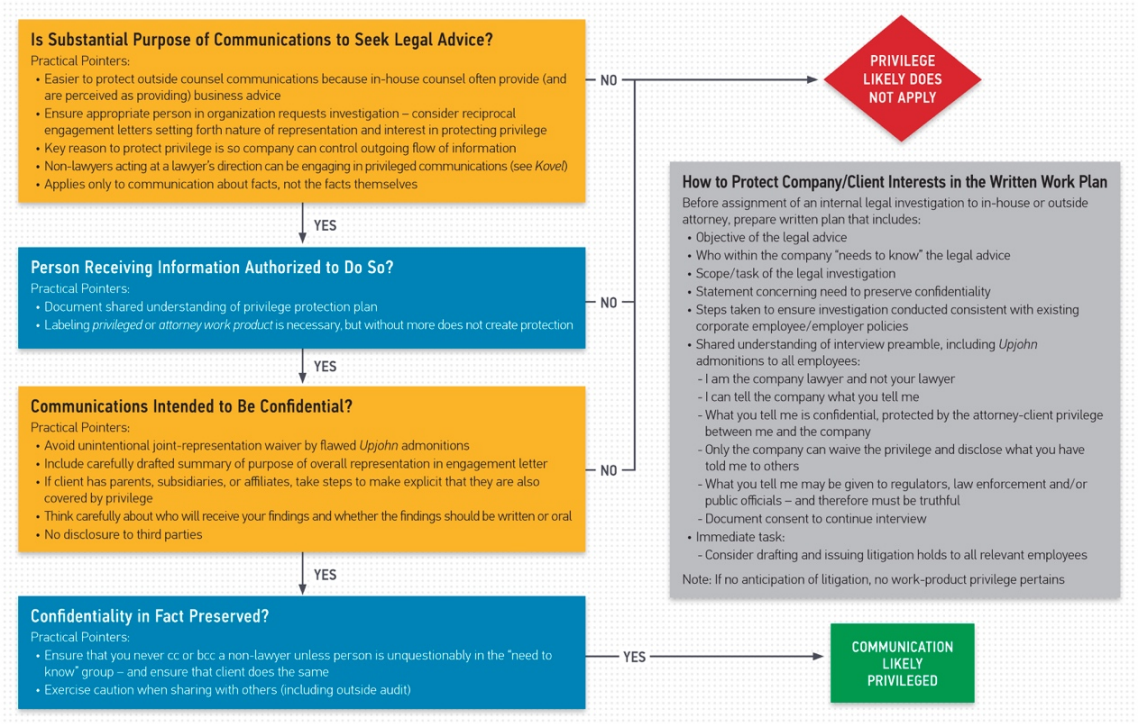
Laudable Objective	"But…"
Maximize Applicable Privileges A primary objective during any investigation is to maximize protection of all applicable legal privileges. As a result, absolute confidentiality is key.	***Running a Company Requires Transparency*** • Key stakeholders want (and sometimes need) to know about the purpose and progress of the investigation and whether "bad apples" or bad acts have been identified. They, accordingly, expect periodic updates concerning the investigation, including the status, preliminary findings, etc. • Nobody—let alone a member of management or the board—wants to be "left in the dark" while the investigation appears
Protect Employee Morale The company cannot afford to allow employee and management morale to erode during a stressful, often painful, and/or longer-than-expected investigative process. And the mere fact of a confidential investigation itself can make employees and management lose faith in the company and worry about their positions. As a result, company-internal members of an investigation team often want to provide real-time investigation updates or preliminary observations to company management/employees.	***Necessary Limitations to Knowledge Circle*** • The sharing of preliminary observations just to appease employee or management concerns risks informational leaks, and can foster an appearance that the investigators are "playing favorites," are aligned with any person or group, or otherwise are merely using the "independent investigation" as a pretext to reach a pre-determined result. • Only if all appropriate investigative steps occur—including, among other things, interviews, transaction testing, document collection and review—will the investigation produce robust and defensible findings and a sensible remediation plan.
Retaining Familiar Counsel When it comes to outside counsel, companies often wish to engage counsel that "know the company," have helped the company with many different legal issues through the years, and appreciate the company's culture and values (and sometimes these factors even cause companies to retain "house counsel" not experienced in internal investigation matters).	***Retaining Independent Counsel with Investigative Expertise*** • Enforcement agencies, courts, and other stakeholders will expect to see experienced, specialized internal investigators conducting sensitive investigations. • The more the retained investigators can demonstrate objectivity and a lack of conflicts of interest (such as "keeping the CEO happy"), the better for the company.

Using In-House Counsel to Investigate It likely will, in the first instance at least, be easier, quicker, and cheaper to have in-house counsel handle the investigation.	***Hiring Experienced Outside Counsel for Potentially Serious Matters Maximizes Privilege*** • There is a happy median. Many jurisdictions (notably, EU countries) will not recognize privilege in communications with in-house counsel, as they do not view in-house counsel as independent from their employer (the company). These jurisdictions, therefore, do not protect in-house counsel communications with privilege. Outside counsel, in contrast, can engage in privileged communications.
Operating Transparently and Quickly to Report Any Actual or Potential Issues to the Authorities Many responsible companies rush to self-report potential issues to authorities. Key stakeholders (including government agencies) will expect self-reporting, transparency and openness about the investigation's results. In fact, the DOJ has built entire divisions around self-reporting and the incentives that flow therefrom.	***Protecting the Company's Interests - and Reporting Only When Necessary*** • In the absence of a third-party/ whistleblower threat, unnecessary or premature reporting and self-disclosure can result in huge headaches for the company. • Companies must, within the confines of legality, protect against costly and avoidable shareholder suits, overzealous enforcers or regulators, etc.
Loyalty Toward Members of Management and the Board Company values often include showing loyalty toward employees, members of management, and the board. Companies, therefore, often feel that they should protect "their people" against overzealous government enforcers, regulators, shareholders, and investigating counsel.	***Protecting the Company Comes First*** • The board's duty is to protect the company's long-term interests by identifying employees and management with potential criminal or civil exposure. • The days of "circling the wagons" and sticking together have been undone by an entirely new incentive structure that rewards the company or employee who arrives first at the prosecutor's office. • In this legal environment, companies are expected to mitigate risk by (as part of a broader remediation plan) strictly disciplining or terminating individuals, and/or turning them over to the authorities. At times, these individuals may be viewed by some as having done little more than made mistakes or exhibited judgment errors.

Key Internal Investigation Steps



Steps to Protect Privilege



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Markus is the Firmwide Chair of Perkins Coie's White Collar & Investigations Practice. Prior to joining the firm, Markus served as a decorated federal prosecutor in Chicago, Section Chief with the U.S. State Department-Balkans, clerk with the federal court of appeals and district court, and law professor at Oxford University and the University of Chicago. He also is the founding Co-Chair of Perkins Coie's Supply Chain Compliance practice, and was named Colorado's "Best Overall Litigator" (2015); "Colorado White Collar Lawyer of the Year" (2015); "10 Best Attorneys for the State of Illinois" (2014) and "10 Best Attorneys for the State of Colorado" (2017); and "Lawyer of the Year" (2013). In 2015, Markus was tapped to head up the firm's Africa Practice, and he since 2010 has been the Founding Co-Chair of the ABA's Global Anti-Corruption Committee.

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Stewart Landefeld, partner and immediate past chair of the Perkins Coie Corporate practice, has counseled corporations and board of directors for 30 years in the areas of corporate governance, securities compliance, mergers and acquisitions, public offerings, private equity investments and venture capital. Stewart has provided corporate governance and other general corporate counsel to dozens of leading companies, including Microsoft Corporation, Costco Wholesale Corporation, T-Mobile, Tribune Publishing Company, Taylor Morrison Home Corporation, Cable ONE, PetSmart Inc., Orbitz (Audit Committee), Aircastle (Independent Directors), F5 Networks, Intermec Inc., Outerwall Inc., Cardiac Science Corporation, The Seattle Mariners, The Tacoma Rainiers (Baseball Club of Tacoma, LLC) and The Seattle SuperSonics among others.

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