

Nuts & Bolts: How to Conduct an Effective Ethical Internal Investigation

*National Institute on Internal Corporate Investigations and
Forum for In-House Counsel*

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Panelists

Moderator

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Presenters

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Agenda

- What Allegations May Trigger an Investigation
- Structuring the Investigation
- Conducting the Investigation
- Gathering Electronic & Hard Copy Evidence
- Interviewing Witnesses
- Finalizing the Investigation
- Cross Border Investigative Considerations
- Q&A

What Allegations May Trigger an Investigation

- Whistleblower(s) or Other Internal Reporting (i.e. “hotlines”)
 - Current v. Former Employees
- Government Agency
 - Subpoena
 - Search Warrant
- Consumers, Customers or Vendors
- Auditors
- Shareholders
 - Civil Lawsuit Filed Against Corporation
- Industry-wide Issues
 - Compliance with Federal Regulations and Statutes

Structuring the Investigation

- Identify the Subject Matter/Define the Issue
- Is an Investigation Necessary
 - Likelihood/Degree of Improper Conduct
 - Handling the Whistleblower
 - Government Credit for Cooperation
 - Cost Considerations

Structuring the Investigation (cont'd)

- Identify the “Investigators” – Who Should Conduct The Investigation
 - The Economics of using Internal versus External Resources
 - Internal Resources – Protection of the Independence and Integrity of the Investigation
 - External Resources – Independence, Experience and Scale
 - Outside Counsel
 - The Role of the Forensic Accountant
- Identify the Client
 - Simultaneous representation must be carefully weighed – corporation and individual employees
 - *United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009)*

Conducting the Investigation

- Create an Investigative Plan
 - Identify Investigative Tasks and Objectives
 - Set and Guide Expectations
- Corporate Counsel's Involvement
 - Protecting Privileged and Confidential Information
- Updates/Reporting Process
 - Frequency and Direction of The Reporting Process
 - Board/Client/Forensic Accountant/General Counsel
- Determine Whether the Scope Should be Narrowed or Broadened as Work Progresses

Gathering Electronic & Hard Copy Evidence

- Securing Documentary Evidence
 - Legal Hold
 - Preventing Irreparable Harm
 - Location of Evidence
 - Aligning the Company's Data Storage and Retention Policy With Those of the Investigation
 - Cost Considerations
- In What Format Should the Evidence be Stored
 - Electronic Review Platforms
- Data Review
 - Search Terms
 - Review Team
- Preserve the Attorney-Client Privilege and Work Product Doctrine

Interviewing Witnesses

- Who to Interview – Employees, Former Employees, Other
- Timing & Order of Interviews
- Structuring the Interviews
- Notice to Witnesses – Upjohn
 - Protecting Attorney-Client Privilege
 - Communications Made by Employees in Order to Provide Legal Advice to Corporation
 - Witness is Cooperating at Direction of Corporation
 - Witness Admonition Must be Clear and Thorough
- Addressing Ethical Concerns
- Retaining Separate Counsel for Officers and Employees
 - Preparing Officers, Employees and Other Witnesses
 - Non-cooperation

Finalizing the Investigation

- Communicating with Constituents
 - Board, Auditors, Government, Other Parties
- Reporting the Results: Oral vs. Written
 - What to Include in Reports
 - Protecting the Company from Suits Arising From Periodic Updates and The Report
 - Maintain Confidentiality After Disclosure of the Report
- Remediation/Corrective Action
 - Revised policies, procedures, internal controls, and training
 - Employee discipline or termination

Cross Border Investigative Considerations

- Investigative Team
 - Foreign Country/US Resources
- Access to Information
 - Privacy & Privilege
- Language & Cultural Considerations
 - Document Review
 - Witness Interviews
- Multiple Government Regulators



Q&A