

Professional Perspective

# Maximizing Internal Investigation Effectiveness & Efficiency

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**Bloomberg  
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# Maximizing Internal Investigation Effectiveness & Efficiency

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In corporate America and across the globe, allegations of wrongdoing within companies are increasingly common, and the high cost of internal investigations continues apace. Companies are now also routinely investigating allegations beyond violations of the law, and internal investigations are a primary tool for board members seeking to investigate and address allegations of all kinds of misconduct.

If you are a corporate director, chances are you will be faced with the prospect of initiating or overseeing an internal investigation at some point in your tenure. Decisions you make when allegations arise can have a major impact on the efficacy and cost of the investigation.

This article will provide a high-level guide for any corporate director contemplating the initiation of an internal investigation as well as tips on how to conduct it effectively while minimizing costs.

## When to Conduct an Investigation

There are many events that could trigger the need for an internal investigation. Perhaps the most obvious example requiring immediate action is when a government agency such as a US Attorney's Office, the SEC, or the FBI sends a letter or subpoena or otherwise contacts a company requesting information as part of a confidential government investigation.

For example, a company may receive a subpoena requesting all documents relating to a company's CFO and Project X. Sometimes these requests are so expansive that they can call for the production of millions of pages of documents. Corporate directors would typically want to investigate the issues as implicated by the subpoena in order to understand the government inquiry and form the company's strategic response.

Aside from government inquiries, whistleblower complaints are another typical trigger for internal investigations. In many cases, a company employee will lodge a complaint through a supervisor, the human resources department, a whistleblower hotline, or some correspondence directed at management—often anonymously.

Such a complaint might allege a wide variety of misconduct. For example, the accounting department is not recording expenses properly, a supervisor is bullying his or her subordinates, or an executive of the company is receiving kickbacks. All of these examples are likely to lead to investigations—and in many cases regulatory actions or even criminal charges if substantiated.

Employee complaints related to company culture have also been increasing, both as standalone allegations to be investigated, and as issues that arise in the context of other complaints. Cultural investigations can start with a specific complaint, e.g., “the CEO is fostering a culture that marginalizes X group of employees” or “Y manager is creating a culture of heavy social drinking required to succeed on his team.”

Investigations can also arise more organically. For example, a board member might learn from an executive that there are concerns that the company's culture is “toxic” or otherwise negatively impacting employees. Boards are increasingly interested in investigating and understanding company culture, both as a prophylactic measure to reduce risk of a more serious issue down the line, and as a part of their diligent management of the corporation.

Routine audits of company financials and records by company personnel or outside auditors could also uncover discrepancies or suspicious circumstances that need to be investigated further. For example, according to a [report](#) in July 2022, Tesla's Head of Legal opened an internal probe investigating the conduct of an executive after a purchase order for construction material was identified as suspicious and flagged to the company's finance and internal audit groups.

As yet another example, a company might be contacted by plaintiffs' counsel seeking to sue the company for some alleged misconduct. An example of which might be a letter demanding an investigation or threatening suit on behalf of employees or shareholders based on allegations that certain executive actions have lowered company stock values.

In all of the circumstances described above, initiating an internal investigation would be appropriate. As fiduciaries of a company, corporate directors and officers have a duty to investigate and cannot “bury their heads in the sand” when allegations of misconduct arise. In today's regulatory landscape, it is practically expected that any organization would conduct some kind of investigation into such allegations.

This is especially the case for publicly held companies and larger companies with substantial resources. For smaller companies, the expectation to investigate misconduct also exists, but considerations of the company's small size and lesser resources would also inform what a sufficient investigation would look like.

## Benefits & Risks

A properly conducted investigation has many benefits, including allowing a company to root out any bad actors or practices that may put the company at risk. It allows a company to maintain or boost its reputation as an ethical actor in the marketplace, which could have positive consequences for a company's standing and value. It sends a positive message to employees about the company's values, which may help attract or maintain top talent even during a tumultuous period.

A fulsome investigation can appease government regulators and minimize or eliminate potential negative consequences, both civil and criminal. It may also help fend off civil litigation against the company, if company takes the appropriate remedial action and prevents harm.

But there are also potential negative consequences involved when conducting an investigation. If the investigation uncovers wrongdoing, then the board will have hard decisions to make about whether to disclose the misconduct and to whom, and what actions to take next. In some cases, the board may decide that self-reporting to the authorities, such as in the context of violations of anti-corruption statutes, will put the company in a better position.

Investigative findings can become public, depending on how the board and company receive the findings and their reporting obligations. Such public disclosure can lead to government scrutiny or increase the risk of civil litigation. Investigations can also uncover problems in a company that go beyond the initial inquiry, requiring a deeper or broader inquiry and more time and expense.

In most cases, however, deciding to initiate an investigation is not a close call. Usually if an issue or allegation has risen to the board level, it is important enough to require the board to begin an inquiry at a minimum. Failing to investigate the issues properly can lead to greater liability for the company, and even for board members individually.

Experienced investigative counsel can help corporate directors navigate any potential pitfalls and provide them with the information they need to act in the best interest of a company and its shareholders.

## How to Start

### ***Selecting the Investigator & Overseer***

Initially, the company must decide whether in-house counsel or another internal group such as HR can handle the review or whether independent—i.e., little or no prior relationship to the company—outside counsel should be engaged. Investigations that are limited in scope and which do not implicate executive leadership can occasionally be appropriately conducted by in-house counsel. Inquiries involving particularly serious issues, such as senior executives' conduct or omissions, potentially material issues regarding a company's financial concerns—especially a public one's—or company culture writ large, however, should likely be handled by outside counsel.

Conducting an independent inquiry in these situations has significant benefits: it may better stand up to regulatory scrutiny, preserve internal relationships, and ensure that the investigation is being conducted by specialized, expert counsel. In addition, it may be prudent to enlist the assistance of an outside forensic examiner or other expert depending on the nature of the allegations.

Directors should give thought to whom within the company—and on the board—will be most closely involved in assisting the investigators. Boards often choose their audit committees to oversee the investigation and work with counsel or establish a special committee whose sole responsibility is conducting the investigation, also with assistance from counsel.

A key consideration is ensuring the relevant committee is composed of independent directors who have no personal connection to the individuals or conduct under scrutiny. The committee, or its leaders, should establish a reporting cadence

with investigating counsel so the board can be apprised of investigation status and any key developments close in time to their occurrence. This also gives the investigating counsel the benefit of directors' insights into the company, the allegations under investigation, and sometimes the witnesses themselves.

### **Preserving Evidence**

After determining whether the investigation will be conducted internally or externally, an immediate next step will be implementing an appropriate document preservation methodology. It is critical that all personnel at the company who may have documents relevant to the investigation—emails, texts, voicemails, instant messages—preserve those items.

All automated deletion protocols that could lead to the destruction of relevant evidence should be suspended. This will typically involve a notice to employees regarding their document preservation obligations.

### **Defining the Scope of the Investigation**

The board should next work with investigating counsel to define the scope of the inquiry and specific questions to be answered. The importance of this task cannot be overstated, as it will guide the investigators through the entire inquiry and help ensure that the investigation achieves its aims efficiently.

The breadth of the scope can vary widely from narrow—e.g., “Did Supervisor A act inappropriately favor Employee B over Employee C with regard to assigning them responsibilities in the accounting department?”—to broad—e.g., “Does the accounting department foster a culture in which certain employees are favored over others for inappropriate reasons?”. The scoping process can also involve preliminary witness identification and timeline development.

Notwithstanding the importance of initially scoping an investigation, there may be information that comes to light later that requires broadening the scope of the investigation. In the above example, if Supervisor A's conduct alone is being investigated, but it comes to light that there may be a toxic culture in the entire accounting department, then this might call for widening the investigation to scrutinize the conduct of others in the department. Depending on the significance of the new information, it could result in a broadening of the scope, or it could just become a footnote to the investigative findings.

## **How to Proceed**

### **Gathering & Reviewing Relevant Documents**

Gathering the documentary evidence is the next step. First, investigating counsel will need to gather and study governing privacy, technology, and other applicable policies to ensure document and possibly phone data collection is compliant with those policies. Depending on the issues under investigation, counsel may recommend a targeted document collection, search-term application against company record and email systems, and review.

For example, if the issues involve the conduct of a certain employee with regard to a specific purchase order, it will likely be unnecessary to gather every purchase order made over the past decade. Similarly, if the allegations involve the conduct of only two employees, searching through the emails of all 50 employees may be a waste of time and resources. In other cases, the number of relevant documents and communications to be reviewed may be necessarily large in scope.

Properly framing the question to be answered and scoping the investigation can affect how burdensome the fact-gathering phase is later.

### **Interviewing Witnesses**

Once the documents have been gathered and reviewed, and oftentimes as this process is still underway, counsel will proceed to arrange for interviews of key employees or other witnesses. Finishing the document review first allows for efficiency and reduces the risk of repeated discussions with employees or other witnesses, but it is not always possible as the timeline for investigations is often short. Guided by the documentary evidence in hand, counsel will prepare outlines of questions for the individuals in order to gain a better understanding of what the documents gathered mean and fill in the gaps in the documentary evidence.

Counsel should generally provide what is commonly known as an *Upjohn* warning to any employee being interviewed, informing them that the attorney represents only the company and not the employee individually, and that the attorney-

client privilege attached to communications between the attorney and the employee belongs solely to the company and may be waived if the company chooses—at its sole discretion—to disclose the contents of the interview to the government or any third party.

In certain circumstances, such as when interviewing high-level executives or individual employees directly implicated in the alleged misconduct, the company may consider recommending that those individuals hire their own counsel. The company may also consider whether to pay for such counsel in order to ensure that those individuals are well-represented in the process. This is a complicated subject, but in many cases having individuals represented by their own attorneys can smooth the investigation process by allowing for more productive interviews and efficient gathering of information.

## Concluding the Investigation

Once counsel have reviewed the documentary and testimonial evidence, they will report their findings to the board, its special investigating committee, or whomever is overseeing the investigation. The report can be given in writing or orally, or through some combination during an in-person or virtual presentation.

The level of detail provided in any written report must be considered carefully, because in some cases—such as in the course of defending a lawsuit or presenting to the government—the reports may lose their privileged status and may become public. Aside from laying out the findings of fact and legal implications, these reports will often include suggestions for remediation measures a company should consider taking in order to prevent future issues.

From there, the corporate directors must use their judgment to determine the next steps going forward. This may involve many different courses of action, such as terminating the employment of certain personnel, changing corporate policies, instituting trainings, restructuring groups within the company, disclosing facts to shareholders or governmental authorities, etc.

## Minimizing Cost & Disruption

Internal investigations can be expensive, but there are many ways in which costs can be minimized. Again, correctly scoping the investigation at the outset will provide boundaries for every decision going forward. For example, if documents archived on offsite servers are highly unlikely to be relevant to the specific issues being investigated, then incurring the cost to gather them may not be worthwhile.

To the extent the company's IT department is able to provide company counsel with the documentary evidence in a cost-effective manner, even applying an appropriate date range limitation to winnow down volume can reduce costs. But in many cases, company IT may not be equipped to handle gathering documents, especially when they involve large volumes. In that case, a vendor may be the most efficient and cost-effective way to provide counsel with the documents needed. Similarly, if the volume of documents gathered is extraordinarily large, it may be prudent to hire relatively less expensive contract attorneys who can work under the supervision of investigating counsel to wade through them and identify only the relevant documents.

With regard to interviews, limiting those to only the core individuals most likely to have relevant information, and then expanding to others only as it becomes necessary, can also be effective. Regarding counsel, all of the same considerations apply when hiring outside counsel to provide any legal services, e.g., whether they are using attorneys at the right cost levels to perform the various types of work required; whether a written report from the attorneys is required, or whether a less costly oral report will suffice.

When it comes to employee representations, many companies seek to have a single outside counsel law firm represent a pool of company employee witnesses without adverse interests. This method is a more cost-effective means of ensuring employees needing counsel have counsel without requiring multiple attorneys to learn the same underlying facts and concerns.

Minimizing disruption to the business is also a key concern for corporate directors. To the extent the legal department or other personnel can facilitate the gathering of documents and scheduling of interviews, this can help minimize the time other executives and employees have to spend away from their daily work. Conducting interviews in a private room onsite at the company, or virtually where appropriate, can also minimize costs.

## Conclusion

Internal investigations have become a critical tool for maintaining good corporate governance. When faced with allegations of wrongdoing at a company and the prospect of initiating an internal investigation, corporate directors have much to consider.

While this article provides a primer regarding such investigations, there are many more considerations and nuances that may come into play. The task of corporate directors investigating potential misconduct is certainly unenviable, but, if done properly, directors can lead their companies out of perilous situations to emerge better off than before.