



Internal Investigations of Anti-Corruption Issues

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*A Broader Perspective*SM



Today's Presenters



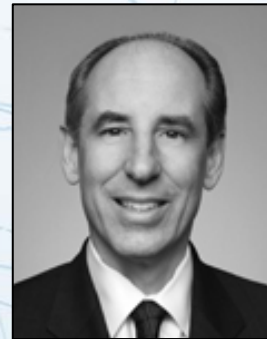
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Issues To Be Discussed

- When is it appropriate/necessary to conduct an internal investigation?
- What factors should you consider when deciding who should conduct any such investigation?
- Should you report the pendency or results of an internal investigation to government authorities?
- How to control scope: At what point can you stop?
- Special considerations in internal investigations of potential corruption issues

The “Decision Tree” for Internal Investigations

- Investigations differ, but there are common themes
- An investigation is a series of decision points; flexibility is essential; reconsideration of prior decisions based on new information critical
- The importance of establishing clear authority/oversight
- Documenting the process (e.g., retention of interview notes)
- Conducting an investigation that, if subject to review, the government will deem credible



**When is it appropriate/necessary to conduct
an internal investigation?**

How Do Investigations Begin?

- The manner in which an allegation comes to the attention of a company often is critical in determining what happens next.
 - > Internal audit / compliance
 - > Whistleblower (anonymous / non-anonymous)
 - > Customers and business partners
 - > Due diligence in the course of a merger or other transaction
 - > Media
 - > Government agency (U.S. and non-U.S.)

Is the Allegation Credible?

- What factors should inform the decision?
 - > Materiality
 - > Specificity of the allegation
 - > Initial documentary support
 - > “Risk factors” based on region / nature of business
 - > Source (the danger of discounting allegations based on the source)
 - > Subject matter of the allegation
- Who decides whether the allegation is credible?
 - > Board / Audit Committee?
 - > Senior Management?
 - > Legal?

The SEC's Whistleblower Rules

- A review of the new rules
- How do the rules affect decision-making in the context of an internal investigation?
- What can / should companies do in advance of a whistleblower surfacing?
- Ensuring compliance with the anti-retaliation provisions of the new rules



What factors should you consider when deciding who should conduct any such investigation?

The Choices for Conducting Internal Investigations

- Internal Audit/Compliance personnel
- Inside counsel
- Outside counsel
 - > “Independent” v. non-independent counsel

Factors in Choosing the Investigator

- Subject matter of the allegation
- Seriousness/consequences of the allegation
- Knowledge of the company
- Resources
- Expertise
- Costs

Important First Steps

- Formalize and document the investigation for privilege
- Determine document / e-mail holds (scope)
- Determine method of gathering / review
- Preliminary interviews
- Retaining forensic accountants and other experts
- Separate representation for individuals potentially implicated?

Interviews of Officers/Directors/Employees

- Who should conduct?
- What should employees be told?
- Privilege / representation issues (“Upjohn” warnings)
- Notes/memoranda of the interview
- Continued confidentiality (“rumor control”)

Who Should Be Informed?

- Audit Committee / Board of Directors?
- Independent auditors?
- Government?



**Should you report the pendency or results
of an internal investigation to government
authorities?**

Factors to Consider in Decision to Self-Report

- Affirmative obligations to report (e.g., government contract regulations; S-Ox certifications; previous orders)
- Likelihood of government discovery
- Nature and scope of violation
- Quality of evidence
- Benefits to self-reporting
- Risks of self-reporting

Benefits of Self-Reporting

- Both DOJ and SEC have provided incentives for self-reporting
 - > Declination
 - > Non-prosecution agreement
 - > Deferred prosecution agreement
 - > Lower penalties
 - > No or better probation/supervision provisions

Risks of Self-Reporting

- Possible DOJ criminal resolution with criminal fines and penalties up to twice the gain
- Possible SEC civil resolution with disgorgement and civil fines
- Loss of control of scope of investigation
- Ensures extra costs
- Potential monitor imposed on company
- Possible suspension/debarment from government contracts
- Possible follow-on civil litigation
- Possible foreign investigations of conduct

Important Reminder

- The decision to self-report is one that should be revisited as additional information is uncovered
- It is a bell that cannot be unrung

If You Self-Report...

- Thorough as to the particular allegation; how exhaustive as to other potential issues?
- Credible (is there a place for advocacy?)
- Present a plan for completing the investigation
- Decisions regarding privilege (e.g., interview memos)
- “Remedial” actions



How to control scope: At what point can you stop?

When Can You Stop?

- Ultimately, must be able to sit across the table from DOJ/SEC attorney and defend what you did and what you did not do
- Investigation should have achieved the answers to the following questions:
 - > What individuals were involved directly and which individuals had knowledge?
 - > Who in management knew or should have known?
 - > What was the scope of the illegal conduct?
 - > Is the conduct likely to have occurred elsewhere in the company?

Factors to Consider

- Consider the allegations – nature and specificity
- The scope of documents reviewed and not reviewed
- The existence of other similar company units in similarly corrupt countries
 - > Generally, can limit to geographic and subject matter areas
- Have you “pulled the string” on bad facts/documents?
- What was the compliance culture like in that unit?
- Is anti-corruption training conducted on a regular basis?
- Reliability of the unit’s books and records

Developing Conclusions

- Written / oral reports?
- Self-reporting revisited / Reaching a resolution with the government
- Public disclosure
- Personnel decisions / Remedial actions (These, often are key)
- Ongoing monitoring



Special Considerations in Anti-Corruption Investigations

Special Considerations in Anti-Corruption Investigations

- Co-ordination in light of differing regulatory regimes
- Gathering information in non-U.S. jurisdictions (issues include: U.S. and non-U.S. privacy laws, language barriers, non-U.S. accounting systems)
- Determining appropriate scope
- Use of personnel in non-U.S. locations to gather documents and conduct interviews
- Prior to an issue arising: the importance of effective, ongoing anti-corruption compliance programs



**After the investigation: How do you
get back to business?**



Questions?