



FOLEY & LARDNER LLP

Internal Investigation A - Z

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What Triggers an Internal Investigation

- Internal Audits & Monitoring
- Hot Line Calls; Internal Complaints
- Other Non-compliance (e.g., Cost Accounting, Quality of Care, etc.)
- Third-Party Complaints/Accusations
 - Legal Proceedings
 - Subpoenas
 - Outside Audits & Reviews
 - Suppliers/Vendors
 - Third-Party Billing
 - Patients/Beneficiaries
 - Competitors
 - Former Employees



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Why is it Necessary to Conduct an Internal Investigation?

- Element of an effective compliance program and fulfills bond's duty to investigate
- Determine if federal/state liability before government or whistleblowers
- Identify and end improper/illegal practices
- Minimize chemical and ____ exposure to extent possible
- Minimize sanctions
- Public relations



How is an Internal Investigation Organized and Structured?

- Who is the client?
- Who should manage and oversee the investigation?
- Who should conduct the investigation?
 - Compliance officer?
 - In-house counsel?
 - Internal audit or other multidisciplinary team?
 - Outside counsel
 - Special counsel
- When is it necessary to formally retain outside counsel?
- Is it always necessary to have an investigative plan?



How Should the Internal Investigation be Implemented?

- Initial Notification and Communication Issues
 - D&O and other insurance carriers
 - Regulators?
 - Public Relations – talking points
 - Internal employee communications
 - Relevant employees



What Additional Steps Should be Taken to Implement the Internal Investigation?

- Preserve documents
 - Rationale
 - Document Preservation Memorandum
- Preserve ability to assert the company's attorney-client privilege
- Resolve conflict issues
- Employee/officer indemnification
- Joint Defense Agreements



How is the Investigation Commenced?

- Understand the system
- Retrieve relevant documents
 - Document collection memorandums
 - Document collection interviews
 - Electronic documents
 - Document organization



What Steps Should be Taken in the Document Analysis?

- Designate key documents
- Organize documents by witness, subject matter or transaction
- Chronology of events
- Use documents to identify current and former employees and third-parties to interview
- Retain expert consultants to assist



What Steps Should be Taken in Interviewing Witnesses?

- Attorney-client privilege and work product protections
- Read and document upjohn warnings
- Avoid giving legal advice or opinions to employees
- Avoid tape recording interviews
- Order of interviews
- Interview setting
- Conducting the interview
- Documenting the interview



What Steps Should be Taken to Synthesize the Facts and Law and Prepare a Report of the Investigation?

- Contents of the report
- Oral vs. written report
- Dissemination of report



What Considerations Should be Weighed in Disclosing the Results of the Investigation?

- Mandatory disclosure
 - SEC
 - Audit letters
 - Misprision of felony (18 U.S.C. §4)
 - Failure to disclose health care overpayment, in certain circumstances or “events” is a felony (42 U.S.C. §1320(a)-7b(a)(3))
 - Others



What are the Pros and Cons of a Voluntary (Discretionary) Disclosure?

Voluntary Disclosure Benefits:

- Avoid Protracted Investigation
- Negotiate Monetary Settlements
- Reduce/Avoid Program Exclusion
- Avoid Criminal Prosecution
- Reduce Criminal Fines
- Reduce Civil Penalties



What are the Pros and Cons of a Voluntary (Discretionary) Disclosure? (cont'd)

Voluntary Disclosure: Factors Against

- No Guarantees of Leniency Up Front
- Matter Could Be Referred to Prosecutors
- Government Can Disregard or Expand on Findings
- Exposure to Liability
 - Criminal, Civil, Administrative
- Public Revelation (Disclosures/Underlying Data)
- Potential Waivers of Attorney-Client & Work Product Protections
- Creation of Adverse Relationships



What are the Key Elements of a Voluntary Disclosure Investigation Report

- Nature & Extent of Improper or Illegal Practices
- Discovery of and Responses to Improper or Illegal Practices
- Certification: To the Best of the Individual's Knowledge, *"The Report Contains Truthful Information and is Based on a Good Faith Effort to Assist OIG in its Inquiry and Verification of the Disclosed Matter"*



What Considerations Should be Given in Waiving the Attorney-Client Privilege and Work Product Protections?

- Full waiver
- Limited waiver
- Crime/fraud exceptions for communications made in furtherance of contemplated criminal/fraudulent conduct
- Shareholder litigation
- Use of privileged documents to prepare witnesses
- Waiver in civil litigation

Implementing Internal Investigations

- Establish Attorney-Client Privilege & Work Product Protections
- Handle Complainant and Subject Personnel
- Preserve Relevant Materials
- Gather Facts and Materials
- Interview Fact Witnesses
 - Individual Counsel Considerations
 - Warning: Recordings/Signed Statements

Implementing Internal Investigations

- Using Outside Consultants/Experts
- Written/Oral Briefings and Reports
- Complaints/Allegations/Suspicious vs. Evidence of Fraud



Weighing Corrective Action Responses

- Potential Liabilities
 - Criminal
 - Civil
 - Administrative
- Office of Inspector General (OIG)
 - “Credible Evidence”
 - 60-Day Requirement
- Other Corrective Action
 - Normal Business or Program Channels



Provider Self-Disclosure Protocol

- No Pre-Disclosure Requirements
 - Compare Pilot Program
- Open to All Providers
 - Entities and Individuals
- Pending Government Investigations Not Automatic Ban
- Disclosure Must Be in Good Faith

