

THE WEB CONFERENCE SERIES FOR CORPORATE COUNSEL

How to Conduct an Internal Investigation

Brought to you by *InsideCounsel* and *Foley & Lardner LLP*

On September 12, 2007, *InsideCounsel* magazine and *Foley & Lardner LLP* presented "How to Conduct an Internal Investigation" in the latest installment of The Web Conference Series for Corporate Counsel. *InsideCounsel* Editor-in-Chief Robert Vosper led the discussion with Ivonne Mena King, *Foley White Collar Defense & Corporate Compliance Practice* vice-chair and partner, Brian S. Chilton, *Foley White Collar Defense & Corporate Compliance Practice* senior counsel, and Annie Goranson, *Symantec Corporation* corporate counsel. The panel discussed effective internal investigation best practices for responding to and investigating potential noncompliance.

Addressing Trends

In today's highly regulated climate, companies increasingly are responsible for monitoring internal operations and identifying any possible wrongdoing. Governmental and law enforcement agencies in the United States expect that corporations will police themselves and, increasingly, self-report potential misconduct swiftly and decisively. If not, the legal, financial, and public relations penalties can be severe.

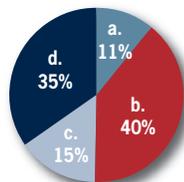
Sharing Solutions

Companies must understand the purpose of an internal investigation, the critical steps to follow when uncovering the facts, and the strategic considerations surrounding an investigation that can affect its outcome.

Polling Question*

How many internal investigations did your company conduct during the last complete fiscal year?

- a. None
- b. Less than five
- c. Six to 10
- d. More than 10



How Issues Arise

Companies learn of issues through any number of means, including hotline calls, employees, compliance audits as mandated by Sarbanes-

Oxley, government audits and investigations, the media, and competitor complaints. In hotline call or employee situations, the company's in-house counsel may be made aware of the potential issue before the government becomes involved and immediately can begin responding to the situation. When issues are identified by the media, counsel often learn about the potential problem at the same time that the government does. This is perhaps the worst scenario for finding out about an issue and requires quick action and the involvement of outside counsel.

Why Conduct an Internal Investigation?

Internal investigations — as potentially disruptive as they can be — serve to help companies identify and understand internal problems before they become widespread and the focus of government scrutiny and punitive action. An internal investigation also is an element of an effective compliance program and can fulfill the board's duty to investigate. By investigating improprieties, companies can minimize the risk of liability and government prosecution. Additionally, internal investigations can help a company control how the relevant issues are communicated internally and to the public.

In-House Counsel's Role and Responsibilities

In-house counsel play a key role during internal investigations. As the company's legal department, in-house counsel must detect and address fraudulent activity within the company. In-house counsel coordinate efforts of the company's executive, human resources, information technology (IT), and public relations departments, with those of any external resources such as outside counsel and forensic accounting and finance professionals, to conduct the investigation and resolve the problem.

When conducting an internal investigation, it is critical for in-house counsel to separate their roles as legal advisors to the investigation from their roles as business advisors to the company. Depending upon the scale of the matter being investigated, it may be appropriate for in-house counsel to involve outside lawyers, especially when allegations involve high-level executives, systemic misconduct, significant financial exposure, or the potential for law enforcement and media involvement. In most instances, in-house counsel can work with internal, non-legal staff to investigate relatively minor matters concerning company policy, technical, or reporting issues.

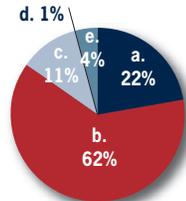
* All polling results are based upon the number of respondents to each question rather than the total number of participants in the Web conference. Due to rounding, not all percentages will add up to 100 percent.

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Polling Question*

For all internal investigations conducted by your company of which you are aware, outside counsel has been retained to conduct the investigation:

- a. Never
- b. Rarely
- c. About half the time
- d. In most instances
- e. Almost always



Uncovering the Facts

The core of an internal investigation focuses on answering several key questions:

- What happened?
- What and when did the company know about what happened?
- How did the company respond?

The answers exist in two key areas: the company's hard copy and electronic documents and in the minds of current and former employees. Additionally, the investigation itself, and its thoroughness and integrity, are part of the company's response.

The Issue of Privilege

Throughout the process of gathering and analyzing documents and conducting interviews, the privilege issue must be considered. Generally, all communications regarding the investigation should be marked and maintained as "privileged." Decisions on whether or not a document should be marked "privileged" should be made by legal staff, not business staff or other non-legal employees being asked to produce the documents.

Evidence: Documents

The panel shared eight steps to effectively collect, organize, and analyze documents:

Define the Mandate of the Investigation

The company's board or relevant subcommittee should issue a memorandum or letter directing the senior management and general counsel to conduct an investigation, retain appropriate expert assistance like outside accounting or legal, and report back to the board with results and recommendations. This letter also preserves privilege and provides a roadmap for in-house counsel, outside counsel, and others involved, to follow. The letter requests the involvement and cooperation of high-level executives and sets a tentative completion date.

Draft an Investigative Plan

The investigative plan provides a work plan to ensure all areas are covered, including a description of allegations, the facts, a chronology, the legal issues involved, analysis of evidence known at the beginning and end of the investigation, and a timetable for completion. The investigative plan should be viewed as a working document to be revised throughout the course of the investigation as new areas of review become apparent.

Preserve Documents and Review Document Retention Policies

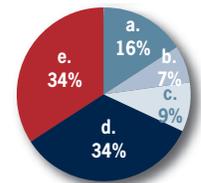
Create a written memo that advises employees to preserve and retain documents, both electronic and hard copy, during the investigation and in accordance with the company's document retention policies. The legal definition of a document is broad in scope and includes Web pages, e-mails, and other electronically stored data. Given the amount of electronic information in today's business environment, it is critically important for counsel to understand the company's information technology (IT) system and be able to work with IT staff to retrieve information.

During an investigation, document retention policies should be suspended to prevent the deletion of relevant documents and to avoid possible criminal charges for destroying evidence.

Polling Question*

My company's electronic document retention policy regarding e-mails calls for the deletion of e-mails from all hard drives and servers:

- a. Every 90 days or less
- b. Greater than every 90 days, but less than yearly
- c. Annually
- d. Never
- e. I don't know our policy



Notify Employees of Government Involvement

In cases where government scrutiny already exists, it is necessary to notify employees of the government investigation and offer instructions on how to respond should they be contacted by the government. This allows the company to preserve its privileges and also allows the employees to protect their own rights. It also enables the company to ensure that its employees are providing appropriate cooperation to the government, while simultaneously allowing the company and its counsel to remain aware of how the government is proceeding in its review.

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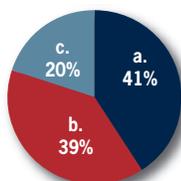
Gather Documents to Uncover the Facts

Preliminary interviews can help identify the people who have knowledge of the location of important documents. Keep in mind that key documents are not limited to the workplace and can reside on employees' home computers. To aid in the search of electronic documents, consider using search terms and the free and useful Google® Desktop application, which applies Google's search functions to individual computers. In-house counsel can be particularly helpful in determining search terms that likely will be used within company documents.

Polling Question*

My company has sufficient resources and personnel to assign someone from our IT department to assist in gathering and maintaining the electronic information.

- a. Yes, but they will still be expected to do their full-time duties
- b. Yes, and they will be permitted to adjust their full-time duties as needed
- c. No



Organize Documents Consistently

An often-overlooked step is simply to develop a consistent system for organizing documents. This helps others involved in the investigation understand how the investigation files — often immense — are organized so needed documents can be found quickly.

Review Documents Thoroughly

The main goal of the investigation is for in-house and outside counsel to review the gathered documents, form an understanding of the governing facts, and begin forming legal opinions and recommendations.

Prepare and Review the Investigation Timetable

To ensure the investigation remains on track, it is critical to maintain and revise the project timetable. This allows in-house counsel to manage and work toward the goals of the investigation and not lose the larger perspective when scrutinizing the details.

Evidence: Interviews

Besides written documents, the evidence needed in an investigation will exist in employee knowledge, which may be uncovered during an interview. Conducting effective interviews requires skill and planning. To maintain objectivity and the integrity of the investigation, counsel should lead the interview efforts without the involvement of senior officials.

A list of current and former employees to be interviewed may be gleaned during the document review. Once the interview list is compiled,

considerable thought and planning should be given to the order in which interviews are conducted. The approach most commonly followed is a concentric approach, interviewing witnesses with the most peripheral information and least potential involvement or exposure first and then using the information gained during those interviews to proceed inward toward the witnesses who have the most information and greatest potential involvement or exposure.

When interviewing the central figures in the investigation, allow the interview to remain conversational in tone and allow the witness to talk to you about the topics they raise in the order in which they raise them. Although it is helpful to prepare an outline in advance of an interview, attaching key documents to be reviewed with the witness, counsel should never force a witness to discuss matters in the order in which they appear on the outline. Use the outline as a checklist to make sure all topics that need to be covered are addressed, but allowing the witness to control the order in which they are addressed will keep the witness in “conversation” mode. Witnesses who stay in conversation mode are much more likely to speak more truthfully off the top of their head, as opposed to a witness who carefully calculates each and every response before answering questions read to them from a script.

Give the witness an “Upjohn” warning prior to beginning the interview, so that he or she understands that (1) the privilege attached to the interview applies to and can be waived by the company rather than the witness and (2) you as the attorney represent the interests of the company, not the witness. In keeping with the “Upjohn” warning, counsel represents the interests of the company and not the employee, and should refrain from giving legal advice to witnesses or sharing documents that the witness has not seen already.

Do not interview former employees, who likely fall outside the scope of the privilege, until the end of the review. It is possible you will be able to determine that they are not necessary. If they remain necessary as witnesses, though, take care not to share any information with them because it will likely be deemed waived. Instead, make sure that the former employee-witness does most of the talking and that you focus on learning what needs to be learned without also revealing privileged information to that witness.

Interview Memoranda

The preparation and use of formal interview memoranda is preferable to conducting a taped interview because taped recordings are not protected under work-product privilege. There should always be two persons involved in taking the interview, one to conduct the interview and the other to take notes of the interview. Both should then be involved in preparing and finalizing the memoranda of the interview. Involving two persons not only

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increases the accuracy and thoroughness of the interview but avoids a “swearing contest” if the witness being interviewed later contests the accuracy of what he or she is reported to have said in the memoranda.

One useful practice tip for the notetaker is to take notes of the interview in one color ink, and then as soon as possible after the completion of the interview, sit down and further annotate those notes in another color ink. Even the most careful and experienced notetaker will agree it is impossible to take complete or accurate handwritten notes during an interview. Supplementing those notes as soon afterward as possible with additional notations and corrections shows diligence and increased attention to accuracy. Putting those additions and corrections in a different colored ink though, preserves the ability to understand which notations were made during the interview versus those that were made after the interview based on the interviewer’s and notetaker’s recollections. The final memoranda of the interview should then be prepared from this supplemental version of the handwritten notes.

Strategic Considerations

When conducting an investigation, in-house counsel should be aware of strategic considerations that might influence the investigation and its desired outcome. Generally, the key concern is whether or not the company faces government sanctions or criminal penalties as a result of any internal malfeasance. Federal prosecutors have tremendous leeway in deciding whether or not to charge a company. For the most part, prosecutors will be less inclined to pursue charges against a company if the company quickly and thoroughly investigated the problem, took appropriate corrective actions and disciplinary measures, has an effective compliance program in place, and disclosed the problem to the government.

Once the government commences an investigation, it views a company’s willingness to waive the attorney-client and attorney work product privileges as a significant factor in determining whether a company is truly cooperating with the government’s investigation. To address the growing concerns voiced by many over the government’s demand for privilege waiver, the United States Department of Justice recently issued the McNulty Memorandum, which sets forth guidelines requiring federal prosecutors to seek supervisory approvals before they can demand that companies under investigation waive the privilege. While few prosecutors have sought supervisory approval to formally request that a company waive the privilege, prosecutors continue to expect that companies will share the results of their internal investigations and provide other sensitive information, the provision of which requires companies to waive the privilege.

Voluntary Disclosure

In situations where the government is not aware of potential wrongdoing, the question becomes whether and when to voluntarily disclose the

wrongdoing to the government. If there is a legal requirement to disclose the impropriety, then it must be done quickly. If there is no legal requirement to disclose to the government, then the question is whether a company should still voluntarily disclose the problem. The challenge is to meet the government’s stated desire to have disclosure made as soon as an issue is discovered while pursuing the time-consuming and complex steps of conducting a thorough internal investigation.

The potential benefits of voluntary disclosure include:

- Decreased civil penalties
- Decreased likelihood of criminal prosecution
- Mitigating effect of the disclosure in the event of prosecution

The potential risks of voluntary disclosure include:

- Alerting the government to the problem
- High financial and employee resource costs that distract from the business
- Requirement that the company provide facts and analysis for the government
- Requirement that the company waive privilege protections
- Fact that a favorable outcome is not guaranteed

Summary

An internal investigation can help identify internal problems and prevent them from becoming larger issues that result in adverse media exposure, government scrutiny, and criminal penalties. In-house counsel should work with outside counsel when a company faces significant consequences for any uncovered problems.

Companies conducting internal investigations should understand what the government considers essential to its decision to prosecute or to settle charges. The government expects that companies will thoroughly and swiftly investigate potential wrongdoing, take corrective actions (including strengthening the existing compliance program and disciplining wrongdoers), and voluntarily disclose wrongdoing to the government.

InsideCounsel and Foley & Lardner LLP look forward to your participation in the next installment of The Web Conference Series for Corporate Counsel. Visit Foley.com/webconference for details on the upcoming “Doing Business in China — Strategic Considerations and Effective Approaches to IP Protection” program.

Please visit Foley.com/webconference for more information or to experience a recording of the “How to Conduct an Internal Investigation” conference.

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