

TOP TAKEAWAYS

Investigating Whistleblower Allegations Reported to the Board

1. **Have a Plan.**

The Company needs to have an existing protocol in place, and the members of the Board need to know it. If they do, the Company can quickly turn to established policies and procedures when allegations arise, meaning it will be more likely to make the right decisions in the heat of the moment.

2. **Let the Audit Committee Do Its Job.**

Many whistleblower situations involving serious allegations of financial wrongdoing or malfeasance by executives will be within the Audit Committee's purview. Usually, the Audit Committee will have the independence and skill set to address the allegations in an independent investigation. Do not rush to form a special committee unless there is specific reason to do so. And, of course, keep any interested officers or directors (even the General Counsel) walled off from the investigation.

3. **Get Independent Counsel.**

The Company's primary legal counsel often will have strong relationships with the CEO or others implicated in the whistleblower allegations. There will often be pushback against engaging new, independent counsel to guide the committee's investigation, both because of costs and because the primary counsel has better knowledge of the Company. Remember that, at the end of the investigation, its optics often will be as important as the report's substance. Err on the side of engaging independent counsel. In investigations with a foreign-law nexus, err on the side of engaging in-country counsel as well.

4. **Inform the Company's Auditors Early On.**

The Company's auditors will always expect to know more, not less. Auditors will have keen interest in any high-level whistleblower allegation – however far-fetched the allegation may seem. The auditors will need to know at some point, so inspire trust by bringing them in the loop early on. In doing so, think about ways to balance the auditor's needs for information with the Committee's need to protect against waiver of attorney-client privilege.

5. **Anonymous Whistleblowers Stay Anonymous.**

When the whistleblower raises the issue, ask her if she is willing to have her name disclosed. If she says she wishes to remain anonymous, that decision must be respected. Just because the Audit Committee Chair (or the CEO) wants to know the whistleblower's identity, even "off the record," does not make disclosure permissible. Merely disclosing the whistleblower's name in this scenario can be an adverse employment action under existing caselaw.

6. **Keep the Whistleblower Apprised.**

Whether the whistleblower is anonymous or not, keep him or her apprised that her concerns are being investigated and keep her engaged in a positive way. The whistleblower, however, need not be provided information regarding the investigation's substance or any of its evidence or interim findings. This can be a tricky balancing act, but keeping letting the whistleblower know that the allegations are being taken seriously can head off further complaints by the whistleblower. The vast majority of the whistleblowers who have received Dodd-Frank awards after reporting to the SEC first reported their allegations internally.

7. **Obviously, Do Not Fire the Whistleblower.**

The investigation may show that the allegations were completely unfounded. If so, there will likely be a push from the CEO or others to dismiss the whistleblower. This response is retaliation and is not acceptable, even if it may seem justified. Be very careful in negotiating a mutually acceptable departure for a whistleblower; SEC rules preclude trying to prevent whistleblower from going to the SEC as part of a severance package.

8. **Check in to Assure No Harassment.**

Follow up with the whistleblower periodically during and after the investigation to assure she has not been subjected to any harassment or any form of retaliation.

9. **Directors Can Be Liable for Any Retaliation.**

Assuring that there is no harassment or retaliation needs to be on the radar of the Board, not just management. Recent case law shows that judges are willing to entertain suits against Board members under these circumstances, whether as "agents" under Sarbanes-Oxley or as "employers" under Dodd-Frank.

10. **If You Inform the SEC of Investigation, Expect the SEC to Investigate.**

Serious consideration should be given to whether to alert the SEC to a whistleblower allegation. If the SEC is told of an explosive allegation, even if far-fetched, the Company should expect the SEC to follow-up with its own investigation, not to give the Company and the Board "credit" for being up-front.

11. **Again, Have a Plan.**

Putting the right processes in place ahead of time not only leads to better decisions, it ultimately leads to lower costs to the Company. Mishandling whistleblower allegations (even meritless ones) can lead to retaliation suits and enforcement actions. Do not let a failed process become the issue.

For more information

For more information on Investigating Whistleblower Allegations Reported to the Board, please feel free to contact the moderator directly:

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