

An Internal Investigation Playbook For Energy Cos.: Part 3

By **Dixie Johnson, Brandt Leibe and Grant Nichols** (October 30, 2019, 4:44 PM EDT)

Energy companies regularly face challenges that require an internal investigation in order to determine the root cause of an issue, evaluate how best to remediate and guard against future harm. There are plenty of landmines in today's legal environment to keep any energy company's general counsel up at night.

This three-part article is designed to help navigate through the twists and turns of internal investigations. The first installment dealt with reviewing company policies, determining the scope and structure of an investigation, and the importance of data preservation. The second part covered conducting witness interviews, compiling an investigation report, and the special obligations of independent auditors.

This final section discusses responding to government investigations, and understanding the needs of various constituents during the investigation process.

Government Investigations

Whether as a result of the company's self-report to the government or because of the government's own information sources, the government may conduct an investigation at the same time as the company's own internal investigation.

The government could include civil or criminal authorities, at federal, state, local or international levels. It also could include quasi-governmental authorities such as self-regulatory organizations. More than one government inquiry could occur simultaneously.

Navigating this multi-front process is challenging, as the company's obligations as a public company issuer continue to apply, even as the government's requests and demands roll in. Experienced outside counsel will be invaluable during this process.

The extent to which government investigators offer cooperation credit to a company for promptly sharing with the government information gathered during the internal investigation differs between government agencies and organizations, and sometimes even between teams within the same agency. For example, the U.S. Department of Justice issued guidance to



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its False Claims Act litigators on May 7, regarding the incentives the department offers to companies that provide voluntary disclosure, cooperate with the department's investigation, "shar[e] information gleaned from an internal investigation and tak[e] remedial steps through new or improved compliance programs."

The U.S. Securities and Exchange Commission's cooperation program is rooted in a report from October 2001 that is commonly known as the Seaboard Report.[1] The SEC has provided updated guidance on cooperation through the years, including a formal cooperation program launched in January 2010, and multiple statements in speeches and enforcement settlements.

The credit a company will get for cooperating is uncertain and difficult to quantify, and the cost of cooperation is high. But the cost of not cooperating may be higher.

In attempting to cooperate with a government investigation, a company and its counsel can become so intertwined with the government that an internal or independent investigation can be found to be "attributable" to the government, creating subsequent evidentiary risks for the government. In such instances, the Fifth Amendment rights of employees — who may be facing the difficult decision of whether to either provide statements to counsel conducting an investigation or face potential termination — can potentially be violated.

Recently, the U.S. District Court for the Southern District of New York issued a decision that reviewed at length the factors suggesting counsel's internal investigation had essentially become the government's investigation.[2] The factors cited by the court included:

- The government directed the company and its counsel whom to interview and when;
- The key witness was compelled, upon pain of losing his job, to sit for multiple interviews with the company's counsel;
- The company's counsel provided the government with timely, detailed information from interviews;
- The government did not appear to have undertaken any investigative steps involving witnesses outside of counsel's investigation;
- The government directed the company's counsel over an extended period and did not make its own governmental investigation known to interview subjects; and
- The government ultimately constructed its own subsequent investigative plan based almost entirely on the information provided by the company's counsel.

To protect the integrity of investigations conducted by the government and the company, counsel for the company should, as appropriate, document that significant investigative decisions are based on independent reasons for the benefit of the company, and not taken at the direction of the government. Counsel should also consider providing language in communications with the government to make it clear that the company and its counsel are conducting their own investigations, and exercising their own, independent discretion with respect to investigative steps and decisions.

Whistleblowers may complicate both the internal investigation and government investigations, often without the company having any knowledge that a whistleblower has contacted the government. The SEC, for example, is required to maintain the confidentiality and anonymity of whistleblowers, and must pay a monetary reward to whistleblowers under certain circumstances.

The SEC has authority to bring an enforcement action against companies and individuals for retaliating against, or impeding, a whistleblower. Retaliating can include discharging, demoting, suspending, threatening, harassing or discriminating (directly or indirectly) against the whistleblower. Impeding can include severance or confidentiality agreement provisions that could be read to prevent, or potentially even discourage, whistleblowers from reporting potential securities law violations to the SEC.

The federal securities laws protect whistleblowers against retaliation by:

- Preserving their ability to file a claim in federal court against the company alleging retaliation without exhausting administrative remedies first;
- Providing a six-year statute of limitations for employees to file claims in court; and
- Awarding double back pay to prevailing whistleblowers.

In 2018, the United States Supreme Court concluded that the federal securities laws do not protect whistleblowers if, at the time of the retaliation, they have not yet reported a potential securities law violation to the SEC itself.[3]

Although the SEC's whistleblower program does not provide for payment of attorney's fees, many lawyers now specialize in pursuing whistleblower claims, including claims for whistleblower rewards from the SEC.

Whistleblowers can include current employees who provide information to the government in real time. Given the significant penalties for retaliating against whistleblowers, and the many ways retaliation can be alleged, companies often decide not to engage in any effort to identify whistleblowers who have, or may have, reported potential violations.

If the company is in communication with the whistleblower, whether because the whistleblower has not chosen to remain anonymous or because the company's systems allow for an anonymous communication with the whistleblower, consider developing a communication strategy to provide appropriate updates to the whistleblower. Here again, experienced counsel can be very helpful.

Interests of Various Constituents

During the course of an internal investigation, it may be helpful to pause and consider whether the interests of the various constituents are being addressed. While it may not be possible to address all of these interests, and while the list below is not exhaustive, keeping these various interests top of mind will help those leading an investigation serve their companies more effectively during the pendency of the investigation.

Constituent	Interests in the internal investigation include:
The board of directors	<ul style="list-style-type: none"> • Clear understanding of process, schedule • Updates as needed and appropriate • Appropriate documentation of process including minutes, resolutions • Integrity of process, findings, remedial measures • Ability to rely on committees, experts, management
Board committees	<p>(In addition to interests as board members)</p> <ul style="list-style-type: none"> • Timely understanding of allegations involving subject matters overseen by their committees • Timely understanding of role in investigation (oversee, lead, receive reports, ensure appropriate documentation, provide information, preserve documents)
Board committee chairs	<p>(In addition to interests as board and committee members)</p> <ul style="list-style-type: none"> • Audit committee chair needs to understand information being provided to independent auditors • Audit committee chair needs to understand if timeliness of public filings is at risk • Other chairs may need early focus of upcoming needs in their areas (e.g., nomination and governance, compensation)
Senior officers	<ul style="list-style-type: none"> • Doing their jobs, and leading the workforce to continue doing their jobs, despite the distraction of the investigation • Potential personal liability
Employees	<ul style="list-style-type: none"> • Information flow • Confidence in fairness of process and integrity of management • Job security
Independent auditors	<ul style="list-style-type: none"> • Early alerts of potential illegal acts that may trigger special procedures by the auditors • Confidence in those overseeing, leading, conducting and supporting the investigation • Timely and accurate updates regarding investigation process, information learned during investigation, findings, remedial measures • Thoroughness of investigation • Confirmation of reliability of senior officers • Briefing regarding all remedial action by management and/or the board of

	<p>directors</p> <ul style="list-style-type: none"> • Understanding of management's view, in light of information learned in the investigation, of the adequacy of its internal controls
Government entities	<ul style="list-style-type: none"> • Compliance with laws, rules, regulations • Early alerts of potential illegal acts, including possible self-reports • Confidence in those overseeing, leading, conducting and supporting the investigation • Timely and accurate updates regarding investigation process, findings, remedial measures • Thoroughness of investigation • Cooperation by sharing of detailed factual information, making witnesses available to meet with the government
Listing exchange	<ul style="list-style-type: none"> • Timely disclosures • Compliance with listing standards
Shareholders	<ul style="list-style-type: none"> • Clear and accurate financial statements and disclosures • Timely filings if at all possible
Lenders	<ul style="list-style-type: none"> • Timely disclosures of any provisions required by agreements, including covenant breaches • Timely filings if at all possible
Suppliers	<ul style="list-style-type: none"> • Timely and reliable payments • Integrity of ultimate products containing suppliers' parts/ingredients/contents
Customers	<ul style="list-style-type: none"> • Safety and reliability of company's goods and services • Timely delivery • Respect for company's integrity
The public	<ul style="list-style-type: none"> • Good neighbor in company locales • Confidence in the company

Internal investigations can be extremely complex, but being prepared with a plan that evaluates the scope, and considers carefully the roles of the stakeholders involved, goes a long way in ensuring that an investigation will start on the right foot.

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[1] See Securities Exchange Act of 1934 Release No. 44969 (Oct. 23, 2001).

[2] U.S. v. Connolly et al., 16-CR-370-CM (S.D.N.Y. 2019).

[3] Digital Realty Trust Inc. v. Somers, 138 S. Ct. 767 (2018).