

An Internal Investigation Playbook For Energy Cos.: Part 1

By **Dixie Johnson, Brandt Leibe and Grant Nichols** (October 28, 2019, 4:48 PM EDT)

Energy companies regularly face challenges that may require an internal investigation to determine the root cause of an issue, in order to evaluate how best to remediate and guard against future occurrences of a potentially harmful event. From corruption to data breaches, environmental catastrophes to human resource issues, there are more than enough landmines in today's legal environment to keep any general counsel up at night.

While not all issues may be avoided, having a playbook in place for conducting an internal investigation that identifies and remediates issues is an important step in being prepared for whatever may come.

When a developing situation requires an internal investigation, a public energy company's general counsel faces a series of decisions, sometimes in rapid succession.[1] Many constituents must stay top of mind as the situation moves forward, including some or all of the following:

- The board of directors;
- Board committees;
- Board committee chairs;
- Senior officers;
- Employees;
- Independent auditors;
- Government entities;
- Listing exchange;
- Shareholders;
- Suppliers;
- Customers; and
- The public.

Each constituent has differing information needs, and all constituents must remain in the general counsel's focus. This three-part article is designed to help navigate through the myriad decisions, twists and turns of an internal investigation, while maintaining focus on the various constituents — and on how best to emerge on the other side of the situation.



Dixie Johnson



Brandt Leibe



Grant Nichols

It should be used in conjunction with communications with counsel and existing company policies — it is not a complete legal or strategic analysis on any topic. Even so, and although no one document can anticipate everything, we hope this provides an efficient, easy reference for what can be a difficult process.

Policy

Does the company have policies, procedures, guidelines or other governing documents that govern how an internal investigation should be conducted? If so, to the extent governing documents differ from these suggestions, be sure to reconcile any differences, ensure authority for any changes and keep records of steps taken that go beyond the company's documented plans.

Scope

Internal investigations may be required due to questions or information arising from internal sources (e.g., hotlines) or external sources (e.g., government agencies). Once the initial information is received and an internal investigation is deemed necessary, consider the following.

Determine Initial Scope

Identify the relevant time period, potential witnesses and subject matters quickly.

Expect Changes

Recognize each could change, as investigators learn more during the process.

Expand if Needed

It is important for the investigators to be able to confirm that no one hindered them from expanding the scope of the investigation in response to information learned during the investigation.

For example, if the internal investigation involves financial reporting issues, the company's independent auditor will need to hear that those conducting the investigation believed they (or someone else) adequately followed up on what they learned during the investigation.

Data Preservation

Immediately upon determining that an investigation is needed, consider preserving potentially relevant documents and data for the relevant time period, potential witnesses, and subject matters.

Stop Destruction

Involve an information technology resource, within the company if possible, who can stop any ongoing, routine document and data destruction or recycling.

Secure Essential Documents and Data Quickly

Electronic documents that are centrally monitored are the easiest to secure — these can include email

and instant message systems, shared servers and archived sources. Investigators should work with internal stakeholders at the company to identify and preserve the most relevant essential data.

- Consider imaging laptops and individually-controlled storage devices like USB thumb drives.
- Consider mobile devices — do the relevant witnesses communicate using means that are not centrally stored by the company (e.g., SMS, iMessage or mobile apps like Slack or WhatsApp)? Are employees' mobile devices property of the company? Are their contents company property? Will relevant personnel give permission for imaging their phones if permission is not already granted by company policy?

Data Retention Memo

Consider sending a data retention memorandum to selected employees, and potentially to directors.

Keep Records

Be ready to describe the retention activity and to evaluate whether to expand it as you learn more.

Vocabulary for Roles During an Investigation

Oversee

A board committee, a legal department representative or another senior employee whose conduct is not at issue typically would oversee the investigation that is being led by someone else.

Lead

The voice of the company for purposes of directing the investigation; this could be a board committee, someone in the legal department or someone in internal audit or compliance. Someone needs to be on point and authorized to lead the investigation; if a board committee is leading the investigation, additional oversight typically is not necessary.

Conduct

Typically outside counsel, inside counsel or inside employees, such as internal audit or compliance personnel, conduct the investigation, in coordination with whomever is serving as lead.

Support

Often one or more vendors are used, typically engaged by outside counsel if maintaining the attorney-client privilege is desired. These may include:

- Document vendors for gathering, processing, hosting and reviewing documents;
- Subject matter experts such as forensic accountants, information technology experts or others;
and

- Company employees who could be assigned to the investigation and report to the legal department for this limited purpose.

Structure

Who oversees, leads and conducts the investigation should be considered carefully at the outset. Companies often have procedures that provide a guide in answering this question. Check there first.

Critically, once these issues are decided, make sure stakeholders have a good understanding of the reporting structure. This will help clarify expectations about communication channels, and improve the likelihood of maintaining available privileges and protections.

When Is Independence Required?

An independent investigation is required if the company is subject to derivative litigation, and determines to form a special litigation committee to investigate the allegations in that litigation. Otherwise, independence may be useful to increase confidence in the findings.

What Is the Measure of Independence for an Internal Investigation?

The analysis under Delaware law includes whether the directors leading the investigation are free of economic ties to the individuals being investigated, as well as noneconomic factors, all designed to ensure impartiality and objectivity when making decisions for the corporation.

Whether a law firm and the investigation team are independent depends on a variety of factors, including the extent to which the law firm and members of the investigation team previously have worked for the company, or any of the individuals under scrutiny.

Who Oversees and Who Leads?

Consider having a board committee oversee or lead the investigation if it involves corporate-level issues, including:

- Accounting, financial reporting or disclosure issues involving conduct by senior management;
- Integrity, #MeToo or other conduct issues involving conduct by senior management;
- Allegations that, if true, could significantly harm the company and/or its constituents; or
- A derivative lawsuit.

If the conduct of independent board members is at issue and/or none of the independent directors are free of conflict regarding the issues under investigation, consider adding one or more directors to the board, and having those new directors lead the investigation.

If the conduct of the general counsel or chief legal officer is at issue, a board committee should lead the investigation, and independent outside counsel should conduct it.

If a board committee is overseeing the investigation and the general counsel is leading it, consider

creating a reporting line for the legal department to report directly to that board committee for purposes of the investigation (to protect them from being fired if bad facts regarding senior management are discovered).

If internal audit or compliance leads the investigation, consider whether an attorney-client privilege is desirable, and if so, whether the legal department and/or outside counsel also needs to be involved in order to maintain the privilege.

Who Conducts?

If legal advice is needed regarding the investigation or its findings, lawyers need to be involved and steps need to be taken to protect the attorney-client privilege and attorney work product. The choice of whether to rely on in-house lawyers or outside counsel will be driven to some extent by who is leading the investigation.

Any investigation that needs to be “independent” (for example, due to current or anticipated securities litigation, or for public or internal perception purposes) should be led by independent board members and conducted by independent outside counsel. Any investigation led by a board committee should be conducted by outside counsel.

Any investigation overseen by a board committee should be conducted by counsel, which probably will be outside counsel (even if that outside counsel is led by the legal department under a protected reporting line to the board committee).

Any investigation led by the legal department could be conducted by inside or outside counsel, a decision driven by:

- Whether the greater resources available to outside counsel are needed to handle the investigation quickly and efficiently;
- Whether the expertise of outside counsel is needed to provide attorneys familiar with government agencies, regulators or prosecutors who already are, or who reasonably could be expected to be, involved; and
- Whether the experience of outside counsel would be useful for complex judgment calls.

Who Supports?

Those who are conducting the investigation typically would engage necessary consultants. If outside counsel is conducting the investigation and forensic accountants are necessary, for example, the outside counsel typically would hire the accounting firm using a special letter describing how attorney-client privilege will be handled.

Costs can add up quickly, and typically the company will request a budget from outside counsel that includes third party support, even if the company is paying the supporting entity directly.

The second installment of this article will discuss conducting witness interviews, compiling an investigation report, and the special obligations of independent auditors.

Dixie L. Johnson, Brandt Leibe and Grant W. Nichols are partners at King & Spalding LLP.

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[1] Although this article focuses on public company preparation for internal investigations, many of the steps outlined here also apply to private companies. Different stakeholders must be considered, of course, but large private companies facing the same potential issues should also be prepared for how to respond in the event an internal investigation is necessary.