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General Counsel's Decision Tree for Internal Investigations

Financial Services

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We designed the second edition of our *General Counsel's Decision Tree for Internal Investigations* playbook as a resource to help in-house teams at financial services firms navigate internal investigations and the unique challenges that may arise, including considerations first introduced by the pandemic.

A well-planned and executed internal investigation keeps the exercise focused and organized and paves the way for smoother resolution of issues internally (*e.g.*, remediation) and, if needed, externally (*e.g.*, later resolution with government authorities or regulators).

Financial services firms regularly encounter situations for which an internal review or investigation may be required following a government inquiry or concerns raised internally or through a third party. These range from industry-specific concerns – such as those related to compliance with regulatory requirements – to more general concerns, including compliance with bribery and corruption statutes such as the Foreign Corrupt Practices Act (FCPA), data breaches, whistleblower complaints, risks introduced by the use of third parties and human resources issues. Although a robust compliance program can help avoid many problems, not all issues that arise can be foreseen or avoided.

This internal investigations playbook is designed to facilitate the identification and remediation of issues and complement a well-designed and functioning compliance program; it also promotes the in-house team's communications with outside counsel, who have a range of experience guiding firms through precarious situations. Adherence to a well-crafted playbook helps firms meet the expectations of enforcement authorities, such as the Department of Justice (DOJ), Securities and Exchange Commission (SEC), Financial Industry Regulatory Authority (FINRA), Commodity Futures Trading Commission (CFTC), Consumer Financial Protection Bureau (CFPB), Office of the Comptroller of the Currency (OCC), Federal Reserve and state attorneys general (as well as others), and foreign regulators such as the Financial Conduct Authority (FCA), Serious Fraud Office (SFO) and European Commission (EC) (as well as others), which can materially mitigate potential enforcement efforts and sanctions.

Internal Constituents. When a developing situation requires an internal investigation, a general counsel may be required to make a series of decisions, sometimes in rapid succession. Many internal constituents must stay top of mind as the situation moves forward, including some or all of the following:

- Board of directors
- Board committees and supervisory boards
- Committee chairs
- Senior officers
- Compliance/internal departments
- Communications team
- Employees, including workers' council and union representatives
- Internal auditors

External Constituents. While this decision tree is focused on recommended practices for conducting an *internal* investigation, external constituents, like the ones listed below, must also be considered as the investigation begins and progresses. The following external stakeholders may require updates and/or document productions should an internal investigation be conducted in response to a government inquiry, subpoena or regulatory obligation:

- Government entities (*e.g.*, local, state and federal governmental authorities)
- Bank supervisors/regulators
- Foreign regulators
- Self-regulatory organizations
- Independent auditors
- Lenders and debtholders
- Listing exchanges
- Fund investors/limited partners
- Shareholders or investors
- Other relevant legal counsel (*e.g.*, securities or bond counsel, counsel in other pending litigation)
- Insurers
- Clients, customers and business partners
- Consultants and contractors
- Media outlets (including social media)
- The public

While this decision tree is focused on recommended practices for conducting an internal investigation, keep external constituents in mind as the investigation is planned, launched and concluded.

Each constituent has unique information needs, and all constituents must remain in the general counsel's focus.

This playbook is designed to help firms navigate the myriad of decisions and complexities of an internal investigation without losing focus on the final outcome: completing the investigation and determining any next steps, including reporting obligations. This document should be used in conjunction with communications with outside counsel and existing firm policies – it is not a complete legal or strategic analysis on any topic. Even so, and although no one document can anticipate everything, this document is intended to provide an efficient, easy reference for what can be a difficult process.

Quick Reference Guide

Each entry is described in greater detail throughout the playbook.

GETTING STARTED

Firm Policies. Should relevant firm policies apply to the investigation process, they should be carefully considered – and any deviations documented – before the investigation is launched.

Scope and Purpose. Relevant time periods, business units, employees and goals for the internal investigation should be determined at the outset. While the scope often expands or changes based on the facts identified, it may be counterproductive and unduly burdensome on the firm for the investigation to take on an unnecessarily broad scope, which may impede the efficient and timely resolution of the critical issues.

Data Preservation. Whether the investigation stems from a subpoena or other legal process, steps should be taken immediately to preserve all potentially relevant data and documents. Recommended steps often include implementing back-end holds on emails and other electronically stored documents, communicating preservation obligations to employees and relevant parties (*e.g.*, board members), and suspending routine document retention and/or deletion policies. Given the prevalence of communicating by text message or other messaging applications, as well as the recent focus by DOJ on obligations to preserve and produce such communications, consideration of whether to collect data from employees' mobile devices also may be necessary.

DEFINE ROLES/STRUCTURE

Decisions about who should be directing, conducting and/or receiving updates about investigation findings are critical for any matter. This includes identifying whether key stakeholders may be witnesses to relevant facts, whether the independence and integrity of the investigation will receive scrutiny (and, relatedly, whether outside counsel should be retained), whether the internal investigation will be conducted at the direction of counsel under attorney-client privilege and what firm personnel will need to assist with fact gathering.

FACT GATHERING

Document and Data Review. Comprehensive document processing and review can take time, and an initial assessment should be made as to whether there are key documents and/or data available that should be collected and reviewed. (*E.g.*, is there electronic correspondence about the specific topic of the allegations? Are certain systems or records referenced in the complaint? Is contextual data (*e.g.*, sales numbers, contracts) on parties involved available? Are minutes from key meetings available?)

Employee Interviews. Once key players are identified (whether through document/data review or other avenues), direct engagement and questioning on matters subject to review are key parts of any internal investigation and can often be the most complicated step.

MEMORIALIZING INVESTIGATION FINDINGS

A decision should be made early on as to how the factual findings and legal conclusions stemming from an internal investigation will be memorialized and reported. In some cases, oral briefings/presentations to key stakeholders may be enough, and in others, formal, written reports can facilitate information sharing with key stakeholders. How the findings are memorialized and reported may depend on the privileged nature of any report and external pressures from regulators, auditors and/or the public.

SPECIAL OBLIGATIONS OF PUBLIC FIRMS AND INDEPENDENT AUDITORS

Public firms and their officers have regular obligations to certify to independent auditors that they have notified them of all information important to the audit. In the event of an internal investigation, careful consideration must be given to communicating to the independent auditor information about the investigation and the related obligations imposed on auditors once they are notified of the investigation.

GOVERNMENT AND REGULATORY INVESTIGATIONS

While this decision tree focuses on the steps involved in an internal investigation, it is critical to bear in mind the considerations that will surface should a government or regulatory body decide to investigate. The firm that evaluates how to position itself early on with respect to a government investigation and (if applicable) how to treat whistleblowers is better positioned to respond to a subsequent or parallel investigation should one arise.

Getting Started

FIRM POLICIES

Reference the existing policies, procedures, guidelines or other governing documents that address how internal investigations should be conducted. To the extent governing documents differ from the suggestions in this document, be sure to reconcile any differences, ensure authority for any changes and keep records of steps taken that go beyond the firm's documented plans.

SCOPE AND PURPOSE

Internal investigations may be required due to questions or information arising from internal sources (*e.g.*, hotlines, whistleblower alerts, employee complaints, audits) or external sources (*e.g.*, government agencies, bank examiners, self-regulatory organizations, media reports, competitors). When an internal investigation is necessary, consider the following:

Determine Initial Scope and Purpose. Thoughtfully and quickly identify the relevant time period, potential witnesses, internal and external stakeholders, and subject matter. Decisions related to investigation scope can have lasting consequences that will affect the entire investigation. Including key stakeholders in the scoping decision early on can save significant costs and time down the line. Defining the purpose of the investigation and/or goals at the outset can be beneficial to avoid "mission creep" and too much being taken on relative to the concerns or issues initially raised.

Expect Changes. Recognize that each decision regarding the scope could change as investigators (internal or external) learn more information during the process.

Expand If Needed but Be Wary of Unnecessarily Expanding the Scope (Mission Creep). It is important for internal investigators to be able to confirm that no one hindered them from expanding or shifting the scope of the investigation in response to information learned during the investigation. For example, if after determining the initial scope, internal investigators learn of financial reporting issues (related to the initial scope or otherwise), 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.

Internal investigations can spin out of control, leading to unnecessary legal spend and the diversion of critical resources. Focus the inquiry on the root cause and contributing factors. Do not, however, ignore noncompliance concerns that could increase the firm's exposure and that fall within "plain view" simply because they fall outside the initial agreed-on scope. If new and unrelated issues surface during the internal investigation, as they often will, evaluate priorities and consider addressing these issues separately and on a parallel (or, if appropriate, consecutive) track, as necessary. It is common for additional issues to be set aside for a later phase of the investigation.

Confidential Supervisory Information (CSI). CSI refers to information prepared by, on behalf of or for the use of the bank regulators. U.S. regulators treat bank examination reports, related correspondence and related materials as the regulators' own property. CSI is the exclusive province of the regulators, and they own the materials. Parties are subject to severe penalties for disclosing such information to third parties without prior regulatory approval. Each regulator has its own process for seeking approval, and its own contours regarding whether information can be shared with affiliates, outside counsel or other regulators without approval. Some regulators require approval before the institution can share CSI with outside counsel, and before outside counsel engages third-party consultants. As a result, special consideration needs to be given in gathering materials for bank regulators. If an investigation is being directed by a bank regulator, that material cannot be shared with other agencies without prior approval.

INSURANCE COVERAGE

Applicable insurance policies should be reviewed at an early stage to determine if, and to what extent, coverage is available to ensure that coverage is not waived. Where coverage is available, notice should be provided to the insurance carrier per the requirements of the policy. Experienced outside counsel may be particularly valuable in evaluating what coverage is available and making sure that appropriate steps are taken to comply with the notice requirements in the policy.

DATA PRESERVATION

Immediately upon determining that an investigation is needed, consider preserving potentially relevant data for the relevant time period, potential witnesses and subject matter. Consider whether there is an active legal obligation to preserve data (*e.g.*, if served with a subpoena).

Evaluate Requirements. Determine whether your organization is subject to requirements or restrictions with respect to certain categories of electronically stored information, such as, for example, the Health Insurance Portability and Accountability Act (HIPAA), the General Data Protection Regulation (GDPR), or laws limiting the distribution of company data (*e.g.*, China's state secrecy law and blocking statute).

Identify Data Sources and Locations. Evaluate where e information likely to be relevant to the investigation is stored, such as paper files, data servers, hard drives, laptops, shared drives, off-site storage, home offices, mobile phone messages, personal devices (such as iPads), etc. Prior data-mapping exercises by the firm can prove invaluable. Consider how potential subjects or witnesses of the investigation communicate and store materials using different types of devices and where key information is likely to be stored, including in personal/private locations, such as a home office or personal device. It may be prudent to conduct custodian interviews to verify that relevant data and sources have been collected. During the interview, counsel should inquire about the geography of the custodian's assigned office and/or personal residence, if data are stored there. Data privacy and bank secrecy regulations of the relevant jurisdiction will need to be considered in scoping the collection, storage, review, redaction, and production of the data. Counsel may need to confirm the approach with the client's data privacy officer or similar personnel for the relevant geography to ensure compliance with jurisdictional requirements and internal client protocol. The firm conducting an internal investigation will need to consider whether relevant data may have been stored or maintained in an unconventional manner or in a way that departed from policies due to unique conditions, such as during the pandemic. As the firm maps out strategies for collecting data that may have been created or maintained in remote work or other unconventional situations, it may consider conducting preliminary custodian interviews with employees to learn how they stored data during periods of dislocation from their assigned office.

Remote Worker Consideration. If the firm has many employees who are working from home or other locations outside of the firm's offices, the firm may face unique challenges in collecting or preserving data from firm-issued laptops and mobile devices that are in the possession of these employees. Under the right circumstances, remote collection strategies can help bridge this gap. To the extent these measures are different from the firm's pre-pandemic practice but have become part of the firm's normal practice going forward, consider whether policies and procedures should be updated or whether the rationale for the alternate procedures should be documented as part of the collection process.

Unconventional Data Storage. The firm conducting an internal investigation will need to consider whether relevant data may have been stored or maintained in an unconventional manner or in a way that departed from policies due to unique conditions during the pandemic, whether or not those conditions continue. As the firm maps out strategies for collecting data that may have been created or maintained during this time, it may consider conducting preliminary custodian interviews with employees to learn how they stored data during this time. Document retention memos also should include language that requires employees to consider their data management practices during the pandemic, if such consideration is relevant to the investigation.

Stop Destruction/Automatic Deletion. Involve an information technology (IT) resource within the firm who can stop any ongoing, routine document and data destruction or recycling of potentially relevant information and devices, if necessary. This is particularly important for popular (and quick-to-delete) instant messaging systems like Slack, Microsoft Teams, Google Chat, WhatsApp and other collaboration tools (*e.g.*, Google Docs). Be alert for personnel using "off channel" communications platforms, especially ephemeral messaging apps (*e.g.*, Snapchat, Signal and others that delete messages almost immediately after sending or receipt) that – if even permitted under company policy – may require even more rapid action to preserve communications.

Document Retention Memo. Consider sending a document retention memorandum from the general counsel's office to relevant employees, and potentially directors, to advise them to preserve and retain specified categories of potentially relevant documents. While issuing document retention memos may seem fairly mechanical, consider carefully whether a memo is being issued in the context of a confidential government investigation or as part of an investigation initiated by a whistleblower complaint. These special circumstances, among others, may call for adjustments in how the document retention memo is crafted and distributed. Document retention memos also should include language that requires employees to consider their data management practices during remote work, if such consideration is relevant to the investigation.

Forensic Expert. Depending on the nature of the investigation and the firm's in-house IT capacity, it may be prudent to have counsel retain third-party forensic experts to collect and preserve data and be in a position to testify, if necessary, to the reasonableness of the firm's efforts to preserve relevant evidence.

Secure Essential Data Quickly. Repositories of electronic documents that are centrally monitored or maintained may be the easiest to secure. These can include email and instant messaging systems, shared servers, and archived sources. Investigators – potentially assisted by forensic experts – should work with internal stakeholders at the firm to identify and preserve relevant essential data. In many cases, it will be prudent to preserve this centrally maintained data before informing the relevant custodians that an investigation is being conducted or issuing them a document preservation notice. This not only shores up the integrity of the investigation, but also may help protect the individual custodians from facing questions about whether they improperly deleted documents after learning an investigation was in progress.

Evaluate Pre-Existing Collections of Data. Consider whether, in response to another litigation or regulatory request, data relevant to the investigation has already been collected and is available in an accessible and searchable format. Quick access to pre-existing collections of searchable data can lead to efficiencies in scoping and planning the current investigation and can potentially reduce collection costs. These collections also may provide the firm with access to data that would normally not be available due to its aging out of ordinary document retention periods.

Devices.

Laptops and individually controlled storage devices:

- Consider collecting and preserving relevant data on laptops and individually controlled storage devices – including forensic imaging devices, where appropriate – depending on the nature of the investigation or enforcement concern.
- If forensic imaging is not performed, consider ensuring that laptops are preserved in their current state (*e.g.*, by swapping out an employee laptop for a new one and placing the old one on hold).

Mobile devices:

- Determine if the relevant witnesses:

  conduct business-related communications using firm devices, personal devices or both; or

  communicate using means that are not centrally stored by the firm (*e.g.*, Slack, Microsoft Teams, Google Chat, WhatsApp and other collaboration tools (*e.g.*, Google Docs)).

Identify ownership of the content on the personal device:

- Seek permission from relevant personnel for imaging of their personal devices if permission is not already granted by the firm's bring-your-own-device policy.
- Determine whether the contents of personally owned devices are firm property or if the firm pays for data services for those devices such that there may be a claim that the data is firm property.

Remote Working. Where relevant personnel are working from home or other locations outside of the firm's offices, the firm may face unique challenges in collecting or preserving data from firm-issued laptops and mobile devices that are in the possession of employees. Under the right circumstances, remote collection strategies, by which employees back up their data under the close supervision of e-Discovery professionals working with the investigation team, can help bridge this gap. To the extent these measures are different from the firm's pre-pandemic practice but have become part of the firm's normal practice going forward, consider whether policies and procedures should be updated or whether the rationale for the alternate procedures should be documented as part of the collection process.

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

Define Roles/Structure

DESCRIPTION OF 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 an investigation that is being led by someone else.

Lead. The lead is the voice of the firm for purposes of directing the investigation. This could be a board committee, someone in the legal department or someone in the firm's internal audit or compliance department, but one individual or group needs to be authorized to lead the investigation. If a board committee is leading the investigation, additional oversight typically is not necessary, although for efficiency's sake it may be prudent to designate one member of that committee as the lead with authority to make decisions concerning routine day-to-day matters. Moreover, in the event some function other than legal is identified as lead, consider creating a foundational document that states the purpose of the investigation in a way that preserves attorney-client privilege and work product protections if a privileged investigation is deemed necessary.

Conduct. Typically outside counsel, in-house counsel or employees in internal audit, compliance, corporate security or investigation functions conduct the investigation, in coordination with whoever is serving as lead.

Support. Internally, compliance department, accounting/finance, internal audit, IT/data security or other subject matter experts may aid the investigation, so long as the individuals providing assistance are not under scrutiny in the investigation. To preserve privilege and work product protection, it should be documented that these internal, non-legal personnel are working at the direction of counsel. Externally, often one or more vendors are used, typically engaged by outside counsel if attorney-client privilege must be maintained. These may include:

document vendors for gathering, processing, hosting and reviewing documents;
subject matter experts such as forensic accountants, information technology experts or corporate communications advisors; or
data analysis consultants.

STRUCTURE

Who oversees, leads and conducts the investigation given the specific circumstances should be considered carefully at the outset. The firm often has procedures that provide a guide for this. Check there first. Critically, once this is decided, make sure stakeholders have a good understanding of the reporting structure, especially if the investigation is subject to a legal privilege. This clarifies expectations about communication channels and decision-making authority and will improve the likelihood of available privileges and protections being maintained.

When Is Independence Required? An independent investigation is likely required if the allegations potentially implicate senior management or suggest widespread or recurring systemic concerns. Determine whether any individuals normally notified about or involved in the investigation should not be notified or involved due to an actual or perceived conflict of interest. An independent investigation also may be necessary where the firm's regular outside counsel provided legal advice related to the issue under investigation. Independence adds credibility to the findings (especially where the findings may need to be shared with enforcement authorities or disclosed to shareholders) and typically provides an additional layer of trust when an agency is reviewing any disclosure or deciding whether to close out the investigation. Additionally, if the firm is publicly held and is facing derivative litigation, an independent investigation also will likely be required.

What Is the Measure of Independence for an Internal Investigation? From a traditional corporate perspective, an analysis of independence under Delaware law focuses on whether the individuals leading the investigation are free of economic ties to the persons or subject matter being investigated, as well as on noneconomic factors, all designed to ensure the impartiality and objectivity of those making decisions on behalf of the entity. Whether a law firm and the investigation team are independent depends on a variety of factors, including the extent to which (and the type of matters on which) the law firm and members of the investigation team previously have worked for the firm or any of the individuals under scrutiny and the extent to which a lawyer or law firm provided legal advice related to the issue under investigation. Inspectors and agencies generally accept the independence of an investigation

if it is conducted by outside counsel, which reviews and presents the relevant facts (as verified) and proposes solutions.

Who Oversees and Who Leads?

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

- accounting, financial reporting, disclosure or compensation issues involving conduct by senior management;
- systemic or recurring compliance issues, such as violations of internal controls that may involve conduct by senior management;
- issues involving noncompliance with regulatory standards;
- any matters that could have criminal implications;
- integrity, "Me Too," racial insensitivity or other issues involving conduct by senior management;
- allegations that, if true, could significantly harm the firm and/or its constituents; or
- a derivative lawsuit.

Alternatively, consider not having a board committee oversee or lead the investigation if the matter does not directly implicate disclosure controls and procedures or if the matter would otherwise be more efficiently addressed at the firm level. Board control over the investigation can be counterproductive in concerns that are far afield from the expertise of the board or too attenuated. Increased and unnecessary bureaucracy, competing interests, and the perception of micromanagement also can exacerbate pre-existing tensions between the board and the firm and can adversely impact investigative fact-finding and the free flow of information.
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, it may be appropriate for a board committee to lead the investigation, and for independent outside counsel to conduct it (*i.e.*, representing the board committee, not the firm).
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 those leading the investigation from being fired if bad facts regarding senior management are discovered).
If internal audit or compliance functions lead the investigation, consider whether an attorney-client privilege is available and desirable and, if so, whether the legal department and/or outside counsel also needs to be involved in an effort to limit the firm's exposure or to appropriately maintain the privilege.
In such a situation, the fact that internal auditors or other nonlawyers are acting at the direction of counsel should be documented to clearly establish the basis for preserving privilege and work product protection.
Be prepared to adjust leadership of the investigation if it is initially overseen by internal audit or compliance outside the protections of the attorney-client privilege. For example, facts or issues may be discovered that could potentially result in findings of violations of law or regulation, in which case leadership should be immediately transitioned to in-house or outside counsel in an effort to establish and preserve attorney-client privilege and attorney work product protections.

Who Conducts? Will the Investigation Be Privileged?

If legal advice is needed regarding the investigation or its findings (*i.e.*, there is any meaningful chance that the investigation may lead to a decision about compliance with laws or regulations) or if litigation or regulatory investigations are anticipated, steps must be taken to establish and 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. For example:

- Any investigation that needs to be "independent" 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 should probably 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 in-house or outside counsel.

The decision whether to have in-house or outside counsel conduct the investigation is driven by:

- whether the greater resources available to outside counsel are needed to handle the investigation quickly and efficiently;
- whether it is valuable to have the experience (*e.g.*, ongoing interactions and feedback from government regulatory authorities, or the ability to benchmark industry behaviors) of outside counsel who are familiar with certain areas of the law or with particular government agencies, regulators or prosecutors;
- whether the experience of outside counsel would be useful in making complex judgment calls;
- whether the relative independence of outside counsel would be an advantage, particularly as remediation steps following the investigation are considered and implemented; and
- whether establishment and preservation of the attorney-client privilege and attorney work product doctrine could be better achieved by using outside counsel.

U.S. counsel could be particularly helpful in conducting investigations for the firm or related individuals based in a foreign jurisdiction where the protections of U.S. attorney-client privilege, attorney work product or other privileges are limited.

Who Supports?

Identify internal functions and subject matter experts who may need to be called on to support the investigation, and determine what support will be needed and whether internal experts' usual, ongoing responsibilities allow them to support the investigation.

Those who are conducting the investigation typically would engage necessary consultants, using a special engagement letter (even for internal personnel in some cases) describing how attorney-client privilege will be handled.

In the event that internal support functions are engaged, a clear chain of command should be established and instructions should be provided, if applicable, about how to maintain any attorney-client privilege or attorney work product.

How Can Costs Be Controlled?

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

When identifying the investigation lead, consider creating a foundational document that states the purpose of the investigation in a way that preserves attorney-client privilege and work product protections if a privileged investigation is deemed necessary.

Fact Gathering

DOCUMENT AND DATA REVIEW

Document and data collection, processing and review regularly serve as the foundation for internal investigation findings and related legal conclusions and are often required in response to a regulatory subpoena or information request. As subpoenas and civil information requests often call for production of broad document date ranges and implicate numerous substantive areas and custodians, outside counsel can often help narrow the materials to be reviewed and produced, assist with assessments of applicable privileges and protect confidential business information, to the extent possible. External data-processing and document-review vendors also can be engaged to make these efforts more cost-efficient and organized, and can do so under protections of privilege, provided sufficient contractual and process protections are in place. If intensive review and production are not necessarily warranted given the nature of the allegations or concerns at play in the investigation or review, internal firm resources (such as IT personnel) may be used to assist with identification of pertinent, key documents or data to assist with factual findings and/or preparation for employee interviews.

- 12 U.S.C. Section 1828(x) provides that submission of information subject to attorney-client privilege to a federal banking agency, state bank supervisor or foreign banking authority in the course of the supervisory or regulatory process does not result in a waiver of privilege as to other third parties. This statute allows federal bank regulators to share the privileged materials with other federal agencies without these actions constituting a waiver. Consequently, regulators may more zealously request privileged information during the supervisory process. However, nothing in the language of the statute gives the bank regulators the authority to compel a waiver of privilege. CFPB has taken the position that Section 1828(x) applies to CFPB and has memoranda of understanding with various state attorneys general. Consequently, CFPB may share privileged materials with state attorneys general.

EMPLOYEE INTERVIEWS

Employee Interview Status.

Firm employees are typically interviewed during an internal investigation. Special considerations apply to the employee interviews depending on the employee's role in the conduct being investigated and the investigation topic.

Careful attention must be paid to firm policies and procedures when talking with an employee who is the subject of an investigation and could potentially face employment action as a result of the investigative findings. The investigation should attempt to confirm as much information as possible about the employee's knowledge of those policies and the potential violations. If the subject employee is a member of a union, that employee likely has a right to have union representation at the interview. Subject employees also need to be counseled about the firm's prohibitions on retaliation to the extent complaining, reporting or whistleblowing witnesses are involved as well. Special consideration should be given to the unique role of reporting or whistleblowing employee witnesses in the investigation. These employees need to be assured of the firm's serious approach to the issue, the prohibition on retaliation and the general process for the investigation. Investigators should steer clear, however, of absolute promises of confidentiality, as often these are impossible to maintain, and of agreements to report back fully on the outcome of the investigation, which also may not be possible. While it is often appropriate and encouraged to share internal investigation conclusions with the reporting or whistleblowing employee, at times this is not possible, depending on the investigation's conclusions and the necessary remedial measures.

When? Different investigations require different strategies. In some investigations, it is important to talk with witnesses quickly, before any documents have been reviewed, and then perhaps speak to them again with a set of documents once those conducting the investigation know more. In other situations, reviewing the documents before interviewing witnesses is essential to an orderly and efficient process. Another consideration is the order in which interviews are conducted. In some cases, it is prudent to start with the lowest-level employee and work up the management chain. In other cases, it is prudent to start with upper management and work down the chain.

Where? Prior to the pandemic, many firms opted for interviews to occur in person in a conference room or convenient location within the firm's offices, preferably in an area that allows the process to remain as confidential as possible, with the lawyers conducting the investigation traveling to the office location for each witness. The pandemic showed that interviews can be conducted

Interviews do not transform facts into privileged information – privilege generally covers the communications during the interview and follow-up that might occur.

remotely (*i.e.*, via telephone or videoconference), and firms should now consider which interviews, if any, should be in person. While independent investigators often are able to gather the most information and best impressions when conducting interviews in person, other strategic considerations exist, such as the cost of travel, the inconvenience and disruption to the business of conducting in-person interviews, the speed at which an interview can be arranged and conducted remotely versus in person, the nature of the interview, the seniority of the interviewee, the location of the interviewee, and the comfort level of the interviewee. The firm may want to consider conducting scoping interviews, custodial interviews and/or non-confrontational interviews remotely where possible and consider conducting only interviews of a more sensitive nature in person.

Who Participates?

In general, witness interviews should be made as streamlined as possible by limiting the interview to a single witness at a time and only those interviewers who are most essential to the investigation.

- Consider whether the witness is likely to provide more candid and accurate information if the interviewer is independent or at least not a firm employee.

Those conducting the investigation typically would lead the interviews.

When board members or management are overseeing or leading the investigation, they might want to attend the witness interviews and perhaps even question the witnesses. This certainly is not required and should be addressed on a case-by-case basis, because in some circumstances it may be ill-advised.

In-house counsel, compliance personnel or internal audit personnel sometimes attend witness interviews that are being conducted by outside counsel. Depending on the circumstances, their presence can make witnesses more or less comfortable. It is important to ensure that witnesses feel free to provide accurate information and frank views.

Supporting consultants also may attend and participate in interviews, depending on the circumstances. It may prove necessary in certain circumstances to include consultants in interviews involving highly technical concerns.

It is advisable to have at least two participants from the investigation team, including one notetaker, to later corroborate statements should there be a disagreement with the interviewee.

Should Witnesses Have Their Own Counsel?

The firm typically is not required to provide counsel to employees during internal investigations, and witnesses often are not represented during internal investigations. This is particularly true when the investigation is being conducted by firm employees (internal audit, compliance, corporate security, investigations or legal department). It also is often the case when outside counsel is asking the questions. The firm should be prepared, however, for employees to inquire about the need for their own counsel as part of any investigation plan.

Counsel representing the firm or a board committee in the investigation typically cannot advise witnesses as to whether they need their own lawyers, even if the witnesses request that advice.

One potential benefit of a witness having counsel is that it can give the employee the opportunity to think through the conduct at issue in the investigation and to deliver information more precisely during the interview.

When the firm decides to make counsel available to employees, companies sometimes engage "pool counsel" who would be available to represent multiple employees during the internal investigation in an economical and efficient manner while also appropriately protecting the employees. Pool counsel must ensure that they can ethically conduct a joint representation without encountering insurmountable conflicts of interest or revealing confidential information. Pool counsel arrangements usually are set up so that the firm pays the bills, but the attorney-client privilege would be between the employees and pool counsel and would not include the firm. Pool counsel may share information with the firm, as appropriate, under a common-interest understanding between the employees and the firm.

Senior officers may request counsel of their own, and the firm often honors this request even if a short delay occurs while the officer selects an attorney. Legal departments and outside counsel may have recommendations tailored to the specific subject matter, potential government interest or other factors. It is often useful to select counsel that both has the necessary experience and can work collaboratively with the firm's own counsel.

Officers and employees likely will want the firm to pay the bills for their individual counsel. Whether the firm is obligated to do so often turns on provisions in employment agreements, corporate governance documents such as bylaws and charters, and relevant state law. The firm often "indemnifies" officers, which usually entails reimbursing fees at the end of a process once it is determined that the officer is entitled to indemnification (*e.g.*, they acted in good faith) and also making "advance" indemnification payments along the way so the officer does not bear the legal fees out of pocket. The firm typically requires officers to sign an "undertaking" in which they agree to repay any advanced amounts if it is determined that the officer is not entitled to indemnification.

The cost of legal fees and expenses may be covered by director and officer insurance, although coverage is less likely if no litigation has been filed. Determinations about whether coverage exists and the extent of any coverage will be governed by the policy and direct negotiations with the insurance carriers.

- When the firm is subject to a government investigation, but not active litigation, it will be further necessary to review the specific terms of applicable policies to determine whether coverage exists.

Sometimes, witnesses want to bring their own individual counsel to the internal investigation interview. There generally is no requirement to allow this. The firm typically evaluates whether to proceed with interviews with individual counsel based on the relevant circumstances at the time.

"Upjohn Warnings."

At the outset of employee interviews conducted by counsel for the firm, it is important that the witnesses understand as much about the investigation background as can be shared without impacting the integrity of the investigation. Do not, for example, impart facts to the employee that the employee would not ordinarily have or that would otherwise shape his or her testimony. Witnesses should be informed of how the attorney-client privilege applies to the interview and of their obligation to maintain the confidentiality of the statements made during the interview. It also is essential that the witness understand that the investigators (including in-house and external counsel, if attending) represent only the firm (or the board committee) and do not represent the witness or have an attorney-client relationship with the witness.

- The concept of Upjohn warnings comes from *Upjohn Company v. United States*, 449 U.S. 383 (1981), in which the Supreme Court held that a firm's attorney-client privilege is preserved when the firm's attorney communicates with the firm's employees. Beyond the Court's holding, Upjohn warnings are shorthand for providing clarity to the employee about the existence of attorney-client privilege between the firm and its lawyers, who the "client" is in the investigation (the firm, the board or a committee of the board), how the privilege is maintained, and whether information from the interview may be shared with third parties later should the client decide to do so.

The warning typically clarifies that:

- the lawyers represent the firm (or the board or board committee) and not the employee;
- communication occurring during the interview is protected by the firm's attorney-client privilege; and
- the firm (or the board or board committee) alone

controls whether to provide information learned through the interview to anyone outside the firm, including a government agency. In the event there is already an existing government investigation and/or counsel reasonably expects to share certain information learned during the interview with the government, counsel should consider stating at the outset that information learned during the interview may be shared with third parties, including the government.

It is important to note that the interview does not transform existing information into privileged information – it generally only covers the communication during the interview and any follow-up. Additionally, it does not prevent the witness from talking separately to the government about information the witness knows. It only protects the privileged communication.

Documentation of the Witness Interviews.

Interviewers often take notes during the interviews to document witnesses' responses to questions. Practices differ as to whether interview notes are in the form of a transcript (Q&A) or – when an attorney conducts the interview – include the attorney's inferences, shorthand and mental impressions. The latter, however, are more easily protected from discovery as attorney work product if the interviewer is legal counsel.

Interview memoranda are more formal records of the communication during the interview.

- These often are created by one of the individuals who attended the interview, and then may be edited by others on the investigation team.
- If a lawyer is involved in the interview, interview memoranda typically would be protected from third-party access by the firm's attorney-client privilege and, depending on the circumstances, by the attorney work product doctrine.
- Creation and completion of interview memoranda is time-consuming and expensive, and it is important to determine whether that expense is necessary under the specific circumstances of the investigation. A middle ground is to prepare a summary of key points from the interview shortly after it is completed, while events are fresh in the investigators' minds, and to prepare a detailed interview memorandum later, if necessary, based on the particular circumstances of the investigation.

Either notes or formal interview memoranda should clearly memorialize the fact that the witness was given an Upjohn warning and that the witness understood the instruction and any clarifications provided.

Government Interviews.

A firm often launches an internal investigation in response to government investigations, and participation of the firm's counsel in government interviews can provide critical information regarding the firm's potential legal exposure. Generally, however, the firm's lawyer does not have a legal right to be present for interviews of non-management employees. Certain agencies also have express authority to restrict access to employee interviews. It is important to understand what authority the agency has in this regard and whether the agency is amenable to allowing firm counsel to accompany or represent employees in its interviews.

One complicating factor that surfaces in major investigations is the fact that there may be multiple federal, state and local government investigations underway and competing demands for employee witness interviews. It is often prudent to work with these agencies to prevent the same witnesses from being interviewed by different agencies at different times, which can lead to inconsistent witness statements or witness statements that are perceived to be inconsistent.

Memorializing the Investigation

CONTENTS

Findings and Conclusions. Investigation findings may include not only a summary of the relevant facts, but also conclusions regarding whether:

- the firm and/or individuals violated the law, rules or regulations (but only if the investigation is being led by attorneys under the attorney-client privilege);
- the firm and/or individuals violated firm policies or procedures;
- there was a root cause of any determined noncompliance;
- any potential noncompliance could have been prevented;
- any potential noncompliance has been remediated and/or whether corrective measures have been put in place to prevent similar future noncompliance;
- any affirmative defenses might be available;
- given their conduct as determined by the investigation, firm officers and employees can be relied on by various outside third parties, such as governmental authorities and regulators or, as applicable, the firm's independent auditors;
- senior management's representations were accurate;
- the firm's certifications were accurate;
- the firm's representations to regulators during examinations/audits or in required filings were accurate;
- the firm's representations to lenders, analysts and shareholders were accurate;
- the tone set at the firm was sufficiently supportive of ethical conduct by employees (a good "tone at the top"); and
- there was any attempt to retaliate or actual retaliation against a whistleblower, or any effort to prevent the whistleblower from sharing information concerning potential violations with regulators.

Special Requirements to Document.

- Whether, as a result of the findings, the firm (if a bank, bank holding company or subsidiary) is required to file a suspicious activity report
- Whether, for firms that are subject to regulatory filing requirements, applicable regulatory filings need to be revised, amended or updated
- Whether, as a result of the findings, the firm has triggered any applicable regulatory reporting requirements
- Whether it is prudent to make a voluntary disclosure to regulatory or enforcement agencies in an effort to mitigate penalties or secure cooperation credit

Additional Considerations for Publicly Held Firms.

- Whether the firm's public filings remain reliable and accurate in light of the information learned, and if not, whether restatement is required (using, among other things, an SAB 99 materiality analysis)
- Whether the investigation revealed material weaknesses or significant deficiencies in the firm's internal controls
- Whether the investigation raises concerns that the independent auditor may no longer be able to reasonably rely on representations from certain members of management

FORM AND DISTRIBUTION

Should There Be a Formal Written Report? Deciding whether and how to document the results of the investigation requires a complex analysis. Drafting a formal report of the investigation is time-consuming and expensive; however, many constituents would prefer a full, detailed report of the information gathered during the investigation and the findings, which ultimately is made public. In some cases, such as where the investigation results may require regulatory reporting, complete documentation may be required. In other situations, firms may prefer only oral reports and no public disclosure at all. Whether the report is ultimately protected by the attorney-client privilege depends on:

- the facts and circumstances of the specific investigation (including whether the object of the investigation is related to legal compliance/litigation risk versus firm policy violations/business risks);
- the firm's obligations to its board or shareholders;
- whether an active government or third-party investigation exists or may occur;
- whether the report is being prepared for disclosure to regulatory authorities; and
- whether a shareholder lawsuit exists or is likely.

How Should Results Be Shared? Regardless of form, findings from the investigation that reveal weaknesses in a compliance program or other firm functions should be shared in the appropriate manner with other internal stakeholders to prevent recurrence. Not only does providing this feedback help prevent future misconduct, but it also aligns with DOJ's expectations outlined in its compliance program guidance and the guidance outlined in the U.S. federal sentencing guidelines.[1]

Confidentiality of Any Written Report. If a written report is prepared, the distribution of the report, and any instructions regarding confidential handling, should be carefully considered. The confidentiality required to maintain the privilege protection is more likely to be compromised if the document is widely distributed.

Special Obligations of Public Firms and Independent Auditors

PROCEDURES

Alerting the Auditors. Public firms and their officers must certify regularly to independent auditors that they have notified the auditors of all information important to the audit. Information requiring investigation often may impact the firm's financial reporting and documentation, internal controls, and other compliance systems, especially if the subject of the investigation is a senior officer, someone in a financial reporting or control function, or another employee or director on whom the auditor may rely. Knowing when and how to alert auditors is an important component of handling internal investigations responsibly. Knowing what the auditors will be required to do upon receiving that notification also can help firm personnel anticipate needs and ensure completeness.

Section 10A Procedures. Securities Exchange Act of 1934 Section 10A[2] requires a public firm's independent auditor to work through a set of detailed procedures if the audit firm "detects or otherwise becomes aware of information indicating that an illegal act (whether or not perceived to have a material effect on the financial statements of the issuer) has or may have occurred." The term "illegal act" is very broad, defined as "an act or omission that violates any law, or any rule or regulation having the force of law."

When Are Procedures Triggered? When an issue arises at a nonpublic subsidiary of a public firm, these procedures may be triggered when the conduct at issue at the nonpublic subsidiary has a material impact on the public firm's reported financial results, and where those involved in the conduct at issue at the nonpublic subsidiary also have senior positions/responsibilities at the public firm.

What Auditors Are Required to Do. The procedures set forth in Section 10A include:

- determining whether it is "likely" that an illegal act has occurred;
- determining and considering "the possible effect of the illegal act on the financial statements of the issuer";
- informing "the appropriate level of the management of the issuer and assur[ing] that the audit committee of the issuer, or the board of directors of the issuer in the absence of an audit committee, is adequately informed with respect to illegal acts that have been detected or have otherwise come" to the firm's attention, "unless the illegal act is clearly inconsequential";
- determining whether the illegal act has a material effect on the issuer's financial statements; and
- determining whether senior management (or the board) has taken timely and appropriate remedial actions.

Investigation findings that reveal weaknesses in a compliance program or other firm functions should be shared with internal stakeholders that can prevent recurrence.

Why Auditors Hold the Cards.
Special – and more serious – procedures are triggered if the audit firm concludes that the firm's actions have not been sufficient. Under that circumstance, Section 10A requires that the audit firm determine whether that failure "is reasonably expected to warrant a departure from a standard report of the auditor, when made, or warrant resignation from the audit engagement."
If so, the auditor must report the results of this determination to the board of directors.
If this report is made to the board, the issuer must notify SEC within one business day and provide a copy of this notice to the auditor.
If the auditor does not receive a copy within one business day, the auditor must resign or furnish a copy of its own report to SEC within one business day.
If the auditor resigns under this provision, it must furnish a copy of its own report to SEC within one business day after resigning.

ADDITIONAL CONSIDERATIONS

The Challenging Dynamic. If these procedures are underway but are not yet complete, the auditor may not be able to complete its quarterly review or its annual audit. And as the independent auditor, the auditor cannot advise the firm of the firm's obligations – it can only react to what the firm does and reach a view as to whether that is sufficient. This can set up a challenging dynamic in which experienced outside counsel may be especially valuable, particularly when navigating issues related to conveying information and conclusions from the investigation that might be protected by the attorney-client privilege.

Forensic Support for the Audit Team. When the firm conducts an internal investigation that could trigger the auditor's Section 10A obligations, the auditor typically involves individuals from its forensic practice and/or its office of general counsel to advise the audit team. The auditor's forensic team may ask to review documents or data gathered in connection with the investigation, and experienced outside counsel can assist the firm in balancing the auditor's needs with the need to maintain any attorney-client privilege or work product protections associated with the investigation.

Government and Regulatory Investigations

Whether as a result of the government's own information sources or as a result of the firm's "self-reporting," government or regulatory entities may conduct investigations at the same time as the firm's own internal investigation.

WHO

The investigating entities could include civil or criminal authorities at federal, state, local or international levels. They also could include "quasi-government" authorities such as self-regulatory organizations (*e.g.*, stock exchange) or government contractors with delegated authority. More than one government or regulatory inquiry could occur simultaneously, particularly in high-profile matters that have cross-border aspects or have generated media coverage.

How to Address Multiple Fronts and Media. Navigating this multi-front process is challenging, as the firm's existing regulatory or reporting obligations continue to apply, even as the government's requests and demands roll in. Experienced outside counsel will be invaluable during this process. As to media interest, while it may be tempting for management to assure customers, the public and the press that matters under review are minor and are under control, these kinds of statements can often prove to be inaccurate, potentially causing additional issues and complications. A good rule of thumb for dealing with inquiries like these, particularly at an early stage, is to minimize what is disclosed and to keep things factual (*e.g.*, "the board/firm is [conducting an internal review, cooperating with a governmental investigation, etc.]").

INVOLVE COMPLIANCE EARLY

It is often important to engage the organization's department charged with regulatory compliance/oversight early on in a government investigation. This department can provide important background information on the overall compliance program, as well as information about specific compliance controls. DOJ's guidance *Evaluation of Corporate Compliance Programs* (updated March 2023) underscores the important role this information serves with respect to prosecutorial decisions.

NAVIGATING BANK EXAMINER PRIVILEGE

Consideration should be given to whether information requested by the government is subject to the bank examiner privilege, which can apply to communications between firm personnel and regulatory examiners during the course of their routine examinations. This privilege is the examining agency's privilege to assert, and where the examining agency is not the entity conducting the investigation, it should be notified so that it may intervene.

"COOPERATION CREDIT"

The extent to which the government or regulatory investigators offer cooperation credit for an entity promptly sharing information gathered during an internal investigation differs between agencies and organizations, and sometimes even between teams within the same agency.

For example, SEC's cooperation program is rooted in its *Report of Investigation* from October 2001, which is commonly known as the *Seaboard Report*.[3] SEC has provided updated guidance through the years, including a formal cooperation program launched in January 2010 and multiple references in speeches and enforcement settlements.

In January 2017, CFTC announced guidance on its cooperation program; the commission subsequently updated that guidance in September 2017 and March 2019. The guidance identifies the factors that CFTC considers in evaluating the quality of cooperation in enforcement actions and the potential penalty-mitigating rewards that firms could receive in exchange for that cooperation. In October 2020, CFTC's acting director of enforcement issued a memorandum outlining the standardized language staff would recommend in enforcement orders to recognize different tiers of self-reporting, cooperation and remediation.

CFPB issued "Responsible Business Conduct" guidelines (as supplemented by CFPB Bulletin 2020-01) that describe the potential benefits to firms of self-reporting issues and cooperating with bureau investigations. The key elements of responsible business – which can result in leniency in enforcement actions – are self-assessment, self-reporting, cooperating with the bureau and remediation.

OCC, in its handbook *Bank Supervision Process*, has stated that a "bank's actions to self-identify concerns is an important consideration when OCC assesses the adequacy of the bank's risk management system."

On July 11, 2019, FINRA announced updated guidance on its cooperation program in "Regulatory Notice 19-23." The guidance clarifies what FINRA considers to be "extraordinary cooperation," as well as the types of steps that indicate a firm has corrected deficient procedures and systems, examples of the types of actions FINRA may find provided "substantial assistance" to FINRA's investigations, and the importance of providing complete and timely restitution to injured customers.

In September 2022, U.S. Deputy Attorney General Lisa Monaco provided policy guidance on corporate criminal enforcement, specifically emphasizing that DOJ will offer more favorable resolutions for firms that voluntarily self-report misconduct and meet the notion of full cooperation and effective remediation.[4] This guidance was followed in January 2023, when then-Assistant Attorney General Kenneth Polite announced changes to the DOJ's Corporate Enforcement Policy (CEP), which among other things, describes the circumstances under which firms can receive substantial credit or a declination if they voluntarily self-disclose misconduct, fully cooperate in any resulting investigation, and timely and appropriately remediate the issue.[5] Then, in March 2023, Monaco and Polite gave speeches announcing additional updates to the CEP related to corporate compliance programs and the use of compensation clawbacks for executives and employees.[6] Given DOJ's recent pronouncements, it is even more important to consider the potential benefits and drawbacks associated with voluntarily self-disclosing conduct.

DOJ issued guidance to its False Claims Act (FCA) litigators on May 7, 2019, regarding the incentives DOJ offers to firms that provide "voluntary disclosure," "cooperate" with the investigation, share "information gleaned from an internal investigation and tak[e] remedial steps through new or improved compliance programs.[7]" In the FCA context, DOJ is authorized to depart down to single damages in the case of full cooperation. DOJ also has issued cooperation credit guidance regarding criminal matters, including specifically in the FCPA context, and the DOJ Antitrust Division's Corporate Leniency Policy offers amnesty and certain leniency based on cooperation and other conditions.

With some limited exceptions, the credit a firm will get for cooperating is uncertain and difficult to quantify, and the cost of cooperation is high. However, the cost of not cooperating may be higher.

COST OF COOPERATION IN LIGHT OF *UNITED STATES V. COBURN*

Firms intending to cooperate with the government should consider and make strategic decisions during the investigation to maintain attorney-client privilege and work product protections. In *United States v. Coburn,* Cognizant Technology Solutions Corporation (Cognizant) voluntarily cooperated with DOJ by disclosing some documents in connection with an internal investigation conducted by their counsel.[8] After DOJ decided to prosecute two of Cognizant's executive employees for violating the FCPA, the two executives subpoenaed Cognizant to disclose documents pertaining to the internal investigation conducted by the firm.[9] Cognizant refused to disclose the information, claiming attorney-client privilege and work product doctrine protections; however, the court held that disclosing internal investigation materials to a potential adversary, including the DOJ, while under threat of criminal prosecution waives the attorney-client privilege and work product doctrine protections.[10] Citing the rule of completeness, the court compelled disclosure of all documents pertaining to the same subject matter as the disclosed documents, including summaries, notes, memoranda, etc., of any internal investigations on the matter.[11]

The Southern District of Florida and the Southern District of New York have similarly held that firms waive work product protection over notes and memoranda of witness interviews by providing oral summaries to a government agency. *See SEC v. Herrera*, 324 F.R.D. 258 (S.D. Fla. 2017)*; SEC v. Vitesse Semiconductor Corp.,* No. 10-cv-9239, 2011 WL 23899082 (S.D.N.Y. 2011).

In making decisions about how to conduct the investigation, the firm should evaluate the potential for the attorney-client privilege and work product protections to be waived – especially if they anticipate they will be cooperating with the government at some point – and/or should consider what steps can be taken to maximize the ability to claim and maintain attorney-client privilege and work product protections.

Some of these strategic considerations include:

- how to draft and finalize memoranda summarizing investigations interviews, including the level of detail in any summaries;
- whether to opt for written or oral summaries of the investigation;
- whether to provide direct quotes from interviews (or interview memoranda) or other investigation work product;
- how to manage the process of drafting and editing proffer outlines; and
- whether to seek a joint defense agreement with individual defendant-employees.

GUARDRAILS

The firm and its counsel can potentially become so intertwined with a government investigation that the firm's internal or independent investigation can be found to be "attributable" to the government, creating subsequent evidentiary risks for the government. In these instances, the Fifth Amendment rights of employees – who may be facing the difficult decision of whether to provide statements to counsel conducting the investigation or face potential termination – can potentially be violated.
In 2019, 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. The factors cited by the court included the following:

- The government directed the firm and its counsel on whom to interview and when.
- The key witness was compelled, upon threat of termination, to sit for multiple interviews with the firm's counsel.
- The firm'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 firm's counsel over an extended period and did not make its own governmental investigation known to interview subjects.

– The government ultimately constructed its own subsequent investigative plan based almost entirely on the information provided by the firm's counsel.[12]

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

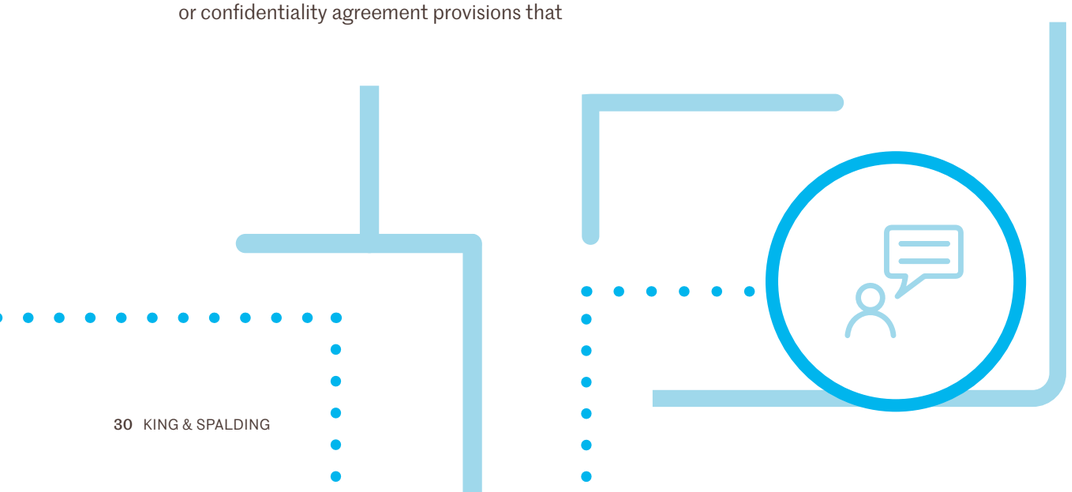
WHISTLEBLOWERS

Whistleblowers may complicate both the internal and government investigations, often without the firm having any concrete knowledge that a whistleblower has contacted the government.

– SEC and FCA whistleblowers are entitled to certain confidentiality and non-retaliation protections and have clear monetary incentives for bringing matters to the attention of federal authorities.

  A firm is prohibited from "retaliating" against an SEC or FCA whistleblower, with retaliation potentially including discharging, demoting, suspending, threatening, harassing or discriminating (directly or indirectly) against the relator or whistleblower. In this context, additional regulations prohibit "impeding" employees from reporting misconduct to the government, which can include severance or confidentiality agreement provisions that could be read as preventing, or potentially even discouraging, whistleblowers from reporting.

It is important to avoid any retaliation or appearance of retaliation, and the investigative team should consider coordinating with the human resources department to ensure that any employment actions taken against any of the relevant employees while the investigation remains pending do not violate whistleblower protection laws. A well-established part of the legal industry focuses on cultivating and promoting whistleblower actions. 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, firms often decide not to engage in any effort to identify whistleblowers who have, or may have, reported potential violations. If the firm is in communication with the whistleblower, whether because the whistleblower has not chosen to remain anonymous or because the firm's systems allow for an anonymous communication with the whistleblower, consider developing a communication strategy to provide appropriate updates to the whistleblower, consistent with preserving attorney-client privilege and work product protection. Here again, experienced counsel can be helpful. As communication is established with the whistleblower, bear in mind that some whistleblowers may have been advised to record (in one-party states) communications that relate to the alleged misconduct, including correspondence with firm counsel.

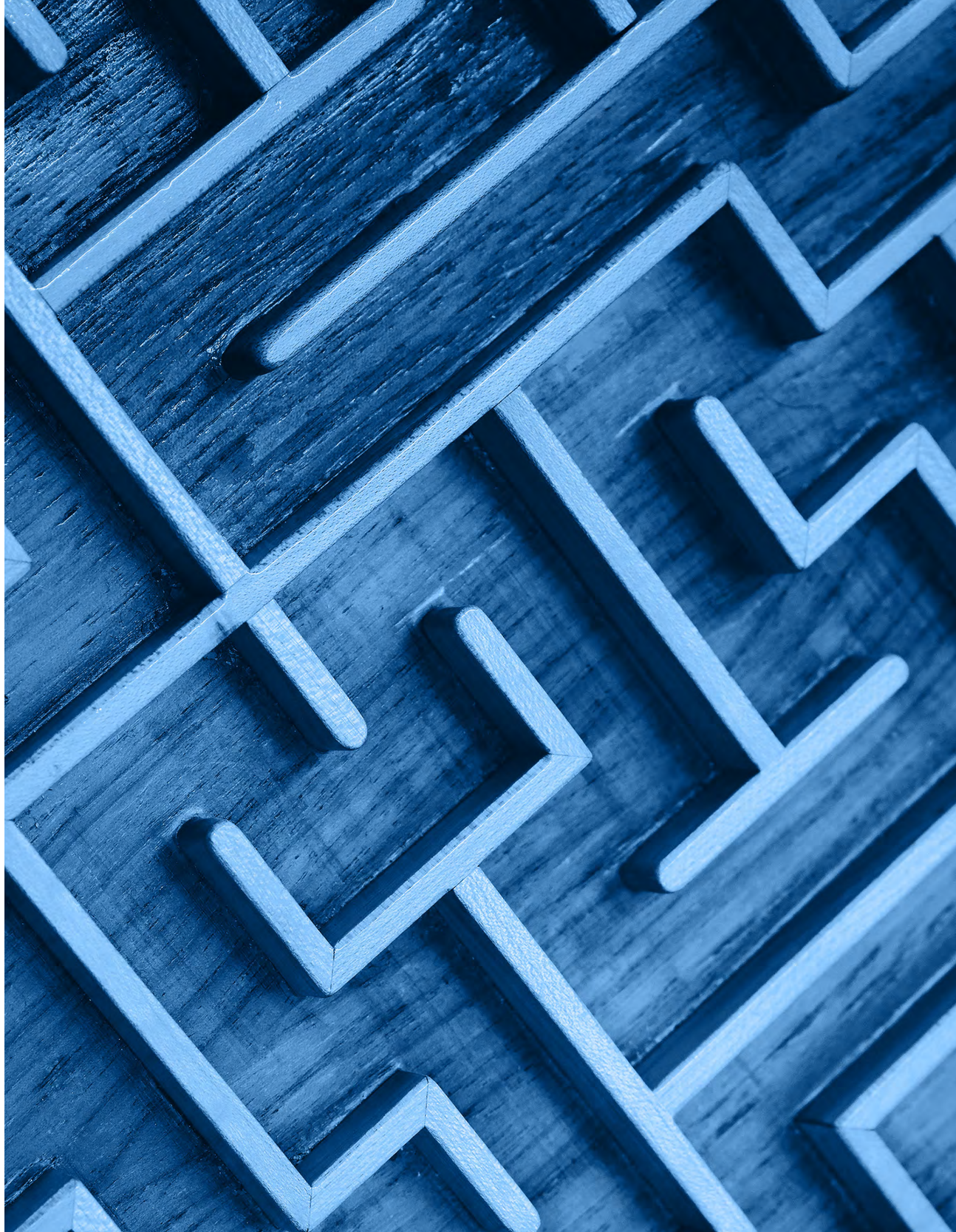


Interests of Various Constituents

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 these interests, and while this list is not exhaustive, keeping these various interests top of mind will help general counsels serve their firms more effectively.

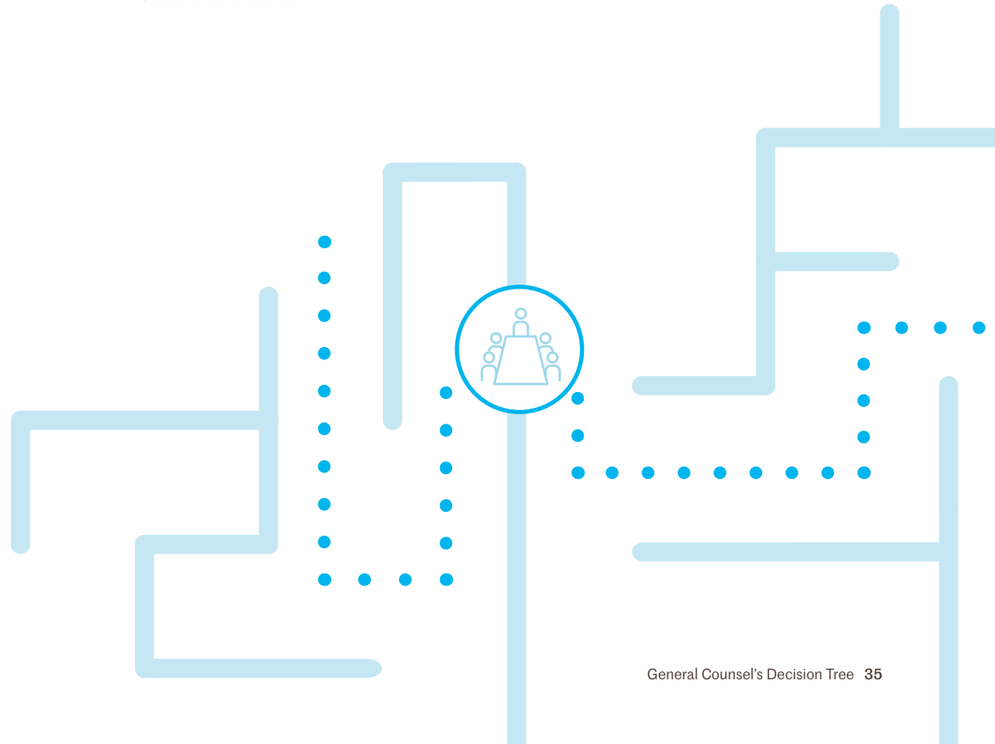
INTERNAL CONSTITUENTS AND THEIR INTERESTS

Constituent	Interests in the Internal Investigation
Board of directors and supervisory boards	Clear understanding of process, schedule Updates as needed and appropriate Appropriate documentation of process including minutes and resolutions Integrity of process, findings, remedial measures Ability to rely on committees, experts, management
Board committees	(in addition to interests as board members) Timely understanding of allegations involving subject matter overseen by their committees Timely understanding of role in investigation (oversee, lead, receive reports, ensure appropriate documentation, provide information, preserve documents)
Committee chairs	(in addition to interests as board and committee members) Audit or oversight committee chair needs to understand information being provided to independent auditors Audit or oversight committee chair needs to understand whether timeliness of public filings is at risk Other chairs may need early focus on upcoming needs in their areas (*e.g.*, nomination and governance, compensation)
Senior officers	Doing their jobs, and leading the workforce to continue doing their jobs, despite the distraction of the investigation Potential personal liability
Compliance/internal departments	Coordinating ongoing compliance efforts, such as audits and risk assessments Receiving sufficient information to help ensure that any needed enhancements to compliance program and controls are implemented
Communications team	Being prepared for eventual press inquiries or releases, to the extent that the results of the investigation may become public or are related to a public complaint or issue Providing appropriate updates
Employees, including workers and union representatives	Information flow Confidence in fairness of process and integrity of management Job security
Internal auditors	Information flow Coordinating ongoing audits and risk assessments Receiving sufficient information to understand implications for prior and future audits



EXTERNAL CONSTITUENTS AND THEIR INTERESTS

Constituent	Interests in the Internal Investigation
Government entities (*e.g.*, local, state and federal governmental authorities)	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 and key documents, and making witnesses available
Regulators/self-regulatory organizations	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 and key documents, and making witnesses available
Independent auditors	Early alerts of potential illegal acts Confidence in those overseeing, leading, conducting and supporting the investigation Timely and accurate updates regarding investigation process, information learned during investigation, findings and remedial measures Thoroughness of investigation Confirmation of reliability of senior officers Briefing regarding all remedial action by management and/or the board of directors Understanding of management's view of the adequacy of its internal controls, in light of information learned in the investigation
Lenders and debtholders	Timely disclosures per any provisions in applicable agreements, including covenant breaches Timely filings/reporting, if possible
Listing exchanges	Timely disclosures Compliance with listing standards
Fund investors/limited partners	Clear and accurate financial statements and disclosures
Shareholders or investors	Clear and accurate financial statements and disclosures Timely filings, if possible
Other relevant legal counsel (*e.g.*, securities or bond counsel, counsel in other pending litigation)	Early alerts of potential illegal acts Timely and accurate updates regarding investigation process, information learned during investigation, findings and remedial measures Confirmation of reliability of senior officers Briefing regarding all remedial action
Insurers	Claims filed for correct periods Informational updates
Clients, customers and business partners	Complete and timely restitution, where warranted Timely delivery of any required notices Respect for firm's integrity
Consultants and contractors	Information updates, where applicable
Media outlets (including social media)	Coordinating external and internal messaging to ensure consistency
The public	Good neighbor in firm locales Confidence in the firm



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About the Practice

King & Spalding combines its government-facing practices into one Government Matters group, enabling a cross-discipline and multiple-skill-set approach to serving our a broad range of financial services clients. Our bench is deep – 100+ former government leaders and enforcement officials across 30+ agencies and departments, and across borders – with experience at all levels of seniority and involving every continent in 100+ countries of every size and culture, in addition to the scores of lawyers who have devoted their careers to helping clients, including some of the largest banks and significant global financial institutions, navigate internal and government investigations.

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[1] U.S. Dep't of Justice, Evaluation of Corp. Compliance Programs 16 (2023) ("Response to Investigations – Have the company's investigations been used to identify root causes, system vulnerabilities, and accountability lapses, including among supervisory managers and senior executives? What has been the process for responding to investigative findings? How high up in the company do investigative findings go?"); U.S. Sentencing Guidelines Manual § 8B2.1 (2018) ("After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.").

[2] 15 U.S.C. § 78j-1 (2021) Audit requirements.

[3] Press Release, SEC, Report of Investigation Pursuant to 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (Oct. 23, 2001), https://www.sec.gov/litigation/investreport/34-44969.htm.

[4] Memorandum, Dep't of Justice, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (Sept. 15, 2022), https://www.justice.gov/opa/speech/file/1535301/download.

[5] Assistant Attorney General Kenneth A. Polite, Jr., Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy (Jan. 17, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law.

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[7] Press Release, U.S. Dep't of Justice, Dep't of Justice Issues Guidance on False Claims Act Matters and Updates Just. Manual (May 7, 2019), https://www.justice.gov/opa/pr/department-justice-issues-guidance-false-claims-act-matters-and-updates-justice-manual.

[8] *See United States v. Coburn*, No. 2:19-cr-00120, 2022 WL 874458, at *7 (D.N.J. Mar. 23, 2022).

[9] *Id.* at *1.

[10] *Id.* at *7.

[11] *Id.*

[12] *United States v. Connolly*, No. 1:16-cr-370-CM, 2019 WL 2120523, at *1 (S.D.N.Y. May 2, 2019).

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with over 1,200 lawyers in 23 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries involving all seven continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

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