

# The first days: Setting the tone for a successful internal investigation

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**December 18, 2019**

An internal discovery or a criminal or civil regulator's inquiry that sparks an internal investigation thrusts in-house counsel into the uncomfortable and complex role of exploring potential wrongdoing inside the company's walls. These are high-stakes matters in which the range of outcomes is typically measured in degrees of bad fortune. But conducted effectively, an internal investigation is an essential risk-management tool that can protect or insulate a company — and strengthen resiliency in the face of regulatory or public scrutiny.

In-house counsel must consider at the very outset of the process three crucial matters that will set the tone for the investigation and determine its overall success: (1) the investigative team; (2) the potential scope and timeline of the investigation; and (3) the preservation of documents and data.

## **Assemble the Team**

A key early decision is whether to conduct the investigation entirely with internal resources, or to engage outside counsel, forensic investigators, or e-discovery experts. For smaller or time-sensitive investigations, companies often choose to assemble a team that combines in-house counsel, internal auditors, and compliance and human resources personnel. Relying solely upon internal personnel has obvious economic advantages, and will likely move faster — at least at the outset — than outside resources that may need time to get up to speed on issues and industry or company practices. Interview subjects may also find internal counsel comfortable and familiar, fostering open and honest communication.

Engaging outside counsel signals to external constituencies that the company is taking the matter seriously and lends objectivity and credibility to the investigation. That is of particular importance when allegations involve high-level employees or executives. Relying upon outside counsel also establishes the boundaries of the attorney-client and work product privileges, affords access to cost-saving and efficiency-generating resources such as e-discovery vendors, and provides subject-matter expertise and experience in interacting and negotiating with the government. The latter may be particularly useful in limiting the scope of the investigation, as well as in presenting findings in a manner that minimizes reputational and financial harm to the company.

## **Establish the Scope and Timeline of the Investigation**

Identifying the scope of an investigation may be as simple as reading the allegations on the face of the document that is the impetus for the internal investigation, or it may require a little digging. Where the scope or allegations are unclear, counsel may consider contacting the source of the allegations. However,

that may not be advisable or possible if the government originally raised the matter. Early scoping interviews can also be an effective tool for developing an initial factual chronology, understanding relevant policies and procedures, identifying key players, and learning where important documents and data may exist. That said, counsel must remain flexible and ready to expand the scope as needed as facts are brought to light.

Counsel should establish a tentative timeline for the investigation that accommodates witness interviews, document collection and review, forensics, and analysis, as well as time to memorialize interviews and conduct follow-up. When scheduling witness interviews, meet first with those who may not be readily available later, whether because of potential employment action or scheduled travel, or another reason favoring early memorialization of the witness's information.

Document collection and review should account for the time needed to identify custodians and categories of documents, and process and mine the data for relevant information. At least some of the review should be completed in advance of witness interviews to assist with outlines, timelines, refreshing witness recollection, corroborating statements, and confronting inconsistencies.

The form, frequency, and audience for any internal reporting will affect the investigative timeline. Counsel should also consider the goals or potential end products of the investigation. And when the investigation emanates from a government inquiry, plan for any negotiated or required deliverables.

### **Protect Documents and Data**

Perhaps most critically, pay early attention to preserving all existing information that is potentially relevant to the investigation or responsive to a request made by the government, including all information associated with any individuals named in allegations or government requests. Counsel should determine where such documents and data may be kept, considering not only the more obvious email and hard copy documents, but also electronic documents and folders, including those stored on document management systems, shared drives, and individual desktops, as well as text messages and instant messages stored on employer-provided cell phones and personal computers. It is prudent to preserve information from the broadest possible timeframe and custodian list that may be relevant to the investigation, as it is easier to winnow later than to recover deleted material.

This is the point at which to issue a legal hold: a documents and data preservation memorandum directed to relevant employees to halt routine destruction of potentially relevant material. Counsel must work with the company's IT department, and potentially with external forensics or e-discovery vendors, to ensure that electronic documents and data are preserved.

Careful attention to a few key steps at the commencement of an internal investigation sets the stage for successfully weathering what is characteristically a difficult time for any company. In-house counsel need to get the right team in place, and start the process of ensuring that the information they will need — from witnesses or documents — is going to be there during the investigation. Armed with an effective team and a clear action plan — and the willingness to be flexible as the unexpected inevitably arises — counsel will be in a position to manage a thorough investigation and minimize harm to the company and its employees.