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North Florida Chapter



Five Pragmatic Tips-Conducting Effective Internal Investigations

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While most General Counsel would prefer to provide legal advice for business activities which augment an enterprise's growth, with increasing frequency, these men and women are confronted with allegations of wrongdoing on the part of management and staff. This article is designed as a primer for the General Counsel approaching his or her first internal investigation.

An internal investigation can best be defined as a company's efforts to collect and evaluate information responsive to accusations of improper actions or inactions. Internal investigations are proliferating, because so, too, are allegations of corporate misconduct. It is axiomatic that these allegations are prompted by rich incentives for reporting purported wrongdoing to certain authorities. Enforcement agencies with skin in the game include the Securities and Exchange Commission (SEC), Internal Revenue Service (IRS), and Department of Justice (DOJ).

In particular, statistics for 2014 bear out these assertions. In 2014, the SEC pursued 755 enforcement actions, which resulted in \$4.16 billion in penalties. Of that amount, \$35 million was distributed to whistleblowers.(1) Under the Dodd-Frank Act, a whistleblower is entitled to between 10% and 30% of monetary sanctions collected in SEC actions.(2) A whistleblower hits this big payday if he or she provides original information; namely, that which (a) derives from independent knowledge and analysis, (b) is not known to the SEC from any other source, unless the whistleblower is the original informant and (c) is not exclusively derived from public information, unless the whistleblower is one of the sources of such information.(3)

Similarly, under the Tax Relief and Health Care Act of 2006, a whistleblower can secure between 10% and 30% of amounts actually collected by the IRS in instances of fraudulent underpayment of tax liability exceeding \$2 million per taxpayer.(4) Under the False Claims Act, whistleblowers can be awarded between 15% and 25% of amounts recovered.(5)

The trigger for internal investigations can be a subpoena received from one of these governmental agencies based on a whistleblower's information. Alternatively, complaints of misconduct may be lodged by employees or other individuals. Additional channels of information include external/internal audits and targeted examinations conducted by state regulatory authorities. Whatever the source, five pragmatic tips lead to effective resolution of internal investigations.

1. TIP ONE: AVOID THE APPEARANCE OF IMPROPRIETY BY RELYING ON INDEPENDENT OUTSIDE COUNSEL

While a General Counsel may well have substantial expertise in conducting investigations, only in rare circumstances should even a very seasoned corporate lawyer attempt to conduct a high-level investigation without retaining qualified outside counsel. If the target of the internal investigation is a director or the Chief Executive Officer to whom the General Counsel reports, the General Counsel may well be accused of protecting his or her self-interest. If the target of the internal investigation is one of the General Counsel's peers, the General Counsel may be tarred with playing politics to disadvantage a competing executive. The General Counsel should consider using an investigator from inside the enterprise only if the subject of the investigation is a staff member outside corporate executive ranks.

How does one select qualified retained counsel in this instance? Given the importance of perspective, the General Counsel should look beyond those attorneys who routinely provide advice to the enterprise and perhaps play golf with its executives. How to proceed? Draft a short list of other qualified candidates. Conduct in-person interviews of a select few to confirm suitability for the specific assignment. Candidates should be limited to those who have either conducted significant corporate investigations themselves or have previously supervised such investigations while in-house. In this author's opinion, there is no better match with a company's independent investigator needs than retained counsel who has significant prior in-house corporate compliance experience in another enterprise. Such lawyers tend to understand departmental accountabilities and inter-relationships.

Who should be the recipient of the independent counsel's findings? High level investigations of a director or executive should report up to the Board Audit Committee. This serves three major purposes. First, charged with overseeing the enterprise's controls, this Board Committee is in the best position to implement any recommended action steps. Second, oversight by this Board Committee appropriately gives the impression that no member of management is steering the investigation. Third, if the company will be reporting its findings and conclusions to the SEC or similar agency, such agency will be assured by the fact that accountability was maintained at the very highest levels of the enterprise.

2. TIP TWO: WITH THE END GAME IN MIND, CRAFT A WORK PLAN WITH CONTAINED SCOPE

The ultimate end-game of the investigation is to thoroughly and fairly conduct an examination of critical facts, producing concrete findings and actionable conclusions. A secondary but important purpose is to achieve these goals without unduly disturbing ongoing business operations and by appropriately constraining expense. The General Counsel should craft a work plan just broad enough to answer key questions identified in concert with retained counsel. Key witnesses must be identified and documents located. A document hold should be issued to avoid possible destruction of relevant materials. But ongoing care should be taken that there is no scope creep, as that will impede the timely resolution of the investigation.

3. TIP THREE: SET APPROPRIATE EXPECTATIONS FOR INVESTIGATION SUBJECTS

The witnesses to be interviewed may be used to viewing lawyers as friendly advisors in a business context. Of course, witnesses should be cautioned that all information exchanged in an interview is to be kept confidential. But to set appropriate expectations in the different context of an internal investigation, witnesses must be warned that the lawyers are representing the corporation, rather than the interviewee. The interviewing lawyers should also refrain from opining whether the subject of the interview should seek legal counsel.

4. TIP FOUR: TRAVEL IN TWO'S AS AN INVESTIGATIVE TEAM

Optimally, two retained counsel should conduct the witness interviews. One should conduct the questioning while the other should take notes. This team approach will result in the most accurate rendition of the witness' version of events.

5. TIP FIVE: PROTECT THE ATTORNEY-CLIENT PRIVILEGE

The seminal case of *Upjohn Company vs. United States* 449 U.S. 383 (1981) established that the attorney-client privilege extends to the transmission of information by anyone in the corporation to the lawyer for the primary goal of providing legal advice to the corporation. So long as providing legal advice is one of the primary goals, the privilege is not destroyed if there exists other business-related goals such as compliance. In *Re Kellogg Brown & Root, Inc.* 756 F. 3rd 754 (D.C. Cir. 2014). Further, the investigating lawyer's mental impressions are protected by virtue of the attorney work product privilege *Upjohn* at p.399. To maintain the attorney-client privilege, the interview summaries must be framed in terms of the lawyer's mental impressions, rather than as a verbatim transcript.

(1) The author acknowledges relying on the presentation "Regulatory Inquiries and Corporate Investigations" for these SEC statistics. This presentation was delivered on May 17, 2016 by Julie Broderick, the Prudential's head of investigations, and her colleagues at the Association of Life Insurance Annual Meeting.

(2) See 15 U.S.C. Section 78u-6(b)1

(3) See 15 U.S.C. Section 78u-6 (a)3

(4) See 26 U.S.C. Section 7623

(5) See 31 U.S.C. Section



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While working as Senior Vice President and General Counsel of The Main Street America Group, Ms. Mack was one of the co-founders of the ACC North Florida Chapter. From 2010-2011, she had the privilege of serving as the ACC North Florida Chapter's President. During her tenure, the chapter secured the "Best Small Chapter of the Year" award from the ACC national organization.

Ms. Mack is also a founding director of ARIAS (US), the premier organization for educating and certifying reinsurance and insurance arbitrators. She was the first woman to ever be on the ARIAS (US) Board. Currently, she holds ARIAS (US) designations as an umpire and arbitrator, and is also a qualified mediator. In addition to her insurance, insurance regulatory and compliance practice, Ms. Mack accepts assignments as an arbitrator, mediator and expert witness.

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