

LOOKING INWARD

How to prepare today for tomorrow's internal investigation.

[BY SARA JANE SHANAHAN]

FOR PUBLIC AND PRIVATE COMPANIES OF all sizes, a comprehensive internal investigation strategy is an essential tool. When problems arise, it is in-house counsel who will determine what to investigate, who to involve in the investigation, and how to investigate it.

If the Securities and Exchange Commission comes knocking on your door, you are likely to make an early call to outside counsel. For example, one might expect that Goldman Sachs & Co. conducted an in-depth internal investigation last year, with the assistance of outside counsel, in response to notice from the SEC that the firm was under investigation with regard to the marketing of an investment known as Abacus 2007-AC1. In April 2010, the SEC felt justified in filing a civil suit against Goldman arising out of that deal.

Similarly, it is likely that Toyota Motor Corporation conducted an internal investigation when reports of unintended vehicle acceleration first came to light. One would also expect that additional investigations occurred more recently regarding what senior managers knew and when they knew it, and what steps were or should have been taken to recall potentially defective vehicles in a timely fashion.



In approaching internal investigations, one size does not fit all; the scope of the investigation should be commensurate with the seriousness of the problem. If one of your factory workers reports that her paycheck is a penny short this week, you would investigate the issue yourself before calling in outside lawyers and accountants.

Any situation that could involve liability for the company or an employee merits a full investigation. All problem-solving activities and expenses associated with addressing that situation can be considered an appropriate part of an internal investigation. In the course of the investigation, you, as in-house counsel, whether alone or in conjunction with others, should take certain steps. These include: (A) determining the extent of

the problem; (B) mitigating any past or ongoing harm; and (C) gathering the information needed to advise the company on necessary and desirable next steps to contain the problem and avoid or limit liability.

When assembling the investigative team, seek to engage those with the required expertise. On occasion, in-house counsel should consult with outside counsel with specialized experience, or with other specialists, including information technology experts, forensic accountants, and/or communications consultants. At other times, you should conduct the investigation alone or with other in-house personnel.

IF THE CHAIRMAN OF THE BOARD IS UNDER scrutiny, a subcommittee of the board could conduct the investigation. On the other hand, if merchandise is missing from your Boston warehouse, you may seek information on general procedures from your Worcester warehouse before interviewing personnel in Boston. Assessing the objectives of the investigation up front will assist in-house counsel in assembling the right team.

Once the investigation is under way, in-house and outside investigators have two main sources of evidence—

documents and witness statements. Both should be approached with care.

At the start of an investigation, direct affected personnel to put on hold routine document destruction policies and preserve all relevant materials until the investigation and any related litigation is resolved. After the document-hold memorandums are distributed to the key individuals or departments, the investigators should collect hard copy and electronic documents that will reveal the relevant details of the topic(s) being investigated. Investigators should record the steps they take to preserve relevant evidence and the scope of the evidence they review.

Similarly, when approaching interviews, in-house and outside counsel alike should consider some basic protocols. Is it best to conduct certain interviews early in the process, or is it more advantageous to wait until after other portions of the investigation have taken place? Perhaps a witness complaining of workplace harassment needs to be questioned right away. By contrast, maybe a suspected embezzler should be interviewed later in the process, after key documentary evidence has been secured and other witnesses have been examined.

Two lawyers should attend any investigative interview—one to ask questions, the second to take notes, and each to serve as a witness for the other. Where investigators are concerned that key witnesses will compare notes, several interviews can be scheduled to occur simultaneously, or one directly after another.

Interview subjects must be warned, up front, that counsel conducting the interview represent the company and not the witness. Furthermore, the witness should be warned that any

privilege associated with the interview belongs to the company, and that the company has the right to waive the privilege to protect its own interests, even if such a waiver would be adverse to the witness's interests. These warnings should be recorded in the interview notes and in any summary memorandums later prepared. Such procedures assist counsel in complying with their ethical obligations in dealing with unrepresented parties and in avoiding conflicts of interest.

To understand the problems that companies can face with waivers, consider the recent case of *U.S. v. Ruehle* (2009). In that case, the U.S. Court of Appeals for the Ninth Circuit considered the question of to whom the privilege belonged—the CFO, individually, or the company. The court ruled that the communications were not privileged at all because the CFO knew that the lawyers were collecting information for the auditors about backdating of stock options. The CFO's allegations that the lawyers breached their professional obligations to him by failing to give him adequate warnings, however, remained outstanding.

Finally, stay focused on the things that truly matter as you navigate the process. Throughout an investigation, keep in mind the key objectives of the investigation and how you plan to use the work product generated by your team. If preserving the attorney-client or work-product privilege is of paramount concern, have your outside litigation counsel direct the investigation and retain any third-party experts required.

If the investigation is being conducted in conjunction with a government investigation, with the expectation that the results of the investigation will be

turned over to prosecutors, prepare any reports and memorandums with this likelihood in mind.

In all events, maintain a focus on the steps likely to follow the investigation—e.g., a lawsuit, a government interview, a change in corporate procedures—in order to structure the investigation in such a way as to achieve your company's objectives.

"An ounce of prevention is worth a pound of cure," as Ben Franklin put it so well. Analyze the issues to be considered and questions to be answered in the course of any internal investigation. If you do, you will be well equipped to respond swiftly and appropriately when problems requiring investigation arise in the future.

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