

Director-Led Investigations

Maximizing Efficiency and Minimizing Business Disruption

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It's midnight and the phone rings—an incoming call from the director of a large public company to his counsel. From counsel's experience, the director must have a very serious issue. Maybe the company's primary product has been linked to a pattern of deaths in a soon-to-be-released report. Or maybe the company received a whistle-blower tip suggesting that the chief financial officer embezzled millions of dollars. Or maybe a reporter called to ask for comment on an allegation of a C-suite sexual misconduct cover-up. While these scenarios differ significantly, they present directors and their outside investigative team with the same basic questions: What is needed to investigate the allegations and resolve any real issues? How can the best interest of the company be preserved throughout the process? And how can the necessary steps be most efficiently managed?

Not surprisingly, director-led investigations are on the rise across industries. Correspondingly, the legal spend for such investigations has risen, with corporate counsel anticipating continued increases in the future. From 2017 to 2018, 42 percent of law departments increased outside counsel spend; when asked about 2019, 41 percent of chief legal officers planned to increase outside counsel spend. See ALTMAN WEIL, 2018 CHIEF LEGAL

OFFICER SURVEY, at iii (2018). Such investigations have become an “unavoidable cost” of doing business. See Carl Jenkins & Norman Harrison, *Standard Issues in Corporate Investigations: What GCs Should Know*, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO CORPORATE INVESTIGATIONS 2018, at 8 (2d ed. 2018).

This trend places directors under mounting pressure to demonstrate expertise in their oversight of investigations. The challenge is to ferret out any misconduct and corruption while working toward the least possible business disruption. In these circumstances, board decision making may be seen as more of an art than a science, requiring wisdom and strategic thinking to reach the right balance in the exercise of good business judgment. And throughout it all, the wise guidance of counsel to prevent runaway costs and a litigation firestorm is more critical than ever before.

This article reflects on five key areas of focus for directors and their counsel in maximizing efficiency in investigations while minimizing unnecessary disruption: (1) the people, (2) the process, (3) the scope, (4) the reporting, and (5) the communication. It is written from the perspective of outside counsel and a forensic accountant who have teamed up to handle those issues across industries in a range of corporate cultures and “bet the business” situations. Provided here are the distilled factors found to drive—or undermine—efficiencies and effectiveness in critical

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times of crisis management. This article offers concrete steps and core questions reflecting solid business judgment and best practices in the high-stakes arena of public company investigations.

Focus on the People: Constructing the Investigative Team; Managing Internal Personnel

The external team. When allegations raise concerns about C-suite or systemic matters broadly affecting a company, the duty to investigate typically becomes a responsibility of the board of directors, often through the audit committee or a special committee (referred to here as the “investigative committee”). Too often, investigations are not timely undertaken, and then it is an uphill battle to create efficiencies in an environment where the investigative team is simply trying to catch up and take control of a rapidly escalating situation. See Joan E. Meyers & Maria McMahon, *Hidden Dangers in the Early Stages of an Internal Investigation* 1 (presented at the ABA Section of Litigation 2016 Corporate Counsel CLE Seminar) (noting that “the number one pitfall” observed is companies not reacting quickly enough at the outset of an internal investigation). Therefore, it is important for the investigative committee to quickly identify and retain outside counsel who is experienced in conducting investigations. Counsel then assists in determining whether specialized accounting, compliance, regulatory, or discovery experts are required.

What to Consider

While independent outside investigative expertise is needed to manage the work for the investigative committee, subject matter experts often lend added efficiency and credibility to the investigation. They may offer the investigative committee and counsel a specific kind of expertise that provides an independent opinion on the evidence collected and that helps the investigative committee understand any complex technical and unique regulatory issues surrounding the allegations. In addition, experts with strong investigative experience may see ready patterns and issues based on prior experience, opening the doors to cost-effective and efficient approaches to the investigation. Independent experts may range from forensic accountants, e-discovery collection experts, and compliance specialists to other specific technical experts as case appropriate.

What to Ask

Consider the following questions when contemplating hiring experts:

- *Are there very specific technical issues surrounding the allegations?*
 - If so, specialized experts may be critical team members.

- *Do the allegations affect the organization’s reporting of its financial results?*
 - If so, it is important to have a forensic accounting team’s expertise, consisting of special skills in auditing, accounting, and analytical techniques, to effectively evaluate the evidence and underlying issues and to assist in discussions with outside auditors, regulators, and third parties.
- *Do the experts have the appropriate industry, business process, regulatory, and compliance expertise, as well as significant investigative experience?*
 - If so, efficiency and creditability will likely be enhanced.
- *Will the investigation involve the collection and review of electronic documents?*
 - If so, experts who specialize in this area can use the latest collection techniques to gather the information from all devices and storage locations and preserve the historical tracking data to add efficiencies.

The internal team. In very practical terms, an early consideration is who within the company must be isolated from direct involvement because they are tied to the areas of investigation, and who within the company may serve as resources for outside counsel and experts.

What to Consider

The process of sorting through what roles company personnel must—or may—assume will drive efficiencies. Allowing executives involved in the allegations to exert improper influence, for example, can lead to a corruption of the investigative process. The perception of an “inside job” will undercut the credibility of the investigation as an independent review and may lead any of the many audiences for the investigation to cry foul. This result would be worse than no investigation at all, as it would not only leave unresolved concerns about the allegations at issue but also raise questions about the integrity of the current company leadership. Care should be taken to insulate senior management from the investigative process so as not to prejudice the development of the investigation. *See* Michael J. Missal, Stavroula E. Lambrakopoulos & Curtis S. Kowalk, *Conducting Internal Investigations* 12–13 (K&L Gates 2015).

Conversely, identifying internal personnel who can serve as uninvolved resources—and then directing them to make the time available to assist outside investigation counsel—can drive efficiency immensely. Knowledgeable insiders can ensure proper document preservation and production. Also, internal subject matter experts can streamline fact finding. In other words, a critical key for success is directing personnel as a resource to help the external team to conduct an efficient investigation.

What to Ask

When sorting through personnel to determine if they should be considered and asked to assist or stand aside, consider the following questions:

- *What people and business units are involved in the allegations?*
 - They should be interviewed but not allowed to drive the investigation process.
- *Who has management oversight for the people and business units involved in the allegation?*
 - They should not be allowed to drive the investigation process and potentially should be interviewed.
- *Who is not involved in the allegations and could be resources for the outside counsel, such as information technology personnel, in-house counsel, human resources, and personnel with valuable business process, technical, and regulatory knowledge relevant to the investigation topic?*
 - These people should be offered to outside counsel as resources.

Focus on the Scope of Review: Keeping It Clear

The scope of the investigation is critical to conducting an effective investigation. It is driven by the specific allegation and

related issues to be resolved. The scope of the investigation should be defined early by the investigative committee and outside team. The scope should address the investigative processes surrounding the specific allegations and the potential requirements of external parties (e.g., regulators or outside auditors). And as the investigation proceeds and new information is learned, the scope of the investigation should be revisited to ensure that the issues are being properly addressed.

“Scope creep” is a potential source of investigation expansion, adding to cost and potential overkill. For example, as witnesses are interviewed, it is pretty common for them to note other concerns, even if not related to the allegations. It is important to avoid the temptation to expand the scope each time a new issue is raised.

Alternatively, it is not uncommon to have the target of a concern choose to leave the company halfway through the investigation once negative issues come to light. After such a departure, the investigative committee and outside team have the opportunity to form a revised—and potentially narrower—scope for the investigation.

Carefully defining the issue or issues for review and using sound judgment about the proper scope throughout the process can keep an investigation on track and enhance efficiency and effectiveness.

What to Consider

The starting point is to consider one question: What prompted the investigation? Allegations of potential wrongdoing can arise in a variety of ways: an employee complaint or hotline tip; an auditor question or concern; a shareholder claim; an outside inquiry from a regulator, such as the Securities and Exchange Commission or a state attorney general; or a media report of misconduct. The allegations may be specific and well defined as to the particular company, or they may be broad and splashed across an industry. Focusing on this question can assist the investigative committee’s endeavors to understand the allegations and necessary scope of review to meet the needs of the interested third parties.

Whether the potential corporate wrongdoing or underlying conduct has criminal or civil implications, scope considerations involve a review of applicable governmental guidelines and relevant laws. For example, in November 2018, Deputy Attorney General Rod Rosenstein announced changes to the Department of Justice’s (DOJ’s) *Manual* regarding cooperation credit for companies facing criminal and civil investigations. Specifically, these new changes limit the Yates memo’s requirement that a company disclose *all* relevant facts about individuals involved in corporate misconduct in order to be eligible for cooperation credit. Now in criminal cases, a company seeking cooperation credit must identify individuals who were substantially involved in or responsible for the criminal conduct. And in civil cases, the

DOJ will now give its civil attorneys discretion to grant cooperation credit if a company provided honest and meaningful assistance to the investigation. See Deputy Attorney General Rod J. Rosenstein, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018); James Melendres, Alope Chakravarty & Carter Gee-Taylor, *Yates Memorandum: Rosenstein Announces Easier Path for Companies to Receive Cooperation Credit* (Snell & Wilmer Dec. 11, 2018). These considerations may very well influence decisions about an investigation's scope, as the investigative team properly keeps in mind the reporting required to regulators once all is completed.

A primary task for the investigative committee as the investigation is ongoing—working in conjunction with outside counsel and advisors—is to review the adequacy of the scope as new information comes to light. A key consideration must be the results needed and the audience involved. With respect to the results, the investigation must be comprehensive enough to allow the company to resolve the issues—but need not be broader. With respect to the audiences, the investigative committee should consider all who will want to know that the process was effective, complete, and fair. The audiences often include the cast that may have raised the concerns from the start: shareholders, auditors, regulators, and the media.

What to Ask

Using a measured and staircase approach, expanding the scope only through deliberate consideration—as opposed to unintended scope creep—will increase efficiency and keep the investigation well focused. Questions to ask in forming the scope include:

- *What is the precise concern raised that created the need for an investigation?*
 - Start there.
- *Does that concern necessarily require a broader review?*
 - If so, go there next.
- *Has evidence in the investigation—through document review or witness interviews—disclosed related or broader concerns requiring reviews?*
 - If so, assess and prioritize the need to go further.

Focus on the Process: Ensuring the Proper Steps and Protections

Defining a proper process is critical to protecting the integrity and usefulness of an investigation. Two key components in the process are (1) taking proper care of the attorney-client privilege and (2) firmly establishing that counsel represents the corporate entity or the board and *not* individual witnesses or company personnel.

What to Consider

Great inefficiencies—and disastrous results—can occur if the attorney-client privilege is not preserved. Waiver of this privilege can result from conduct that fails to maintain the confidentiality of the communication, either through voluntary or inadvertent disclosure to outside or non-covered recipients. See Steven D. Ginsburg, *How to Lose Attorney-Client Privilege*, BUS. TORTS & UNFAIR COMPETITION, March 16, 2017. Whether a privilege can be asserted to protect the investigative work and findings will depend on how the investigation is handled.

In addition, counsel must clearly inform witnesses that the attorneys are representing the board or the corporation, not the witnesses, and that the information discussed may be disclosed to third parties. This is often referred to as the *Upjohn* warning or corporate *Miranda*. A corporate *Miranda* disclosure protects the company and the board from a witness who later asserts that he or she thought that the attorney was representing the witness or that no disclosure to third parties would occur. Although witnesses may be asked to cooperate in the investigation and speak to counsel, the attorney-client privilege does not necessarily extend to these witnesses. *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009). Being unclear with witnesses may imperil the entire investigation. If a witness may credibly claim that he believed the investigative committee's lawyers were also acting as his personal attorneys, the consequences can be serious and damaging. See *United States v. Nicholas*, 606 F. Supp. 2d 1109 (C.D. Cal. 2009) (referring law firm to state bar for disciplinary action where firm had no written record of the corporate *Miranda* admonition to director), *rev'd on other grounds by United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009). Likewise, keeping the proper scope of the investigation in mind will focus the investigative team, properly direct forensic experts, and save both time and money.

The following steps allow for an orderly investigation:

1. *Document preservation*: Immediately implement the company's document retention policy and ensure it functions as intended; suspend any routine document destruction.
2. *Document preservation period*: Determine the appropriate date ranges to preserve and collect data. Consider a broad enough date range for the preservation of data to ensure a comprehensive and complete collection.
3. *Preliminary document interviews*: Identify the issues presented, individuals with relevant knowledge, organizational flow of information, and potential document sources.
4. *Document collection*: Work with information technology staff to accomplish data collection, including data contained in emails, imaging hard drives, phones, personal devices, social media accounts, system backups, and cloud storage, as well as hard-copy documents.

5. *Document review*: Review hard-copy documents and electronic data, including emails. Consider sampling techniques, using date-range and specific-issue targeted searches and tiered approaches.
6. *Witness interviews*: Review key documents and facts with witnesses and carefully assess all information that is shared.
7. *Conclusions*: Prepare findings and share conclusions with the investigative committee, the broader board of directors, key management as appropriate, and any other necessary audiences.

What to Ask

As the investigative team proceeds through the above steps, questions to ask or revisit at this stage include the following:

- *What steps are necessary to protect the attorney-client privilege?*
 - This question should be asked early and revisited often.
- *What documents need to be preserved—or collected—or reviewed?*
 - Preservation and collection should be broad; review can be narrower and be increased as appropriate.
- *What order of interviews makes the most sense?*
 - Prioritization is key. And consider the order in terms of building out all the issues at stake.
- *How can the directors—or company personnel—assist with what counsel needs?*
 - Efficiency results when the right company contacts help to open the necessary doors.

Focus on the Reporting: Selecting the Approach Appropriate for the Presentation of Results

At the conclusion of the investigation, the investigative team will present its findings to the investigation committee and likely the full board. The findings may be presented in a variety of ways: a written deliverable report or presentation, an oral presentation, or a combination of oral and written reports.

What to Consider

The specific form of the findings will depend on a variety of factors, including the nature of the inquiry and findings, whether the findings will also be presented to third parties, and considerations of potential litigation. As appropriate, the investigation's findings may also be shared (in whole or in part) with auditors or regulators, or they may be disclosed to the market and media. Consider, for example, the recent decision by Ohio State University's board of trustees to release the complete report

of the independent working group tasked with investigating allegations against former head coach Urban Meyer, following media and public scrutiny. See *Public Records Related to the Investigation into Allegations Involving Urban Meyer*, OHIO STATE NEWS (Aug. 3, 2018); *The Independent Investigation: Summary of Findings*, OHIO STATE NEWS (Aug. 22, 2018) (explaining the investigation's primary questions, its independence and scope, key factual findings, potential violations of law, university policies and rules, contractual obligations of Meyer, other observations, and conclusion).

It is critical for the directors to consider what might be required by the potentially numerous and varied audiences and interested parties. While less disclosure of any attorney-client work often leads to more efficiencies, practical considerations may require broader disclosure. And throughout these critical decision points, the advice of counsel as to the cost/benefit of sharing the results among these audiences is highly valuable.

What to Ask

The following questions will help determine the approach to presenting the results:

- *Is an oral presentation enough?*
 - If so, it is often the best medium for delivery of investigative results.
- *Were there documents uncovered in the investigation that are helpful to supplement an oral report?*
 - If so, they offer a good way to see firsthand evidence without written attorney work product.
- *Is a written report of counsel appropriate—either because it is internally beneficial or it is required by an external audience?*
 - If so, it cannot be shared beyond the directors without risk to the attorney-client privilege.
- *Are these findings final, or is there a chance of revisiting these issues?*
 - If the findings may be revisited, it is a wise practice for counsel to make clear in any written report or presentation that it is a "Working Draft—Privileged and Confidential." When presenting information to government regulators, dispelling notions of finality is critical, to leave room for the investigative team to revisit the findings and update if necessary.

Focus on Communication about the Investigation: Preventing Chaos

While transparency about proper process is important, leaking of information as the investigation proceeds can lead to significant problems and unnecessary drama from a monetary and corporate culture perspective. Vast inefficiencies may result if any

level of hysteria results from the existence of a claim requiring investigation.

What to Consider

The directors serve a critical function in overseeing and controlling the communications about the investigation. Good practices here dictate delivering a clear and concise message to necessary audiences when an investigation starts, that a proper team is in place, that a well-defined process will be followed, and that the directors will assess and act on the results once the investigation is complete. Regulators and auditors may require briefings along the way, and best practices would be to engage them “in the tent” from the start so that their needs are known and can be met at the end. Great inefficiencies can result if there are unmet regulator or auditor expectations at the end of an investigation.

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Correspondingly, recent high public consumption of and interest in investigations make decisions about releasing information—when, what, and how to do so—that much more important. Consider “the structured approach” example, as seen in the DOJ’s investigation led by Special Counsel Robert Mueller. Former federal prosecutors and commentators note that Mueller has made frequent use of “speaking indictments,” a term used to describe indictments that go into more detail and provide more facts than what is required by law, to tell the public more about what his investigation believes happened during the 2016 election, to warn others of impending actions or to “telegraph the sheer amount of evidence” in the prosecutors’ possession or both. *See* Morgan Chalfant, *Mueller’s “Speaking Indictments” Offer Clues to Strategy*, THE HILL, Aug. 24, 2018. Also consider what can happen when a company does *not* get ahead of news about an investigation and is *not* in control of its messaging, in the example of Google. *See*

Daisuke Wakabayshi & Kate Conger, *Google Workers Fume over Executives’ Payouts after Sexual Harassment Claims*, N.Y. TIMES, Oct. 26, 2018 (reporting that Google paid millions of dollars in exit packages to male executives accused of misconduct, “stayed silent” about the transgressions, and ultimately faced internal pressure from employees for these actions).

What to Ask

The following are basic questions to ask at this stage:

- *Who are the audiences that need to know about the investigation?*
 - Consider personnel, shareholders, regulators, auditors, and the media/public—and keep any disclosures focused and specific, on a need-to-know basis.
- *What input of any of these audiences would help the investigation?*
 - Invite input through focused communications and specific channels.
- *When and with whom should investigation results be shared?*
 - Only at the end—and then only with those needing to know.

Conclusion

Investigations are on the rise, but much can be done to keep them from creating unnecessary business disruption. The people on the team, scope of the investigation, investigative process in place, delivery of results, and surrounding communication channels and content are all critical. These considerations are in the control of the directors leading the investigation. Their quick and decisive decisions in guiding the work of outside counsel and any experts can make a substantial impact in ensuring the completeness, efficiency, and effectiveness of any investigation. ■