

*Chapter III:*  
**Conducting an Internal  
Investigation**

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# Summary

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## **Investigation Lifecycle:**

- Establish the Investigative Plan
  - Define scope
  - Determine goals
  - Identify key personnel
  - Create a timeline
- Initial Background Fact Gathering
- Document Collection/Review
  - Identify custodians
  - Collect potentially relevant documents
  - Implement a review protocol
- Conduct Interviews
  - Determine individuals who are likely to have knowledge of key events, evidence, or other relevant facts
  - Identify whether any employees need individual counsel
  - Review relevant materials in preparation for the interviews
  - Memorialize interviews
- Reporting and Disclosing Investigation Results
  - Identify the audience(s)
  - Determine the best format for reporting information
- Potential Responsive Actions
  - Improvements to corporate compliance policies and/or procedures
  - Potential disciplinary action against any employee(s) who committed misconduct
  - Consider whether to self-report to law enforcement authorities
  - Analyze market disclosure requirements and considerations

## Introduction

Conducting an internal investigation while managing a global crisis can be a daunting task. An internal investigation is often necessitated by a crisis situation, so that a company can get to the bottom of what occurred, stop any ongoing conduct that could make matters worse, identify the appropriate remedial measures, be in a position to answer questions from auditors or other relevant internal or external constituencies, and anticipate and respond to any potentially related government investigations. When multiple jurisdictions are involved, expertise is required in understanding the impact of the various applicable laws on how the investigation should be conducted, including with respect to attorney-client privilege and data privacy rules.

Planning for and conducting internal investigations requires careful consideration and a well-developed strategy tailored to the company, the particular type of suspected or alleged misconduct, the interests of the company, and the likely regulatory and other external and internal expectations. For that reason, no two investigations will be conducted in exactly the same manner. However, there are certain generally applicable principles that are ordinarily considered and followed as best practices when conducting an internal investigation. This chapter sets out the most important components of the investigation lifecycle and describes the fundamental principles of conducting an effective internal investigation.

## Establishing the Investigative Plan

An internal investigation should begin with the development of an investigative plan. While the form and length of such a plan can vary based on the circumstances, having an investigative plan is an important first step in any internal investigation to establish guidance and parameters for the investigators and other stakeholders who will be overseeing the investigation. The investigative plan will serve as the roadmap throughout the investigation and will often be a “living document” that will be modified once the investigation gets underway. The core components of any investigative plan include defining the investigation’s scope, identifying the goals of the investigation, determining who will be overseeing and conducting the investigation, and setting an anticipated timeline for the investigation.

## *Define the scope*

It is critical to determine the particular scope of an investigation at the outset to ensure the right issues are being investigated and resources are being used effectively, and then to periodically reassess that scope as time passes or in response to specific events. Determining the initial scope of an investigation is sometimes a straightforward exercise, but it can also be more nuanced, particularly when information about the conduct at issue is scant at the initial stages. Nevertheless, endeavoring to establish an investigation's scope from day one will ensure that the investigation does not get off the ground in a rudderless fashion, even if the scope must ultimately be adjusted as new facts emerge.

The scope of the investigation will depend on the investigation's triggering event. For instance, if the investigation is a reaction to media reports, whistleblower complaint, or internal audit finding, the scope will likely be an investigation of the allegations contained therein. If the trigger is a regulatory inquiry, the actual and expected areas of regulatory interest will determine the scope of the investigation, and it is important to discuss the regulator's expectations for the scope of the investigation early on. It may be important to have the initial investigation plan identify the specific allegations to be investigated to avoid wasteful and unnecessary "mission creep." A good rule of thumb is reflected in the Department of Justice's ("DOJ") stated expectation that companies "carry out investigations that are thorough but tailored to the scope of the wrongdoing."<sup>1</sup>

It is often the case that additional issues will surface when investigating facts within the original scope of an investigation. It is important, however, that any new issues are neither reflexively added to the scope of an investigation nor cast aside. Rather, new issues should be duly considered by the investigating team and the individuals overseeing the investigation to determine whether expanding the scope of the investigation is necessary or appropriate or otherwise in the best interests of the company.

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<sup>1</sup> *Frequently Asked Questions: Corporate Cooperation and the Individual Accountability Policy*, Dep't of Just., <https://www.justice.gov/archives/dag/individual-accountability/faq> (last visited Aug. 2, 2018).

## ***Determine the goals***

In addition to determining the scope of the investigation in the investigative plan, it is helpful to identify the goals of the investigation. A goal of almost every investigation is to establish the underlying facts that led to the initiation of the investigation. Beyond that, the goals of an investigation can range from delivering a factual report to the individuals overseeing the investigation, providing cooperation to regulatory authorities, determining whether the company has any legal claims or liabilities, and/or identifying remedial measures for any harm suffered by the company, among other examples. Determining the goals of the investigation will help maintain focus on the intended benefits and purposes of the investigation.

## ***Determine who will be conducting the investigation***

### **Clearly identify who is overseeing the investigation**

It must be made clear whether the investigation is being overseen by company management, the board, a regular committee of the board, or a special committee of disinterested directors. Consciously making this decision at the outset of the investigation is critical to avoiding having to redo investigatory work if it is later determined that the investigation would have been better overseen by another group.

In many cases it is perfectly appropriate for company management or the board as a whole to oversee an investigation. There is value to having an investigation overseen by company management. Company management should have the best understanding of the business and be able to direct counsel to appropriate areas of investigation, while it also has the responsibility for the business and thus can help ensure that the conduct of the investigation does not unduly interfere with the company's operations and is not unduly wasteful. However, if there is a reason to believe that a current member of management or the board is implicated in the subject matter of the investigation, or otherwise has a conflict, it may be advisable for a special committee of the board to be established to oversee an independent investigation. Moreover, there may be other advantages to having an independent investigation, even when there is no clear conflict, including that regulators and other stakeholders may view the investigation's findings as more objective and credible. Setting up such a special committee may require hiring counsel that is separate from the company's regular counsel in order to prevent a potential conflict or appearance

of conflict. Even if a special committee is not established, in no circumstances should an officer, director, or other employee potentially involved in misconduct be responsible for overseeing or conducting an internal investigation. A real or perceived conflict of interest can undermine the integrity of the investigation and affect its credibility in the eyes of the various stakeholders, including regulators, shareholders, employees, and the public.

**Identify who the investigators will be**

In addition to identifying the body overseeing the investigation, it is also important to determine at the outset who the primary investigators will be. Although there may be some flexibility in adding to an investigative team at a later stage, it is often preferable to choose the primary investigators at the initial stages to ensure consistency and efficiency.

***In-house.*** The advantages of using in-house investigators include insider knowledge and perspective of the company, as well as lower costs for conducting the investigation. This is often a viable option when the investigation is sufficiently contained, does not involve high-level executives, there are adequate in-house resources available to investigate the issues fully without it becoming a disproportionate distraction for company personnel, and when regulator interaction is not anticipated. In-house investigators can also be utilized when there is no reason to conduct an independent investigation. In all such cases, the investigation should be overseen by in-house lawyers to ensure the maximum privilege protection, even if in-house counsel utilizes non-lawyers to conduct certain investigatory tasks at their direction.

In larger investigations, or investigations that are particularly significant or time-sensitive, it will often be preferable or necessary to retain outside counsel. It is important to choose outside counsel that has both the resources and expertise to conduct a credible investigation.

Outside counsel will also often have the ability to leverage its resources to complete the investigation in an expeditious manner to prevent the investigation from lingering over the company and draining internal resources for months or even years. Moreover, when there is the possibility of regulator interest, regulators often expect significant investigations to be conducted by outside counsel. Outside counsel also

often deal with regulators across several matters, resulting in productive working relationships and credibility that can be important when advocating on the company's behalf. Further, outside counsel can manage a globally-coordinated response when regulators in multiple jurisdictions are involved. Finally, utilizing outside counsel can be helpful in maintaining privilege because almost all substantive work and communications by outside counsel will be presumptively privileged, while in-house counsel will on occasion be involved in non-legal related issues in their day-to-day roles. Indeed, in some jurisdictions, communications with in-house counsel are not privileged at all.<sup>2</sup>

***Consultants and experts, if necessary.*** Some internal investigations require accounting, forensic, technical, and/or data analysis experts or consultants.<sup>3</sup> To ensure maximum privilege protection, counsel conducting the investigation should hire all experts or consultants.<sup>4</sup> In order to preserve privilege, ensure that expert and consultant engagement letters are drafted to expressly memorialize that the communications to and from the expert/consultant will be made in confidence and for the purpose of obtaining or providing legal advice.<sup>5</sup>

## ***Timeline***

Many factors determine the timing for an investigation, such as the nature of the investigation and the investigation trigger, which may determine how quickly the investigation can or must be conducted. Some investigations can take a matter of days, while others will last a year or longer. Where possible, setting at least tentative timing goals for an investigation's initial stages will help the investigative team stay focused on acting with deliberate speed and set expectations for those overseeing the investigation. Complex investigations may require multi-stage and/or staggered investigative phases, so it is important to identify the highest priority work-streams. If regulatory bodies are already involved, discuss with them their progress and

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<sup>2</sup> For further discussion, see Chapter IV: Preserving Legal Privilege.

<sup>3</sup> Communications with these experts can be covered by attorney-client privilege. Four factors must be met in order to trigger attorney-client protection between the company and these third party experts under U.S. law. See Chapter IV: Preserving Legal Privilege).

<sup>4</sup> *United States v. Kovel*, 296 F.2d 918, 921-22 (2d Cir. 1961). *Kovel* holds that attorney-client privilege extends to communications an attorney has with an outside expert if those communications are made in confidence for the purpose of obtaining legal advice from the lawyer (e.g., consulting an accountant to understand underlying financial documents in order to render a legal opinion). *Id.*

<sup>5</sup> See *id.*

timing expectations. In some cases, statutes of limitations, tolling agreements, auditor needs, or related parallel civil litigation, can also affect timing.

## **Gathering Background Facts**

After establishing an investigative plan, the first stage in an internal investigation is often the gathering of background information from the individuals knowledgeable of the basic underlying facts at issue. Some of these background facts may also be gathered even before the investigative plan is finalized and will be useful in formulating the investigative plan.

This stage involves informal interviews with company personnel who are not necessarily firsthand witnesses to the conduct at issue, but have received enough information to convey to the investigators what is believed to have occurred and/or general knowledge concerning the impacted area. In addition to getting a basic understanding of what should be investigated, this initial stage should be focused on identifying the individuals who are likely to have key information and documents.

For example, if misconduct is believed to have occurred in a particular department of a company, initial background information may be gathered from one or more supervisors in that department who, in addition to having information about the facts to be investigated, will be familiar with the general workings of the relevant group as well as the key relevant employees. As another example, if the investigation concerns a whistleblower report, investigators may first interview the internal audit personnel or other employee who initially received the whistleblower report. In other cases, the background information may be gathered from in-house counsel who have learned the basic facts by being part of the initial response team. In most cases, and wherever possible, the initial background information should not be gathered from witnesses directly implicated in any relevant misconduct, so that investigators can gather as much information as possible before interviewing and evaluating the information provided by key witnesses.



## **Document Preservation, Collection & Review**

The next stage in a typical internal investigation is document preservation, collection, and review.

### ***Identify Document Custodians***

The identification of the initial set of custodians is often done through the background fact gathering described above. It may also be helpful to consult relevant organizational charts and documents relevant to the investigation (if available) to identify relevant custodians. Care frequently should be taken to ensure the custodian group is broad enough to satisfy expectations of regulators, auditors, or other external constituents, as appropriate.

### ***Preservation of Documents***

After identifying all of the custodians who are likely to have relevant documents, a company should take steps to preserve any such documents for the relevant timeframe. The first step for preservation is to identify the types of information that may exist. This often includes electronic data stored on servers, local drives, smartphones, and shared databases, among other sources. Other types of potentially relevant files include paper documents that would not have been captured in the electronic collection and special types of data, such as recorded phone calls or transaction data. Take a broad view at the identification stage, for example, by potentially including documents held by assistants of key individuals, off-site storage locations, or home office computers.

Preservation may be done by issuing written document hold notices to employees and/or the company taking its own steps to preserve centrally stored documents, including electronic data. When available, the latter method is often used to ensure that employees do not inadvertently or intentionally destroy relevant information, as well as in situations where a company does not yet want to reveal to employees that it is conducting an investigation.

Prompt and thorough preservation of documents is critical for any investigation, both to ensure that relevant information can be reviewed and because enforcement authorities and courts take a strong negative view of any carelessness or intentional conduct that leads to the spoliation of evidence.

### ***Collect Potentially Relevant Documents***

The next step is to determine a collection protocol. For electronic data, determine the forensic collection method, including whether it can be done with in-house personnel, such as members of the company's IT department, or if an outside firm will be required. Maintain a record of the chain of custody. Files can be difficult to track back to their original locations afterwards if not done properly from the outset. Additionally, many regulators require certain metadata to be produced and retained. Another consideration is that documents will often need to be searchable by categories like subject, custodian, and email fields once they are included in a review platform.

### ***Review Protocol***

Once documents are collected from electronic and other sources, they should be reviewed pursuant to a written review protocol, particularly if there is a voluminous amount of documents. The protocol should lay out how potentially relevant documents will be initially identified (through the use of electronic keywords or otherwise), how the documents will be categorized by the initial reviewers, and what information will be elevated for further review by more senior investigators.

Another key part of many review protocols is a method for identifying potentially privileged documents. For example, the review protocol may provide a list of relevant internal and external counsel, so that reviewers can identify potentially privileged communications in order to make a determination as to whether certain communications are actually privileged. Not having a rigorous privilege review can lead to the inadvertent production of privileged documents to government authorities and litigation adversaries and, in some cases, even a waiver of privilege. Keep in

mind that some privileges that exist in the U.S. might not apply in foreign countries or in foreign investigations.<sup>6</sup>

### ***Further Logistical Considerations***

There are several additional logistical considerations to keep in mind regarding document collection and review. It is important to consider subsidiaries or related foreign entities of the company. Depending on the scope of the request, and subject to considering potential jurisdictional issues and blocking statute issues, it may be necessary to include appropriate documents from those entities in the collection and review. If many documents are in a foreign language, anticipate a system for efficient document translation, sharing, and review by all interested parties.

As noted, investigators should also consider the impact of any data privacy laws on how documents are collected, reviewed, and produced. For example, some jurisdictions forbid personal information from being sent out of the jurisdiction absent certain circumstances. This may counsel or even require the review of certain information within the physical jurisdiction. Some jurisdictions do not allow cooperation with foreign authorities and have enacted blocking statutes that limit or bar the production of documents and information for use in foreign litigation. Those blocking statutes, however, usually permit a work-around, such as requesting those materials through the Hague Evidence Convention, but additional time must, accordingly, be factored into the process.<sup>7</sup>

### **Conducting Interviews<sup>8</sup>**

The next stage of an internal investigation is often interviewing fact witnesses. Once the document collection and review process has identified important documents and the key individuals, interviews should be conducted to learn more about the issues being investigated and to understand the salient events and evidence.

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<sup>6</sup> See Chapter IV: Preserving Legal Privilege.

<sup>7</sup> See Chapter V: Data Privacy & Blocking Statutes.

<sup>8</sup> For more information concerning interviews, see Chapter IV: Preserving Legal Privilege and Chapter V: Data Privacy & Blocking Statutes.

## *Representation Issues*

### **Determine if the witness already has individual counsel**

When conducting witness interviews, determine if the witness has hired individual counsel. Representation will impact the way the interview is conducted and could implicate privilege issues when sharing documents with witness counsel. Note that for multi-jurisdictional investigations, employees who are based outside of the U.S. might also have individual counsel from their country of residence.

### **Determine whether individual counsel is needed**

Where the witness does not already have individual counsel, investigators should determine whether individual counsel is advisable. Individual counsel is likely advisable when a conflict of interest exists between the company and the employee.<sup>9</sup> A conflict of interest does not require opposite interests and exists any time there is divergence in the interests of the company as compared to those of the employee. There are several ways that conflicts of interest may arise during the course of an investigation.<sup>10</sup>

Lawyers representing the corporation generally should inform the corporation's employees that they represent the corporation and not individual employees (so-called "*Upjohn*" warnings named after a U.S. Supreme Court decision).<sup>11</sup> The failure to give a warning may create obstacles to sharing the information obtained in the interview, particularly if the witness is left with the impression that company counsel is representing the individual. When giving warnings, lawyers should further inform the employees that the conversation is privileged, but that the privilege belongs to the corporation, which can waive the privilege at its discretion.<sup>12</sup> Such

<sup>9</sup> The Model Rules of Professional Conduct impose limits on an attorney's transactions with an unrepresented witness, including that the attorney should not state or imply that she is disinterested, must correct an unrepresented person's misunderstanding regarding the attorney's role in the matter, and may not provide advice except where the witness has a conflict with the company, that the unrepresented witness should secure counsel. Model Rules of Prof'l Conduct r. 4.3 (Am. Bar Ass'n 2018). Further, where the company's counsel knows or should know that the organization's interests are adverse to the employee's interests, the company's counsel must explain that they represent the company and not that employee. *Id.* at § 1.13(f).

<sup>10</sup> See also Chapter VI: Employee Rights & Privileges.

<sup>11</sup> *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

<sup>12</sup> See Chapter IV: Preserving Legal Privilege.

warnings are helpful in ensuring that privilege is maintained.<sup>13</sup> Interviews should then be properly memorialized to show that the warnings were conveyed.<sup>14</sup>

If the company has determined that a potential interviewee was likely involved in criminal misconduct, there is likely a conflict between the company and the employee, particularly if the company is cooperating with prosecuting authorities. This is true because the employee might want to invoke his or her Fifth Amendment Right not to self-incriminate, while the company has incentive to encourage the employee to speak. Potential criminal misconduct, however, is not required, and conflicts can arise when the employee has any potential civil liability, has engaged in any conduct that could be actionable by the company through disciplinary measures, or any time the individual is under investigation by the company.<sup>15</sup> Finally, conflicts can arise at any time, even once a company has already decided to represent an employee.

### ***Interview Best Practices***

#### **Best practices for preparing an interview outline**

While preparing an interview outline, review documents authored by the witness, collected from the witness, that mention the witness, or that contain subject matter pertinent to the witness (such as internal company policies or documents available company-wide). You may also ask about any communications on which the witness was copied even if he or she was not the sender. You will also wish to incorporate any information learned about the witness through prior interviews.

Consider preparing questions to: (1) learn facts (both to understand what you think you know and what you do not know); (2) identify other potential witnesses; (3) identify other relevant documents; (4) test legal theories; and/or (5) explore

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<sup>13</sup> An employee can prove that an attorney-client relationship was formed by showing that their subjective belief of the formation of an attorney-client relationship was reasonable under the circumstances. *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 339 (4th Cir. 2005), cert. denied, 546 U.S. 1131 (2006). If that employee can show the formation of an attorney-client relationship with company counsel, then the employee will be able to determine whether privilege can be waived, and, in the event of conflict between company and employee, company counsel would need to withdraw from all representation to maintain all confidences. See *id.* at 340; see also Model Rules of Prof'l Conduct r. 1.13(f) (Am. Bar Ass'n 2018).

<sup>14</sup> For more information on note taking see Chapter IV: Preserving Legal Privilege.

<sup>15</sup> See Model Rules of Prof'l Conduct r. 1.7 (Am. Bar Ass'n 2018); see also *Upjohn Co.*, 449 U.S. at 383; *In re Grand Jury Subpoena: Under Seal*, 415 F.3d at 340; *United States v. Keplinger*, 776 F.2d 678, 701 (7th Cir. 1985) (discussing whether company counsel represented employees and implications on privilege).

potential biases of the witness. Be prepared to ask fact witnesses about all important topics, even if just to confirm that the witness knows nothing about some of them.

If the company and individual counsel are engaged in a cooperative relationship, consult with the individual counsel to determine what information might have been learned previously and share documents that will be discussed at the interview ahead of time to ensure a productive interview—just remember to be cognizant of privilege issues. In cross-border matters, also consult with co-counsel in other jurisdictions and individual counsel to determine the most strategic and appropriate approach to the interview.

### **Best practices during and after the interview**

Bring all relevant documents to the interview and, in the case of documents translated from their original language, make sure to have copies of documents in both the original and translated language.

Consider only including attorneys and paralegals in the interview and designating one person to take notes and write an interview memorandum. Limiting attendance also helps witnesses to speak more openly. Always check beforehand whether the interviewee would prefer to conduct the interview in their native language and have an interpreter available.

If the interview will be conducted in multiple languages using an interpreter, be prepared for the interview to take considerably longer and plan accordingly. In some circumstances, if the witness will be bringing an interpreter, you may want to bring your own interpreter to confirm that the translation is accurate. Even if the employee is comfortable conducting the interview in English, an interpreter should be available to confirm any discrepancy in translations that could affect substantive understanding.

A final consideration is to make sure to show witnesses only documents that they would have seen at the time; this will avoid leading witnesses to speculate on matters they were not involved with. For example, if the witness was only included on earlier emails in an email chain, consider redacting the portions the witness would not have seen at the time when showing the document. Similarly, interviewers should

not otherwise educate fact witnesses about important facts and events of which the witness is not otherwise aware.

Interview memos should be prepared to record and summarize the substantive information that was learned from the interview so that the information can be accessed at a later point in time. Be sure to make clear that the memoranda are not verbatim transcripts and include the author's thoughts and mental impressions in order to maintain privilege.<sup>16</sup> The interview memorandum should be finalized shortly after the interview is complete while the events and mental impressions of the writer are still fresh.

## **Reporting: Disclosing the Investigation Results**

### *Format of Reporting*

The company should consider its goals, objectives, and audience when determining whether to deliver the results of the investigation orally, in a written report, or with a presentation. A lengthy written report will provide the company a comprehensive record of the investigation and its methodology and findings, but it can create potential litigation risk in the future and may be an inefficient mechanism for conveying information; a set of PowerPoint slides, however, may convey the most important information and serve as a useful record of the investigation, but it will sacrifice detail. A further alternative is for counsel to make an oral report and to keep a record in its files of what the investigation looked at and found.

### *Audience*

#### **To Management and/or the Board**

Companies should consider early on who will get the results of the investigation and in what format. For a lengthy investigation, senior management or the board may want periodic updates, particularly to the extent it impacts daily business decisions for the company while the investigation is ongoing.<sup>17</sup>

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<sup>16</sup> See Chapter IV: Preserving Legal Privilege.

<sup>17</sup> For more information on privilege issues when the client is the company as compared to a particular committee, see Chapter IV: Preserving Legal Privilege.

## To Regulators

When companies are faced with a regulatory investigation, they often choose to cooperate with the regulators. In the course of such cooperation, the results of the investigation will likely be shared with the relevant regulators through several formats and over a period of time. This can include any combination of document productions, proffers, presentations, and making witnesses available for interviews. The goal of presentations is to demonstrate the company's commitment to cooperation, by assisting the regulators in their own investigations, while at the same ensuring that all relevant information is provided and considered before any regulatory action is taken.

### CASE STUDY: HERRERA

Internal and external lawyers should carefully consider their approach when conducting internal investigations, particularly when providing downloads to the government of material that may be privileged or subject to work product protection. In *SEC v. Herrera*, an oral download of external counsel's interview notes to the Securities and Exchange Commission ("SEC" or "Commission") was considered to have waived protection from disclosure under the attorney work product doctrine, and the law firm that presented the proffer was ordered to disclose the notes that were orally downloaded.<sup>18</sup>

## Privilege Waiver

It is occasionally in a company's interest to disclose the results of its investigation either to the authorities, to the broader public, or to some narrower external constituency such as auditors or underwriters in a public offering. During the course of disclosing investigation results to authorities or external constituencies, there will likely be considerations regarding privilege waiver. With respect to governmental authorities, in theory, failure to waive privilege should not impact cooperation credit, but in practice the question is more nuanced.

Relevant information collected during the investigation is expected to be disclosed by a company in a cooperative relationship with the government. The failure to

<sup>18</sup> *SEC v. Herrera*, 324 F.R.D. 258, 264-67 (S.D. Fla. 2017).



disclose relevant information can impact the outcome of the case.<sup>19</sup> For this reason, the decision to participate in any joint defense agreement with an individual or other company should be carefully considered, and any such agreement should be carefully crafted to provide flexibility for the company. While joint defense agreements themselves do not impact eligibility for cooperation credit, such an agreement could limit the company's ability to seek maximum cooperation credit if a situation arises where the company is prevented from producing privileged material favorable to it.<sup>20</sup> One question the company might carefully consider is whether to enter into a joint defense agreement with counsel for one of its executives or employees. While such an agreement might facilitate the transfer of information and enhance the company's ability to make accurate and fair findings, it could also constrain the company's ability to share information obtained from the individual with the government, unless the agreement is carefully drafted.

If the company decides to provide the results of its investigation to the government, it should be mindful of the impact such cooperation could have on the company's ability to invoke privilege and withhold such information in subsequent enforcement actions or civil litigation. In a cooperative posture with the government, the company can suggest methods of providing such documents that would prevent them from being discoverable in a later action. An example of such a strategy would be to confirm any information is grand jury material under Fed. R. Crim. P. 6(e) (so they are exempt from production) or to enter into a non-disclosure agreement.<sup>21</sup>

Care should also be taken when sharing information about an investigation with the broader public, auditors, or underwriters in a public offering. Any time materials that would otherwise be protected by attorney-client privilege are voluntarily shared with a third party, the privilege is put at risk as to that communication and other communications of the same subject.<sup>22</sup> Documents provided to underwriters'

<sup>19</sup> For example, when using an advice of counsel defense, if an argument is being made that employees acted in good faith, showing communications where employees sought advice of in-house counsel may be crucial to a company's defense.

<sup>20</sup> Dep't of Just., *U.S. Attorneys' Manual* § 9 28.730 (Nov. 1997) ("USAM").

<sup>21</sup> See also Chapter IV: Preserving Legal Privilege; see Order, *SEC v. Bank of Am. Corp.*, No. 09 Civ. 6829 (S.D.N.Y. Oct. 14, 2009), ECF No. 33 (finding that under Rule 502(d) of the Federal Rules of Evidence, which empowers a court to determine the scope of privilege waiver for documents produced in that court, Bank of America could waive attorney-client and work-product privileges with regard to certain categories of information for the government and related state and federal inquiries without waiving those protections for other information that might be sought in related private lawsuits).

<sup>22</sup> See, e.g., *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981) ("[I]t has been widely held that voluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege as to all other such communications on the same subject." (collecting cases)).

counsel or to another party in a transaction, for example as part of due diligence, may be considered to have been disclosed to third parties, regardless of the type of confidentiality agreement in place or sharing necessity based on due diligence obligations, and therefore constitute a waiver of attorney-client privilege.<sup>23</sup>

Likewise, disclosure to independent auditors is considered a waiver of attorney-client privilege in many jurisdictions. One potential solution, particularly where the auditors require certain information about an internal investigation to render an opinion, is to provide the necessary information to auditors by providing documents that are covered by work product privilege. The work product privilege, which prevents discovery of materials prepared by a party, its counsel, or other representatives in anticipation of litigation, is not automatically waived by any disclosure to a third party.<sup>24</sup> Instead, privilege is not waived for documents protected by work product privilege unless they are disclosed or risk being disclosed to an adversary.<sup>25</sup> A majority of courts have held that disclosing work product to independent auditors does not constitute a waiver because the independent auditor is not considered an adversary. This determination, however, must be made on a case-by-case basis, taking into consideration the information conveyed to auditors, the manner by which that information is conveyed, and the relevant privileges that apply to the documents at issue, as well as the case law in the relevant jurisdictions.<sup>26</sup>

## Potential Responsive Actions

### *Remediation*

In concluding an investigation, management, the board, the auditors, shareholders, and/or regulators will inquire as to steps the company has taken, and will continue to take, to remediate the cause of the misconduct. The DOJ in particular has taken a standard approach to evaluating the sufficiency of a company's corporate

<sup>23</sup> See *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982) ("Federal securities laws put a price of disclosure upon access to interstate capital markets. Once materials are utilized in that disclosure, they become representations to third parties by the corporation. The fact that they were originally compiled by attorneys is irrelevant because they are serving a purpose other than the seeking and rendering of legal advice.").

<sup>24</sup> See Fed. R. Civ. P. 26(b)(3); see also Chapter IV: Preserving Legal Privilege.

<sup>25</sup> See, e.g., *In re Steinhardt Partners L.P.*, 9 F. 3d 230, 235 (2d Cir. 1993); *Brown v. NCL (Bahamas), Ltd.*, 155 F. Supp. 3d 1335, 1339 (S.D. Fl. 2015); *Curto v. Med. World Commc'ns, Inc.*, 783 F. Supp. 2d 373, 380 (E.D.N.Y. 2011).

<sup>26</sup> For more information on formulating a disclosure strategy for auditors, see Elizabeth (Lisa) Vicens and Daniel Queen, *Audits and Adversaries: Making Disclosures to Your Auditors Without Waiving Your Privilege*, Cleary Gottlieb (May 1, 2017), [https://www.clearymawatch.com/2017/05/audits-adversaries-making-disclosures-auditors-without-waiving-privilege/#\\_edn4](https://www.clearymawatch.com/2017/05/audits-adversaries-making-disclosures-auditors-without-waiving-privilege/#_edn4).

compliance program by asking questions aimed at examining the program's design, the stakeholders at issue, and the resources provided to compliance overall.<sup>27</sup>

For remediation of underlying conduct specifically, there are several important components. First, any immediate ongoing misconduct should be halted, and, if there are bad actors within the company, appropriate action should be taken to prevent any continuing harm to the company and others. Second, a root cause analysis should be conducted to determine the root cause of the misconduct at issue and any systemic issues identified.

Remedial action can also include improving internal controls, policies and procedures, and training. Other measures could include employee discipline or severing relationships with third parties. Note that certain actions like employee discipline can be impacted by foreign labor laws.

For public companies subject to requirements under the Sarbanes-Oxley Act of 2002, deficiencies identified by management (for example, through an internal investigation) or by auditors will also require remediation. Under Section 404 of Sarbanes-Oxley, public companies must attest to the adequacy of the company's internal controls to prove compliance with the Act. Material weaknesses in a public company's internal controls that exist as of the year-end assessment date must be disclosed to the public. If such deficiencies are identified and remediated prior to that date, the company may be able to limit the public disclosure necessary, incentivizing a proactive approach to remediation.

A public company's board of directors is also required to be informed of matters that could impact the company's compliance with the law, which means that the directors must ensure the company is adequately handling risk.<sup>28</sup> These responsibilities are typically satisfied with a well-designed and administered compliance system, such that any material compliance issues appropriately make their way to management. In the event that an internal investigation highlights a deficiency in the compliance system or risk management, the board must remedy the area of concern in a timely

<sup>27</sup> See *Evaluation of Corporate Compliance Programs*, Dep't of Justice, Crim. Div., Fraud Section, <https://www.justice.gov/criminal-fraud/page/file/937501/download>; see also USAM § 9-28.

<sup>28</sup> See *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996) (finding that corporate directors' fiduciary duties to a company requires adopting and maintaining compliance programs that can adequately detect corporate wrongdoing and properly elevate those issues to the company's management and board of directors).

manner in order to protect the board's decisions from potential liability in a shareholder derivative suit if the company suffers losses due to compliance violations.<sup>29</sup>

### *Self-reporting*

Although there is no general rule that a company must disclose employee misconduct, disclosure can be triggered by other reporting obligations, or a company can choose to voluntarily self-report to regulators. Regulated entities, such as reporting companies, might have their own disclosure obligations and should therefore ensure that the proper information is disclosed accordingly.

Voluntarily self-reporting can lead to reduced penalties through cooperation credit and gives the corporation the opportunity to exercise some control of how and when the information is first disclosed. However, voluntary self-disclosure also has risks, including creating regulator interest when there is none to begin with, prolonged cooperation obligations, and increased government scrutiny. Self-reporting decisions should be formulated in consultation with counsel.

### *Market Disclosure*

Disclosure advice is frequently jurisdiction and fact specific, and beyond the scope of this Handbook. For disclosure advice, companies are usually well-advised to consult their regular disclosure counsel. Nonetheless, a few considerations are in order.

In cases of public companies, reporting obligations may trigger the disclosure of an internal investigation, but typically discovering corporate misconduct through an internal investigation, without being part of a larger trend, does not itself require public disclosure. For example, the Securities Exchange Act of 1934 generally requires that companies not make materially misleading statements. Under SEC regulation S-K Item 103, companies are required to disclose "Legal Proceedings," an obligation that is triggered when "the regulatory investigation matures to the point where litigation is apparent and substantially certain to occur," meaning that even a notification to the company that it is under investigation is not in itself necessarily

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<sup>29</sup> *Id.*; see also *Stone v. Ritter*, 911 A.2d 362, 372 (Del. 2006) (finding that director liability exists where there is "sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists.").

sufficient to trigger the obligation.<sup>30</sup> However, the company is required to disclose known trends or uncertainties that might have, or could be reasonably expected to have, a material unfavorable impact on the company's business, which includes patterns related to corporate misconduct learned through an internal investigation.<sup>31</sup> The determination of whether to disclose the results of an investigation will, in any event, require a careful analysis. Even if a determination is made that affirmative disclosure is not required, a company should nonetheless consider whether such disclosure might still be in its best interest.

### ***Other Disclosures***

Consideration should also be given to whether and to what degree information from the investigation requires disclosures to other external constituencies. For example, disclosure requirements could arise under Section 10A of the Securities Exchange Act of 1934, which outlines the required steps auditors must take when an illegal act has been discovered, and states that if the issue has not been remediated by the time the auditor is required to report the issue to the company's board of directors, then the company must self-report to the SEC within one business day. Otherwise, the auditor must report the issue to the SEC. Other external constituency disclosures to consider are underwriters, which might be a required part of due diligence, merger or transaction counterparties, or lenders.

### **Cross-Border Considerations**

Cross-border investigations add additional layers of complexity to a process that already consists of many moving parts. The most important element of having an effective global strategy is communication, including frequent and efficient communication with the investigation team, those overseeing the investigation, local experts, regulators, and other stakeholders.

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<sup>30</sup> See, e.g., *Richman v. Goldman Sachs Grp. Inc.*, 868 F. Supp. 2d 261, 274-75 (S.D.N.Y. 2012).

<sup>31</sup> 17 C.F.R. § 229.303(a)(3)(ii) (2018).

### CROSS-BORDER CONSIDERATIONS

- Consider the laws in all jurisdictions in which the company is located, all jurisdictions in which alleged misconduct took place, and all jurisdictions in which government authorities are conducting investigations that might impact strategy and decision making.
- Engage in open communication across multiple parties to manage expectations and anticipate any issues, including with:
  - Local counsel, teams conducting the investigation in different jurisdictions, and other teams working on related investigations, in order to ensure the investigation is coordinated, operating at the same pace, and relevant information is shared.
  - Regulators in order to understand their expectations and ensure that all investigations are moving, to the extent possible, at approximately the same pace, as well as to inform regulators of any actions taken by a foreign governmental entity that could impact their investigation.

The subject matter of an investigation may necessitate special considerations. Below is a chart that describes some common special considerations for certain types of investigations.

**EXAMPLES OF SPECIAL CONSIDERATIONS****Antitrust:**

- Antitrust enforcement is growing around the world, and multinational companies are increasingly subject to simultaneous review by multiple antitrust regulators.
- Legal standards for what constitutes per se illegal antitrust activity varies significantly between jurisdictions.

**Corruption:**

- The nature of corruption crimes can require reverse engineering payment streams, such as through reviewing money transfer patterns. The time and resources this will take should be taken into consideration when crafting an investigative plan.

**Cybersecurity:**

- When investigating a potential cybersecurity incident or data breach, it is essential to establish a secure communication channel while conducting an investigation until any potential breaches have been identified.

**Sexual Harassment:**

- Applicable laws and policies should be evaluated from federal and state law as well as internal company policies and procedures.
- The investigation should work closely with the human resources department to ensure all relevant complaints are investigated.
- Witness and complainant interviews require sensitivity to potentially emotionally charged circumstances giving rise to the complaint.

**Whistleblower:**

- Due to the nature of the way the information was received, it requires special care and communication.
- It is essential that nothing is done which can be perceived as retaliation against the employee, which includes ensuring that there are no efforts to discover the identity of the whistleblower.<sup>32</sup>

<sup>32</sup> For further discussion, see Chapter VI: Employee Rights and Privileges.

## Conclusion

While for purposes of this summary we have presented the investigation lifecycle in a linear fashion, in most cases, particularly in larger investigations, the investigative steps can overlap and cycle back several times before the investigation is completed. For example, an initial round of interviews may lead to identifying new potentially relevant documents and relevant interviewees, leading to a new round of document review and interviews, and so on. Similarly, a follow-on government request after an initial disclosure will often lead to another round (or more) of document review and interviews. Whatever the final scope and outcome of an investigation, taking a deliberative and methodical approach along the lines above will ultimately inure to the company's benefit and help achieve the objectives of an investigation.