

A Successful Internal Investigation

situation

Choose your poison. A whistle-blower complaint is lodged against your company; the Securities and Exchange Commission (SEC) has called to say it plans to investigate a recent restatement of earnings; or your general counsel receives a derivative demand letter. The charges could be serious, but at this point you don't know.

in-house counsel challenge

An internal investigation is obviously in order. Key to its success is the credibility of the investigative committee and process. Any potential conflicts of interest must be identified and resolved at the outset. If executed properly, the regulators and the courts will view the investigation and the company in a positive light.

approach adopted

The decisions you make during the first 20 days of the investigation will determine your likelihood of future success. Act quickly, because a measured but swift response will positively impact how the SEC or the Department of Justice (DOJ) perceives the investigation, and perceptions matter. A delay will cast a negative light.

A committee of independent directors will often manage the investigation, though some investigations can be managed by in-house counsel depending on the seriousness and nature of the allegations. Be sure the committee chooses the lead investigator carefully. The best choice is often special counsel for the committee so you have the benefit of the attorney-client privilege to control the flow of information as you assess the problem. If it's an SEC issue, perhaps over a restatement of earnings, you could choose your outside corporate securities counsel, but be wary if their legal services are somehow implicated in the investigative issues as the perception and reality of independence in your investigative process may be critical. If you have such concerns, you should consider hiring a new law firm strictly for the investigation.

How will regulators view this decision? Was the corporate securities lawyer involved in the circumstances leading to the investigation? If so, he may be viewed by regulators as wanting to protect his law firm. In this case, retaining a new firm might be a better choice. Put a stamp of trustworthiness on the investigation. Be careful of perceptions as the company can be viewed as investigating itself.

Consider the scope of the investigation. What items are you investigating? And what authority will the investigative committee have? Can it litigate, settle or does it simply report its findings to the board? In most cases, it is best if the committee itself has authority to resolve the problem.

Scrutinize committee members. For example, does anyone have a personal relationship with an individual being investigated? Perhaps they're both on the board of directors at a country club. How much time do they spend

implementation steps

- Respond as quickly as possible. Delays cast a negative light.
- Determine if independence is important and act to protect that attribute.
- Consider hiring new outside counsel as the lead investigator.
- Give the investigative committee the authority to resolve the issue itself.
- Evaluate your data preservation requirements.
- Carefully define the scope and control the investigative process.
- If possible, allow your representative counsel to work proactively with regulators.

together? Investigate now, because if litigation follows and the court decides a committee member was not truly independent, the committee's findings will be subject to additional scrutiny and may not be accepted.

Evaluate your data preservation requirements and get control of the information that might be relevant. Immediately take steps to preserve evidence and build a chain of custody. If prudent, copy laptops. Disable rotating backup tapes. Both regulators and the courts will cast a critical eye on this effort.

In the past, the government usually let the committee conduct its investigation first. Now, with government authorities under increased pressure, you may see the SEC or DOJ conducting their investigation(s) simultaneous to yours.

Determine at the outset whether or not to allow your representative counsel to work proactively with regulators. If you decide not to, understand that you could lose the perception of credibility.

measuring success

At the end of the day, you have to be able to explain why you made the decisions you made. You know you succeeded if you organized a response that is viewed as trustworthy, there was a sufficient level of inquiry and regulators have deemed the evidence as reliable.



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