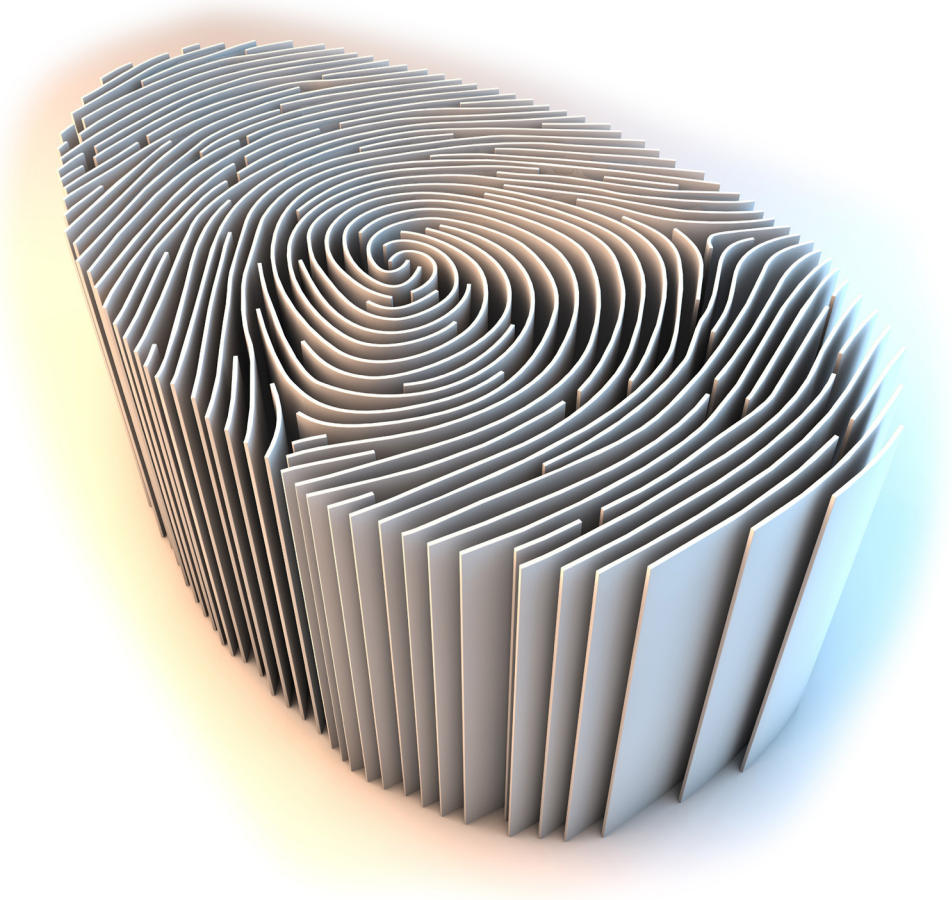
Locke Lord LLP

# Internal Investigations

The Three C's – Confidence. Credibility. Cost.



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Boards of Directors and management at companies of all sizes face a common problem: they need to make decisions that are best for the company and in order to do so they need to know the facts — the pleasant and the unpleasant — that confront them. Most times those facts are readily available from the ordinary flow of information. At other times, however, either the company or the Board must investigate in order to understand the facts needed to move forward.

These investigations can be for relatively small issues, such as a minor localized employee theft or an interpersonal dispute, or for much more significant issues, such as suspected criminal activity by management; or a demand for information by a government agency that tells the company it is investigating potential wrongdoing or of some indications which may require disclosure. No matter where on the spectrum the issue lies, however, effective internal investigations share certain traits.

## THE THREE C'S — CONFIDENCE, CREDIBILITY AND COST

Think of an investigator as being charged with describing a field completely covered with 100 stones. How many stones do you need to look under to describe the field accurately? Certainly more than one stone needs to be removed in almost every case, but almost never will you need to "look under every last rock." How many figurative stones are to be turned over may be the subject of some tension, as the business managers think enough has been done and the investigators want to be certain of their findings. This balancing will be dynamic as the process moves forward and will depend on a multitude of factors such as the seriousness of the issues, the company's history of such issues, whether the issues may implicate potential senior management activity, and the risk of public reaction.

With this analogy as a backdrop, all good internal investigations must succeed at the "Three C's."

- *Confidence.* The decision makers — management or the Board — must be confident at the conclusion of the investigation that they have learned the facts well enough to make an appropriate decision.
- *Credibility.* Increasingly, the results of internal investigations must be shared with others – the government, outside auditors, or perhaps a Board committee. The investigation must be constructed in such a way that the results are credible to a stranger to the matter. The company may well want its auditors or the government to accept the results of the company's investigation without conducting a second investigation, and these third parties' first question will often be: Was this company just going through the motions, or did these corporate executives or board members vigorously investigate in good faith so that they could really get to the point where they knew what needed to be done? For the third-party to accept the company's results the answer to the second part of this question must be "yes." To that end, the metrics of the investigation should be closely tracked from beginning to end: what resources were devoted to the investigation; how many interviews were conducted; how many documents were reviewed; the difficulties, if any, posed by the investigation, etc. In any large investigation, the investigators should be able to report that they were given unfettered access to the company personnel and documents in order to pursue any leads that arose.
- *Cost.* Every investigation is more expensive in terms of money, time and distractions than a company would like it to be, most often because it is an unanticipated and unbudgeted cost. Just about every person involved — from management to the employees who need to be interviewed — wants an investigation to end as soon as possible. Balancing the costs with the needs for confidence and credibility can be one of the more delicate tasks for the investigative team.

## WHO CONDUCTS THE INVESTIGATION?

Many investigations can be performed effectively in house. Others require the engagement of outside counsel and forensic accountants or other specialists. Who is to conduct the investigation and to whom they report is one of the first items on the agenda.

*The Importance of Independence.* Generally speaking, the investigator should be "independent." That means different things in different contexts, but always means that the investigative team should not be in a position where their prior relationships with the person(s) under investigation can be said to have had an effect on the outcome. Otherwise, the investigation will lack credibility and management will lack confidence in the results. Independence standards apply to the company personnel supervising or managing the investigation as well as the hands on investigators.

*Attorney-Client Privilege Considerations.* If attorneys conduct the investigation, much of their work can be protected by the attorney-client privilege and work-product doctrine, depending upon the context of the investigation. They can hire consultants, often forensic accountants, to assist them with their work, and the consultants' work will also be protected as attorney work product.

*Employee Interviews.* One key aspect of attorney-conducted interviews is that attorneys are required to give so-call "Upjohn Warnings" (named after a 1981 U.S. Supreme Court case called Upjohn Co. v. United States) to employees at the beginning of each interview, which some people can find intimidating. Those warnings require the attorney to advise the employee about to be interviewed that the attorney represents the company and not the witness and that the attorney is not allowed to give the employee legal advice. Lawyers also advise interviewees that the company alone holds the attorney-client privilege and that the company may disclose what is said in the interview, including to the government — if it deems that to be in the company's best interests. Many practitioners also ask witnesses to keep confidential what is discussed in the interview, but the National Labor Relations Board has recently ruled that employers must have a very good reason for making that request — a reason that goes beyond protecting the integrity of the investigation generally — or run the risk of liability for stifling organizing rights protected by federal labor law. Care must be taken to ensure that the company retains the uncompromised ability to take adverse personnel action consistent with the laws of any relevant jurisdiction.

## SCOPE OF THE INVESTIGATION

Once the investigative team is assembled, the first item that must be discussed is the scope of the investigation. Our years of experience conducting investigations suggest that the outlined scope of the investigation should be slightly broader than the limits of the issue as it is understood at the outset. If an employee is suspected of misusing a corporate credit card during the past six months, for instance, perhaps the initial scope of investigation should include reviewing the past year's charges. The investigator should not go on a fishing expedition but should be mindful that only part of the problem may have become visible.

*Where Are the Facts Going to Come From?* The initial scope decisions should include the preparation of a list of the people who need to be interviewed, and a description of the documents that need to be obtained. If the investigation is going to require the review of emails or electronic documents — which is very often the case — then keywords need to be determined so that computers, servers and databases can

be searched efficiently. To this end, the investigator will need to work closely with the company's Information Technology department, which will often be an invaluable resource. Often one of the biggest challenges is finding relevant emails and electronic files on computer systems that contains hundreds of thousands or millions of emails in a cost-effective manner. Care must also be taken to operate within the relevant laws of implicated jurisdictions.

*The "Document Hold Notice."* Additionally, if the investigation is likely to be associated with future litigation or a government enforcement action, or if misconduct by multiple people is suspected, a "Document Hold Notice" should be issued to those persons likely to possess relevant documents. This notice tells the recipients not to discard any relevant documents and to suspend normal document destruction practices until further notice.

## MINDSET AT THE OUTSET OF AN INVESTIGATION

Every investigator should begin his or her task with an open mind: There might be a big problem or there might be no problem — and either result is acceptable.

The investigators should not go in with pre-conceived notions of the people under investigation. "There is no way she would ever do that" and "We have always thought there was something squirrelly about him" are the types of sentiments often voiced at the beginning of an investigation. The investigators need to keep such statements in context and be careful not to get ahead of themselves. Many surprising facts can emerge from a well-done investigation. The investigation is not being conducted to confirm what "everyone knows" but to ascertain the truth as much as possible.

In addition to keeping an open mind, the investigator should be willing to follow facts to their logical conclusion. Positions which seem plausible at first can disintegrate with only a little follow-up. One good basic question to ask is "What is the legitimate business reason for this arrangement?" Another way of looking at this focus is the classic reporter's formulation:  Who is doing it, What is being done, When did it start, Where is it having an effect, Why is this the way it must be done, and How do you know that the conduct is both legal and consistent with company policy?

## THE NEED FOR SPEED

Investigations cannot be allowed to drag on forever. At the same time, interviews will be necessary and they are best conducted in person and are most effective when the interviewer has reviewed the pertinent documents — such as the interviewee's relevant emails — in advance of the interview. Both of these factors can slow an investigation, especially at the outset. Documents need to be collected, searched and compiled into a useful format. This can take days or weeks depending upon the locations to be searched, any technical issues that arise, and the volume of documents collected.

The company may want at least preliminary answers immediately. Consequently, initial interviews are often conducted before all of the documents have been reviewed, with the understanding that some people may be interviewed again once the documents have been digested and the investigators get the lay of the land. This can be a benefit. Many investigations uncover important facts on a second pass through witnesses who either have their memories refreshed by documents or who now understand that the company is taking the issue seriously and provide more accurate information than in their initial interview.

Another component of any inquiry is whether the investigation is to be followed to a solution or to its ultimate conclusion. Often, the investigators can come to an early determination about the conduct involved, the controls which failed, the corrections that are needed and the sanctions which should be imposed. But in other circumstances there are good reasons to take an investigation to its ultimate conclusion to give assurance of the thoroughness of the undertaking and to reinforce the resulting actions being taken. That decision is one that must be reviewed regularly and often with the client.

## WHEN IN ROME — LANGUAGE BARRIERS AND DATA PROTECTION CONCERNS

Many companies do business internationally, and international internal investigations can present some unique issues.

*"Translation" Issues.* A company's documents may not be in English and the witnesses may not speak English. Both of these issues can be overcome through good translation services, but they must be taken into account in order for the investigation to be efficient and effective. Along the same lines, employees outside of the US may not know quite what to make of the investigators and may find them more intimidating than employees in the US. Obviously care must be taken not to offend employees while conducting the interviews, and investigators travelling overseas need to be aware of the social and cultural norms of the country to which they are traveling. At the same time, it is not unusual for employees to claim that they were not understood due to "cultural differences" when the claimed differences are little more than a smoke screen to hide the bad facts.

*Data Protection and Privacy Issues.* Data protection and privacy concerns can be even more problematic than language differences. Simply because a person is employed by a US company may not mean that the company can look at everything on his or her computer, for example, and certainly does not mean that whatever is found there can be removed from the person's country. The data protection and privacy laws of each involved country need to be considered and obeyed. Some countries, such as France and China, have laws which are markedly different from those in the US when it comes to interviewing employees, reviewing documents and data, and removing investigation-related materials from the country. Consequently, the investigators may need to review all data in-country, which can add to the expense of the investigation. Foregoing that review due to the expense, however, might well compromise the credibility of the investigation and the confidence the company can have in its results.

*Attorney-Client Privilege and Foreign Investigations.* In many cases, an investigator will need to rely on non-lawyer professionals in foreign countries, such as forensic auditors, computer forensic specialists, and investigators. Be aware that the attorney-client privilege may not extend to them. In other countries, the privilege is not accorded confidential status, which means that even things determined under the privilege in the US may not be respected as privileged or even confidential abroad. Whether the privilege may be waived will be country-specific and also depends on the work being done by the third-party professional, which means that a company needs to examine this issue closely at the outset of an investigation.

*There are Other Country Specific Issues.* In the UK, for instance, auditors and accountants may have an obligation to report the alleged misconduct to the government without notifying the company that they are doing so. These concerns apply irrespective of the location of the lawyers and must be considered whenever foreign consultants or lawyers are engaged to assist.

## SHOULD THEY STAY OR SHOULD THEY GO? — EMPLOYEE DISCIPLINE CONSIDERATIONS

Assuming the company finds some misconduct, it will be faced with the question of discipline. The investigators should not be deciding what level of discipline should be imposed — that is a question for the company. The following are a few factors that a company should consider, however:

- *Nature of the Misconduct.* Was the nature of the misconduct "Old Testament" bad conduct such that everyone would know it was wrong? Or was it the kind of misconduct in a regulated industry that requires a team of lawyers three hours to explain?
- *Effect on the Investigation.* How would the discipline (including dismissal) affect the rest of the investigation? For example, if an employee is dismissed during an investigation, the company loses access to a potentially valuable source of information. On the other hand, certain information may warrant immediate termination.
- *Employee Morale.* How would certain discipline affect employee morale? Is it fair and well thought out?
- *Consistency with Prior Disciplinary Actions.* Many companies today have made their policies "zero tolerance" when it comes to certain conduct, while others have established a "precedent" by their handling of similar matters. Whether the conduct is being treated differently from the way that company policy or precedent would dictate must be taken into consideration.
- *Reporting to the Government.* Is this case going to be referred to the government (or is the government already involved)? If so, the company needs to consider that the government will frequently expound upon the need to fire all wrong doers. The company needs to balance this consideration, however, with not unnecessarily "throwing employees under the bus," especially since that approach may not be in the company's best interests. Importantly, that approach may not generate the good will from the government that the company might hope to engender. There is no guarantee that sacrificing an employee or two will appease the government; it is just as likely to act as blood in the water and convince the government that there is a serious case worth pursuing.

## THE FINAL PRODUCT – WRITTEN REPORTS AND PRIVILEGE WAIVERS

In the end, the investigators need to report their factual findings to management or the Board. This report does not have to be in writing, but can be verbal, or made with the benefit of an outline or PowerPoint presentation. Again, the circumstances surrounding the investigation need to be considered when deciding the form of the report. For example, there will likely be no need for attorneys to draft a lengthy and expensive final report if an investigation ended with a relatively simply and straight-forward answer.

Additionally, a crucial consideration surrounding an investigation's results is that, if the investigation was conducted by counsel, then care must be taken to preserve the attorney-client privilege until such time as the company determines it is in the company's best interest to waive the privilege. All persons privy to the details of the investigation, its findings, and/or a final report need to know that:

- If the company shares the report with its outside auditors, the privilege may be lost.
- If the company shares the report with counsel for individual executives and directors the privilege may also be lost unless appropriate safeguards are in place.

- If the company shares the report with business partners or prospective buyers, the privilege may be maintained under state law in certain circumstances but disclosure to any third party will probably be deemed a waiver under federal law.
- If the company shares the report with the government, the privilege is likely lost, since there is no "selective waiver" that allows companies to share information with the government while protecting it as privileged from the rest of the world.

Maintaining the privilege is also paramount in most cases (unless there is a good reason to break the privilege) because if there is concern about lawsuits against the company, plaintiffs' counsel will be searching for reasons why the report is not privileged and must be produced to them. This is true even among corporate constituencies where the sharing of reports prepared for a Board committee might not be shared with the company's general counsel without endangering the privilege.

## SELF-REPORTING TO THE GOVERNMENT AND THE EFFECTS OF DODD-FRANK

If the misconduct being investigated involves fraud or some other criminal behavior, or if the senior management of a public company is involved, or the company may need to restate its prior financial statements, then the company will need to consider making a voluntary disclosure to the government.

*When to Approach the Government.* There are competing factors regarding when to self-disclose. The first consideration is whether the company is bound by some prior obligation to make a disclosure, as may arise from industry "voluntary disclosure" commitments, prior consent decrees or deferred prosecution agreements. Even without those obligations, however, companies must consider the risks and benefits of self-disclosure. On one hand, the government urges companies to make a voluntary disclosure as soon they become aware of the potential wrongdoing. Most companies feel more comfortable, however, conducting at least some investigation before contacting the government so that at a minimum they have some idea what they are talking about when they make the disclosure and are not mistakenly "blowing the whistle" on themselves based on bad internal information. In the end, if a company is inclined to make a voluntary disclosure, it should do so as soon as it is comfortable.

*Whistleblower Considerations.* When deciding when or if to self-disclose to the government, a company needs to consider that it will likely receive a lesser benefit from a disclosure if the government already knows about the issue and just has not advised the company of it yet. The recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Law has made it more likely that the government will know of the company's problems earlier. Dodd-Frank provides enormous economic incentives for people to "blow the whistle" on their own company by reporting bad conduct to the government. Specifically, whistleblowers (in certain circumstances) are entitled to a percentage of any fine the government ends up collecting as a result of the "tip." Previously, whistle-blowers were primarily ex-employees and ex-spouses. As a result of Dodd-Frank, however, the whistleblowing community has expanded beyond "the two exes" and includes current employees, competitors, and third parties.

*Some Risks to the Government's Carrot and Stick Approach.* The government posits that companies that self-report will be treated better than companies that have their misconduct found out by the government independently. That makes logical sense — and with respect to certain government agencies that is the case. Recent studies of enforcement actions pursuant to the Foreign Corrupt Practices Act, however, have

found no difference in the level of penalty between companies that voluntarily disclosed their issues and those that did not. Therefore, companies need to be aware that the government's "carrot" may not be as appetizing as it seems.

## PUBLICITY

From time to time, word of the investigation may become public – well before the company may be prepared for public discussion. Care must be taken so if publicity occurs, the company is prepared to respond in a way that reassures its employees and the public without appearing to be in a "panic" mode. Companies often bring in crisis counselors to assist them in managing disclosure, public relations fallout and internal ramifications on management and company morale. Unless those consultants are specifically retained and brought under the attorney work product umbrella, however, their knowledge of the underlying problem — and their communications with the investigative team — may not be privileged.

## CAPABILITIES OF LOCKE LORD

At Locke Lord LLP, we have partners in the U.S. and UK, including former federal and state prosecutors, who have spent decades assisting companies with their most sensitive investigative needs around the world. We have conducted internal investigations for clients involving subjects as diverse as Foreign Corrupt Practices Act violations, UK Bribery Act violations, as well as antitrust, executive misconduct, corporate theft, executive compensation, defense contracting, accounting, process and control deficiencies, employee dishonesty, health care, and other regulatory matters. Our lawyers know how to work with a company's in-house counsel and auditors and have experience overseeing and working with forensic accountants and technologists. We also advise clients with respect to post-investigation remedial measures, policies and protocols.

Members of the group have extensive experience in conducting internal investigations and in representing clients in investigations brought by federal, state, and local authorities, including the Department of Justice, the Securities & Exchange Commission, the Commodities Futures Trading Commission, the Federal Trade Commission, the Department of Defense, the Department of State, and the U.S. Postal Inspection Service, as well as the Serious Fraud Office and European regulatory authorities. Our experience includes working with leading crisis counselors and PR advisors, managing the privilege issues and crafting an overall strategy for dealing with the legal and well as non-legal implications of the investigation.

Our lawyers have experience with investigations in many jurisdictions throughout the world including most countries in Europe, North America, South America, Africa, the Caribbean and the Far East. We have also established close relationships with leading law firms in those jurisdictions as well as the leading accounting firms in forensic investigations around the world.

We also pride ourselves on our deep group of experienced privacy and data-protection attorneys who can help decipher and comply with the laws of any country in the world.

***Please contact the Locke Lord lawyer with whom you work, or any of the following main contacts:***

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