Common Sense and Internal Investigations

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In-House counsel and corporate compliance officers dodge bullets everyday as they stare down the barrels of aggressive prosecutors, regulators, civil litigants, whistleblowers, disgruntled employees and shareholders prodded by trial attorneys to file derivative suits at the drop of a hat. In the face of all of these risks, internal investigations have become commonplace and a standard defensive tactic for a company to regain some leverage, learn the scope of a potential problem and then develop a plan for resolving a particular issue.

All too often, companies follow the rote formula developed in the Sarbanes-Oxley era of the early 2000s. Those same formulas are being applied in the Foreign Corrupt Practices Act, and in more discrete global anti-corruption, money laundering, export compliance and antitrust enforcement matters. This model, while very helpful in some situations, can set up potential problems for a company. A slavish devotion to so-called “independent special counsels” can sometimes lead to erratic, costly, and less than helpful internal inquiries, which may expose a company to significant risks, depending on how the investigation was conducted.

There is an ‘art” to conducting internal investigations. An internal investigation requires a goal, a strategy and careful design. Too many practitioners develop a checklist, go down the checklist, and follow it without regard to the specific situation and client needs.

Do You Need an Internal Investigation?

Use internal investigations for appropriate matters: An internal investigation should not be used for every run-of-the-mill allegation of misconduct. It should be reserved for those cases that warrant it. Companies already have the ability to conduct internal inquiries on their own.

An internal investigation should be used when a combination of factors may be present: (1) the allegations raise significant potential liability and reflect serious misconduct; (2) high level management and/or board members may be involved or have been aware of the conduct and failed to act; (3) an independent investigation will be needed to deal with the government prosecutors or regulators, and/or shareholders interested in the matter; (4) an external auditor has raised suspicions of misconduct; (5) a parallel inquiry is being conducted by regulators or prosecutors; and (6) media and/or public attention on an issue may have a serious negative impact on the company. Many whistleblower complaints and other more rudimentary claims can be handled outside the internal investigation process.

Develop an Overall Strategy

Too often, an internal investigation becomes the strategy and goal itself. A more practical approach is needed which requires strategic thinking – what are the overall risks, the worst-case scenario and the

best-case scenario? How likely is each scenario? Assuming a result of the investigation, there are ways to conduct it knowing how it needs to be used. No company should ever blindly authorize an investigation and wait for the results to determine what steps may be needed. A proactive approach is more appropriate – weigh the likely outcomes, the remediation alternatives, and develop a strategy for dealing with the government, the public and shareholders.

Investigative Independence: Let's be Practical

The standard model for "independent special counsel" – an independent committee of Board members supervising outside counsel is designed to maximize the "independence" of the inquiry so that the results of any investigation will be viewed as thorough and free from any potential bias. According to the concern, established corporate counsel may have an incentive to conduct an inquiry that "pulls punches" out of favoritism from the company. But are there alternatives? Of course there are.

These days, most Fortune 500 companies, have a laundry list of firms they turn to on specific matters. (One in-house counsel recently told me they use 400 outside law firms). What matters more is not whether the company turns to a firm it has not used before to conduct the inquiry, but who the company engages to supervise and conduct the inquiry. Once that team is selected, and a counsel is chosen who has a reputation for conducting fair and impartial, as well as aggressive inquiries, that team can be kept separate from any established counsel who may have a relationship with the company. And in fact, the independence can be maintained through the standard "Chinese wall" or other appropriate safeguards. It is important to keep in mind that any experienced counsel wants to maintain his or her integrity and his or her reputation for conducting through, fair and "let the chips fall where they may" inquiries. To think that somehow a respected investigative counsel is going to somehow pull punches is unrealistic. So long as transparency is followed and fairness is pursued, these issues can be overcome.

Keep the investigation as narrow as possible: Assuming that an independent board committee has retained special investigative counsel, the focus of the investigation should be crafted as narrowly as possible to serve the company and shareholder's interests. Why? Two reasons: (1) You do not want to have special counsel investigating in areas where they do not need to investigate; and (2) if the scope needs to be expanded at a later point, the independent committee can do so. You should start the inquiry with a focus and only adjust that focus if appropriate.

Reporting to the Board and/or Special Committee

Oral reports should be made by counsel: In order to avoid possible confusion, credibility issues and possible unfairness to officers and employees, counsel should avoid any written memoranda during an investigation. Written interim reports are only an invitation to disaster. Preliminary or interim findings should always be avoided. A written report may be prepared at the conclusion of the investigation but the handling of that report must be carefully analyzed depending on the circumstances. In almost all investigations, it is fair to assume that the written investigation report will be disclosed to the government and possibly other interested parties. For that reason, it has to be carefully crafted and protected.

If the Government is Involved, Develop a Working Relationship

Regularly consult with the government and regulators: In significant investigations where government prosecutors and /or regulators are aware of the matter, the company and outside counsel should regularly consult with the government prosecutors and regulators to ensure buy-in and acceptance of the overall pace and scope of the internal investigation. Government prosecutors and regulators are the critical audience in many cases, and they need to be informed regularly throughout the process as to the overall progress. That does not mean that counsel describes in painstaking detail the ins and outs of an investigation; rather, the strategic disclosure of information is critical in order to gain the support of the government.

Document Review and Witness Interviews

The internal investigation should carefully assemble as much information as quickly as possible. To accomplish that task, the document universe has to be defined, preserved, and efficiently reviewed. Early interviews of some employees may be needed focused only on documents and responsibilities in order to identify who has relevant documents and who has relevant information. A revised document storage and retention policy should be adopted to facilitate the investigation. The gathering of the relevant documents should include technology experts, and possibly, regular counsel familiar with the company's document system.

To the extent possible, witnesses should not be interviewed until all relevant documents have been gathered and reviewed. Otherwise, it is likely that additional interviews will be needed. No witness ever tells a lawyer everything they know at the initial interview, even if they have been able to review the documents before the interview.

Based on my years of conducting complex criminal investigations and criminal trials, there are several important points for interviewing witnesses. First, it is critical to establish a rapport with the witness. Heavy handed threats and scare tactics never work. Most witnesses know (and feel) what is at stake. Second, take your time and let the witness tell his or her story. No witness tells you everything they know — some because they cannot remember and some because they do not trust you.. Third, do not confront the witness by telling them they are a "liar" or other accusatory words. Use as many documents with the witness to narrow their story and boil down the discrepancies. Fourth, after the witness has told his or her version, go back and review the areas where you think they may be untruthful, use documents to narrow the story and ultimately demonstrate to the witness that the story does not make sense. You show them that you know they are being less than candid and why their story makes no sense.

At the beginning of each interview, special counsel needs to make very clear that: (a) special counsel represents the company (or an independent committee); (b) special counsel does not represent the employee or the employee's interests; (c) the interview is protected by attorney-client privilege and the privilege belongs to the company; (d) the company may choose to waive the privilege in the future and disclose all or part of the interview to external auditors, the government or regulators; (e) the employee has rights and responsibilities if they are contacted by regulators or prosecutors and asked to be interviewed. The interview itself, along with these explanations, should be memorialized.

Attorney-Client Privilege, Work Product and Waivers

Before initiating an investigation, counsel need to consider attorney-client privilege and work product issues which inevitably arise. First, an overall practice and procedure for protecting the privilege for the investigation needs to be adopted. Second, no decision on whether to waive the privilege should be made until the investigation is completed and an overall strategy and plan has been adopted. Third, the privilege must be protected when dealing with retained experts and professionals when they are assisting in the investigation.

While many outside counsel and Boards wrestle with the difficult issues of waiving attorney-client privilege and work product protections in order to deal with prosecutors and regulators, they may be spending too much time on an issue which is more form than substance. Prosecutors and regulators do not really care if the information is privileged or not – what they want is one thing – the information itself. With that in mind, how much of an internal investigation is legitimately privileged and how much of it is subject to work product protection? These issues depend on the specific circumstances. Yet, all too often, companies and counsel broadly apply privilege and work product claims on anything and everything that moves without regard to the importance of such information and possible strategies for use or disclosure of such information. Instead, counsel need to focus on what information will the government want and how can it best be packaged, without engaging in the dance or theoretical discussions about waiving privileges.

Document Preservation, Collection and Review: A New, Global World

Special care has to be taken with regard to document preservation, collection and review. In-house counsel, regular outside counsel, and special counsel need to act with care but do not need to be hyper-concerned about every little step that is taken. As special counsel become more familiar with the scope of the investigation and the issues, regular counsel and in-house counsel should play a critical role in making sure that sufficient steps are taken to preserve documents, collect an appropriate scope of documents, and identify, and even interview, some individuals to determine whether or not they may have relevant information. All of this can and should be done quickly, and may be completed before special counsel is ready to proceed and take over. These are critical initial steps with enormous importance to the overall success of the internal investigation.

Two significant pitfalls arise in the early stages of such an investigation: (1) data privacy laws and regulations outside the United States may prevent or hinder collection, dissemination and review of relevant documents; and (2) documents which are brought within the United States may then become subject to subpoena by United States authorities. Both of these concerns are significant and can undermine an investigation if careful attention is not paid to these potential risks. Document collection and review may have to take place in foreign locations in order to avoid running afoul of these restrictions.