

Internal investigations: What you don't know *can* hurt your company

Despite the increasing frequency of high-stakes investigations and prosecutions of business crimes, the catastrophic risk of such an ordeal cannot be protected through insurance. Or can it? Although commercial policies do not exist, valuable forms of proactive “self-insurance” are being implemented by companies interested in managing risks, adding value and “covering their assets.”

Under this preventive insurance analogy, the premiums are relatively low, while the coverage is extremely high. Internal investigations are a critical part of a company's plan for self-protection.

One size does not fit all

What is an internal investigation? It is any effort initiated by a company to gather facts relating to its operations, often in response to a problem or allegations of misconduct. These steps often involve document gathering (both electronic and hard copies) and witness interviews. Over the past decade, public companies have hired law firms to conduct more than 3,000 internal investigations.

Ideally, a company's contingency plan for conducting internal investigations should be a natural extension of its overall compliance program. Rather than an elusive art form, effective corporate compliance is a science — and internal investigations are a key part of the formula. The true measure of a company's commitment to compliance is not just what it “declares,” but more importantly, by what the organization adequately funds, accurately documents, and regularly measures or monitors. Ethical codes of conduct and compliance plans are important declarations or blueprints. But planning for, and conducting, internal investigations is one of the action items that fulfills those promises and builds a culture.

The two most common and dangerous myths surrounding internal investigations are that they are

always expensive and lengthy, and they are only justified or necessary in response to serious events. Thus, the key to effective internal investigation planning is to avoid doing “too little,” starting “too late,” or spending too much.

Sometimes — by sheer necessity — internal investigations need to be expanded and become more complex. Other times, they are easily completed. How far you have to go depends on what you find. The critical first step is the willingness to take a hard look.

Responsible responses to trouble

Overlooking “red flags” of misconduct within your company is like denying the smell of smoke in the middle of the night or ignoring a suspicious new lump in your body. If a “bad apple” is discovered in your midst, will external skeptics or investigators assume your company is a “bad orchard?” Your company may not be held responsible for all unauthorized “bad acts” of employees. However, it will be held accountable for its response to them. The unwill-

The following checklist identifies some practical pointers on how to oversee an internal investigation:

- Start early.
- Identify the seriousness of allegations.
- Cease all detected misconduct.
- Promptly secure relevant documents.
- Assemble a qualified, cost-effective and objective team.
- Establish initial scope, goals and timeline.
- Follow a transparent and credible process.
- Seek evidence and support conclusions through:
 - Document gathering, organization and review.
 - Witness interviews.
- Assess the law and regulations.
- Maintain confidentiality and privileges (avoid waivers).
- Prepare for rumor mill and inquiries (media, regulators, etc.).
- Correct problems and refine training to prevent recurrence.

ingness to respond responsibly causes your company to forfeit two critical opportunities:

- To gain control and minimize damage and costs; and,
- To earn a good corporate citizenship “merit badge.”

To look or not to look: Is there really a choice?

Experience in corporate governance repeatedly has shown that information is power. Unfortunately, most companies learn the hard way that there are no secrets. If misdeeds are occurring, they will eventually be revealed – either by disgruntled employees, scorned competitors, disrespected regulators or simply by accident.

The key to proactive protection is to set up a system in which problems are detected early. This can occur through an anonymous hotline or through regular monitoring or auditing. When a company discovers and corrects its own problems, it speaks volumes about the internal culture and genuine commitment to self-regulate. Using a medical analogy, staying healthy requires regular physical examinations. In between check-ups, when something doesn’t seem right, tests need to be run so the “ailment” can be properly diagnosed. The central question applies equally when seeking to protect the corporate body: How serious is the problem? Once that is answered, treatment can be prescribed.

If the company doesn’t set up procedures for carefully looking internally, an outsider probably will. When problems come to light, every company must be prepared to answer the central questions:

- How could you not have known about, or discovered, these misdeeds?
- What action did you take, *in advance*, to prevent or detect them?

External regulators often do not understand your business. Implementing a responsible response allows you to create a factual record based on documents and interviews. This will help you guide external regulators, regain control, lower risks and keep costs under control.

Internal investigations often prevent external ones

Apart from the damage control and other benefits gained from learning facts earlier, an internal investigation also allows you and your company to earn a positive impression and build credibility by documenting the

process you followed. In other words, the true power and benefits of the investigation are not simply the facts that are revealed – and the better decisions that arise – but the culture that is conveyed. A credible internal investigation demonstrates a company’s willingness to objectively and regularly examine its operations and to respond early to problems. It only makes sense that a



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Terpening have collectively conducted dozens of cost-effective internal investigations, involving highly sensitive matters, for a variety of companies and boards.

After gaining invaluable experience at national law firms for a collective period of more than 20 years, they formed the boutique litigation firm of **Anderson Terpening PLLC**, based in Charlotte. The firm routinely defends individuals and businesses courts in federal and state courts on criminal, regulatory and complex litigation matters, including securities, tax, environmental, health-care and insurance fraud.



corporation that handles its own problems is much less likely to be aggressively scrutinized and harshly punished.

If the process is transparent, and the scope is tailored to the underlying allegations, regulators are less likely to second-guess these efforts and require an expensive and time-consuming “do-over.” In addition, the government often will impose a harsher punishment when they have to “catch the bad actors.” Any factors that confirm good corporate citizenship and positively influence a regulator’s (or prosecutor’s) discretion cannot be ignored.

Conclusion

No compliance program is perfect. Misconduct and crimes can be committed by otherwise good people working in good companies. However, systems can be set up to prevent, detect, respond to and correct problems. Conducting internal investigations in a timely, accurate, credible and transparent manner will yield ample dividends.