ARNOLD & PORTER

The Fifth Annual National Congress on Health Care Compliance

Ten Questions About Internal Investigations

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1. When should a company do an internal Investigation?

2. What should the goals be?

3. Who should do the internal investigation?

4. What should management's role be?

5. What should a company tell employees about the investigation?

6. What should be done about documents?

7. How should interviews be conducted?

8. Do employees need separate counsel?

9. Should the report be disclosed to anyone?

10. How do I avoid going to jail?

1. When should a company do an internal investigation?

Whenever information suggests that there may have been wrongdoing by corporate officers or employees:

- A corporation is liable for acts of its agents within the scope of their employment and intended in part to benefit the corporation

Risks: an internal investigation might prompt government investigation or uncover damaging information

It's usually better to know than not to know

1. When should a company do an internal investigation?

External triggers:

- Government audit
- Qui tam or other lawsuit
- Newspaper
- Search warrant, subpoena or investigative demand

The pharmaceutical industry is a major target of government scrutiny today

1. When should a company do an internal investigation?

Internal triggers:

- Internal audits
- Calls to hotline
- Complaints by employees
  - Treat complaining employees nicely: Prevent a lawsuit or a whistle-blower.

A well-designed compliance program can provide guidance on when to conduct an investigation and how to structure it.

2. What should the goals be?

Find out what happened:

- Learn if there is a problem at all
- Estimate scope of potential liability
- Fulfill fiduciary duty to shareholders
- Deal with wrongdoers
- Fix things so it doesn't happen again
  - Disciplinary Actions
  - New processes and controls, if necessary

2. What should the goals be?

Defend against investigation or litigation:

- Control flow of information to the government
- Keep track of what the government knows
- Present facts in most favorable light
- Protect the investigation under the attorney-client and work-product privileges

2. What should the goals be?

Minimize the potential consequences:

- Avoid shareholder or qui tam litigation
- Cooperation with the government may convince it not to proceed
- Cooperation can minimize sentence under U.S. Sentencing Guidelines
- Avoid suspension or debarment

3. Who should do the internal investigation?

In most cases, investigation should be under the direction of lawyers:

- Preserves the option of asserting privileges to prevent disclosure
- Investigations often involve difficult legal issues

3. Who should do the internal investigation?

Advantages of inside counsel:

- More familiar with the company
- Known to management and employees
- Less likely to disrupt operations
- Cheaper

3. Who should do the internal investigation?

Advantages of outside counsel:

- New and unbiased view of the facts
- Employees may be more willing to share concerns about management
- Likely to have greater experience
- Greater credibility with government
- Facilitates assertion of privileges
  - Dual role of inside counsel: business or legal advice?
- Inside counsel may be witnesses

3. Who should do the internal investigation?

At a minimum, if a company might hire outside counsel to handle this type of matter in litigation – hire them now to do the investigation

Outside and inside counsel should work together

3. Who should do the internal investigation?

Retention of experts may be necessary, but risks compromising the attorney-client privilege:

- Counsel should retain them
- Counsel should direct their activities
- Instruct in how to maintain the privilege
- Must be genuinely necessary to legal advice – not public relations or business advice

4. What should management's role be?

Investigation should be independent of management control to ensure credibility

But it needs management's agreement and support

Written agreement defining scope of engagement

- Should state that retention is for purpose of rendering legal advice and in contemplation of litigation, to protect applicability of privileges

4. What should management's role be?

Management will make ultimate decisions on what steps to take as a result of your findings

BUT

Management may be within the scope of the investigation:

- Don't report to individuals who are potentially involved
- May be preferable to report to the Board of Directors or a special committee

5. What should a company tell employees about the investigation?

If there is a government investigation, employees need to be told about it:

- Avoid damaging rumors and uncertainty
- Advise employees of their rights in case government agents show up at their homes without warning

5. What should a company tell employees about the investigation?

Send a letter or memo (Attachment A is a sample):

- Nature of government investigation and its subject
- Company intends to cooperate
- Agents may try to interview employees
- Employee has right to talk or to refuse to talk
- Company will provide counsel for employees
- Employees should be fully truthful
- Don’t discuss facts with others

6. What should be done about documents?

- Instruct employees to collect and preserve all relevant documents
  - Suspend normal document destruction procedures
- Have a designated, uninvolved employee be responsible for gathering documents
- Review documents before interviews
- Review documents before producing them to the government
  - Remove all privileged documents

6. What should be done about documents?

The problem of computers:

- Employees need to be specifically instructed to check for and produce e-mails
- Ensure retention of electronic documents
- Stop recycling backup tapes that may contain relevant documents

7. How should interviews be conducted?

Begin with “warnings”:

- What you’re investigating
- Interview is for the purpose of rendering legal advice
- You are the company’s lawyers, not the individual’s
  - Why is this necessary?
  - Fairness to employee
  - Avoid possible disqualification of counsel
  - Avoid problems with subsequent decision to disclose
- Privileges can be waived by the company
- Employee should keep interview confidential to preserve privilege

7. How should interviews be conducted?

Prepare an interview memorandum but take steps to make it privileged:

- Don’t do a verbatim transcript; include attorney mental impressions
- Label memorandum as privileged
- Limit access to the memorandum and store in secure location

8. Do employees need separate counsel?

Possible conflicts between company and employees:

- Company's interest is often to cooperate
- Employee's interest is often to obtain immunity by refusing to testify
- Employee may have information inculpating management

8. Do employees need separate counsel?

Usually not when there is no pending government investigation:

- Separate counsel may make it harder to get information
- Separate counsel may make it harder to disclose information you obtain by insisting that interview be subject to joint defense privilege
- If there is no conflict apparent, no need for separate counsel

8. Do employees need separate counsel?

When there is a government investigation, usually better to get separate counsel for *anyone* the government wants to talk to:

- Government is less suspicious of separate counsel
- Employee's rights will be better protected
- Company counsel will be better protected from disqualification or allegations of obstruction
- Affords an opportunity to select counsel who will cooperate with the company
- One lawyer can represent many employees if there are no conflicts

9. Should the report be disclosed to anyone?

Decision is up to the client (management or board)

Delay decision on whether to disclose until after investigation is complete:

- Permits a more informed decision
- Once a company intends to disclose, protection of privileges is much more difficult

9. Should the report be disclosed to anyone?

In most cases company will want to disclose:

- In a regulated industry, can't afford risks of fighting
- Disclosure may have significant benefits
- May be statutory obligations to disclose
  - E.g., 42 U.S.C. § 1320a-7b(a)(3) (retention of federal health care program overpayments)
  - E.g., FDA or SEC may require disclosure of certain matters

9. Should the report be disclosed to anyone?

Voluntary disclosure programs:

- Many agencies have them, formal or informal
  - HHS Inspector General
  - Antitrust Division, SEC
- Provide for some form of leniency for companies that make voluntary disclosures
- Usually enable company to forestall suspension or debarment
- Often require onerous corrective measures
- Agency can use company's disclosure against it or even as a basis for prosecution

9. Should the report be disclosed to anyone?

U.S. Sentencing Guidelines:

- Sentence of a convicted corporation can be reduced if it promptly and before threat of disclosure reported the offense to appropriate authorities and cooperated fully in the investigation (U.S.S.G. § 8C2.5(g)(1))

9. Should the report be disclosed to anyone?

Waiver of privileges:

- Department of Justice is increasingly taking the position that full cooperation requires corporation to waive all privileges and disclose all interview memoranda, etc. (See Attachment B)
- Most courts hold that voluntary production of a report of an internal investigation to the government waives any otherwise applicable privileges, so that the report will have to be produced to plaintiffs in civil litigation

9. Should the report be disclosed to anyone?

Disclosure to third parties:

- Disclosing the results of an investigation to third parties may waive the privilege as against the government
- Don’t disclose to accountants, banks, public relations personnel, etc.
- Don’t disclose even within the company except to those who have a need to know

10. How do I avoid going to jail?

Obstruction of justice: 18 U.S.C. § 1512(b):

"Whoever knowingly . . . engages in misleading conduct towards another person, with intent to . . . influence, delay or prevent the testimony of any person"

can go to jail for up to ten years

Limited exception for "solely…lawful conduct" when the "sole intention" is to encourage truthful testimony

10. How do I avoid going to jail?

Take steps to ensure that relevant documents are preserved and produced if requested

Obstruction of justice can occur even before a subpoena is served

10. How do I avoid going to jail?

Be careful in talking to employees:

- Don’t suggest that they not cooperate with the government
- Don’t tell them what to say (except to tell the truth)
- Don’t mislead them as to the facts
- Follow a script or put it in writing

10. How do I avoid going to jail?

What to do about the whistle-blower employee?

- Discipline or termination can look like retaliation
- Rewards can look like a payoff or bribe
- Follow normal procedures

10. How do I avoid going to jail?

What to do about the guilty employee?

- Government expects you to fire
- Government expects you not to support with legal fees or joint defense. See Attachment B

Even if the person involved is part of senior management

ATTACHMENTS

A. Sample letter to employees

B. Department of Justice Principles of Federal Prosecution for Corporations