



ARNOLD & PORTER

## 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

## 1. When should a company do an internal investigation?

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

- ◆ But: Federal charging and sentencing guidelines for corporations reward remedial action.

*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
- ◆ Competitors' complaints

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
- ◆ Deal with wrongdoers
- ◆ Fix things so it doesn't happen again
  - Disciplinary Actions
  - New processes and controls, if necessary
  - Document company's investigation and response



## 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:

- ◆ Shareholder or qui tam litigation
- ◆ Criminal prosecution
- ◆ 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
  - Back up network servers
  - Don't alter or add documents either
- ◆ 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 and other electronic documents
- ◆ 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
- ◆ Privileges can be waived by the company
  - Why is this necessary?
  - Fairness to employee
  - Avoid possible disqualification of counsel
  - Avoid problems with subsequent decision to disclose
- ◆ 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 inculcating management



## 8. Do employees need separate counsel?

Usually not when there is no pending government investigation and no conflict is apparent:

- ◆ 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

## 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 many 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

*Exception for “solely...lawful conduct” when the “sole intention” is to encourage truthful testimony*

## 10. How do I avoid going to jail?

Sarbanes-Oxley bill added new § 1519:

“Whoever knowingly alters, destroys . . . [or] conceals . . . any record [or] document . . . with the intent to impede, obstruct or influence . . . [any federal investigation] or in relation to or contemplation of any such matter or case,” can go to jail for 20 years.

What does it mean?

- ♦ Can you edit a memo to employees?
- ♦ Can you have a document retention policy?

*No one knows.*

## 10. How do I avoid going to jail?

The good news: Federal obstruction of justice statutes do not reach “the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.”

The bad news: That didn't help Andersen.

## **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
  - ◆ Sarbanes-Oxley gives extra protection to whistle-blowers in public companies
- ◆ 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*