

Five key components of successful internal investigations



Recent years have seen an increase in the number of internal investigations into possible export control violations and voluntary self disclosures. Key to the success of an investigation is a clear focus and understanding of procedure. Daniel Pickard provides his five-point checklist to a successful internal investigation process.

Internal investigations of potential export control violations have become increasingly commonplace. As companies are more likely to investigate issues now than ever before, they are becoming much more sophisticated regarding expectations for how internal investigations should be handled. While U.S. companies have been inclined to investigate for some time now, this trend is now evolving globally. Internal investigations have started to become routine in Canada, Europe, and South America.

Careful consideration is needed at the outset when designing an internal investigation in order to maximise the benefit and to avoid unintended, and potentially serious, negative consequences. The most basic question is whether or not an internal investigation is worth the cost and distraction as many investigations can be both expensive and time-consuming. However, many cases demand an internal investigation, both for business purposes and for reasons connected with potential liability. While practitioners in this field have traditionally treated their internal investigation procedures as almost trade secrets, nearly all experienced counsel would agree that there are (at least) five key components of successful internal investigations.

I. Clearly defined scope

Perhaps least understood and practised is the need for a clearly defined, mutually agreed upon scope of an internal investigation at the outset. It is well known that certain high-profile internal investigations have become exceedingly expensive and time-consuming because of the high stakes involved. However, this certainly does not always need to be the case. A clearly defined scope – substantively, geographically, and temporally – will

increase the efficiency and accuracy of the investigation.

In terms of substance, the investigation should clearly define the nature of the potential violations investigated. For example, the scope

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can be limited to one particular realm of export controls (e.g., International Traffic in Arms Regulations ('ITAR')), or can be broader to include, for example, export controls, anti-corruption, and economic sanction concerns. By keeping the focus of the investigation appropriately defined, this will alleviate concerns regarding 'mission creep' and as new areas of concern may be discovered, then either the scope can be re-defined or the new concern can be dealt with as a separate matter.

Temporally, the scope should define the period of time that the investigation will examine. The typical period in an investigation under U.S. law is a five-year 'look back' due to the statute of limitations for most non-capital offences. However, there may be grounds for either expanding or shortening the period of time covered.

Geographic considerations are also key to a clearly defined scope. Specifically, determine whether the investigation will cover only one country, an entire region, or an examination of global operations.

A clearly defined scope of an investigation protects not only the client, but counsel as well. The benefits to a client are more immediately apparent, i.e., the company is protected from potential over-reach in an investigation. However, a clearly defined scope also protects counsel from potential claims of malpractice. As just one example, a clearly defined scope that indicates (for example) that a review only relates to a company's ITAR compliance in its Latin American operations will prevent against any claim that the counsel should have detected an FCPA violation that occurred in a Russian subsidiary.



While an initial scope definition may be the least commonly practiced key component discussed in this article, its importance should not be minimized.

II. Effective maintenance of privilege

If the importance of a clearly defined scope may be the least well understood component of an internal investigation, the importance of maintaining the attorney-client privilege may be the best appreciated. Obviously, the maintenance of privilege is a critical element to a successful investigation.

There is also a growing understanding of the applicability (or lack thereof) of privilege in regard to in-house versus outside counsel, both under U.S. law and other jurisdictions. While this topic alone could be the source of an entire article, there is a growing appreciation that in regard to the attorney-client privilege and attorney work product doctrine, courts have applied stricter standards to in-house counsel when determining whether material is protected. Similarly, a number of foreign countries have held that in-house counsel do not have the same privilege and work-product protections as they do in the United States. Indeed, the European Court of Justice has held that certain communications between in-house counsel and the company may not be privileged because in-house counsel are unable to exercise professional independence from the companies that employ them.

Thus, while it is understandable that companies may wish to avoid expense by conducting their investigations with their own employees, it bears emphasising that this may come with the cost of forfeiting attorney-client privilege. In the age of whistle-blower claims, the avoided expense of obtaining outside counsel, may pale in comparison to the increase in liability exposure.

III. Issuance of a document hold memo/document review

It is standard practice in internal investigations, as it is in similar litigation matters, that as soon as possible, a document hold memo should be issued to ensure that all potentially relevant documents are preserved. The memo should make clear to all relevant parties that they must preserve documents and communications related to the

investigation. The memo typically indicates the applicable time period, the type of documents covered, and clarifies that 'documents' and 'communications' should be interpreted broadly to include information stored in any medium. The memo will confirm that the company's normal document retention schedule and disposition policies for the materials are suspended and provide a contact person for any questions. Lastly, document hold memos generally clarify that the company must preserve its attorney-client privilege and will advise, among other things, that the memo (a privileged communication) is not to be forwarded to others.

There are two phases to a document review: 'hard' and 'soft' document reviews. During a hard document review, counsel reviews the tangible paper documents that are relevant to the transactions at issue. The collection and review of said documents are particularly straight-forward.

The second phase of document review involves retrieval and analysis of email communications and other electronically stored information. These documents will generally be retrieved with the help of the company's IT professionals and may involve use of outside vendors for hosting and search capabilities of the retrieved documents. For multinational investigations, special attention must be paid to domestic privacy laws.

IV. Conducting interviews

Witness interviews are another key part of the internal investigation process and are generally done only after all relevant documents have been reviewed. Again, the importance of maintaining attorney-client privilege is difficult to overstate.

While styles of interviews vary, frequently depending on the skill and experience of the investigator, the importance of the Upjohn warning is widely acknowledged. In *Upjohn v. United States*, 449 U.S. 383 (1981), the Supreme Court held that communications between company counsel and company employees are

privileged, but the privilege belongs to the company, not the employee. This warning makes it clear that counsel only represents the company and that anything the employee states in the interview is privileged only between counsel and the company and the company may choose to waive the privilege in the future, potentially disclosing the employee's statements to the government.

V. Report/summary

At the conclusion of an investigation, the company may determine that a written report summarising the investigation's findings is necessary and/or appropriate. Such a report may also provide recommendations as to potential voluntary self-disclosures ('VSDs') and any appropriate remedial measures, including termination decisions, necessary to prevent future issues. Standard compliance improvements are connected with the corporate policy statement and/or the company's written code of conduct, the extent of centralised compliance oversight, incorporation of compliance-related obligations in contracts and other business agreements, periodic training requirements, record-keeping, and reporting procedures and disciplinary mechanisms.

While there is no standard or checklist for internal investigations, these five key components are important to ensuring a successful outcome. Without them, investigations can be excessively expensive, unfocused, and ineffective.

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