

# Guide to Conducting An Effective Internal Investigation

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Investigations<sup>1</sup> are a critical component of an effective compliance program. Even companies with the best compliance programs inevitably experience violations of law and company policy, which may subject the company to criminal and civil liability, harmful publicity, and loss of public confidence. Though the need for a company to investigate wrongdoing is well-established, too often Investigations are conducted on an ad hoc basis as a rushed reaction to negative publicity, litigation, or the threat of a governmental investigation. A reactive ad hoc process of investigating wrongdoing in some instances produces sound results, but too often either fails to uncover the relevant facts in time or fails to restore public and regulatory confidence in the ability of the company to comply with the law and to police itself appropriately.

It is important to institutionalize the Investigation process as an integrated component of the compliance system itself to provide an existing structure and process within the company to address allegations of serious wrongdoing as they arise and to recommend remedial action based on the results of its Investigations. With an Investigation process in place, a company can respond to allegations of serious wrongdoing in a consistent and timely manner. To gain legitimacy, an Investigation process must be guided by the company's commitment to uncover the relevant facts in an objective and thorough manner, without the pull of external or internal forces that can influence the result for a particular objective. An effective Investigation process,<sup>2</sup> rigorously and consistently applied, will strengthen the company's compliance system as a whole and lend credibility to the results of any Investigation.

This Guide to Conducting an Effective Internal Investigation ("Guide") sets forth how to investigate effectively matters arising within the company that have been referred to the legal department. This Guide does not address how to determine whether a matter should be referred to the legal department as opposed to another corporate function. Even though this Guide is designed to provide this guidance to the legal department in conducting Investigations, many of the principals in the Guide are universal and could be applied to investigations conducted by non-lawyers.

## **I. KEY COMPONENTS OF AN EFFECTIVE INVESTIGATION PROCESS**

A best practices Investigation process will have the following qualities:

*Purposeful.* The potential violation and purpose and scope of the Investigation must be clearly identified and memorialized in a plan from the outset.

*Independent.* An Investigation, must be conducted, whether by in-house counsel or outside counsel, independent from the other units of the company potentially implicated in it. The Investigation must be allowed to proceed without pressure from other interests that would have an interest in affecting the outcome.

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<sup>1</sup> "**Investigation**" as used in this Guide means a defined, formal factual and legal investigation into allegations of specific wrongdoing. This definition of Investigation does not include hotline phone calls or other informal inquiries resolved by a simple response and fact-gathering that occur in everyday corporate life and are resolved without formal legal investigative work.<sup>1</sup> We do not distinguish between the terms "independent" and "internal," which some may use to describe an Investigation.

<sup>2</sup> By "**Investigation process**," this Guide does not intend to exclude Investigations conducted by outside counsel. A good Investigation process can and should employ the resources of outside counsel in appropriate circumstances.

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*Objective.* The Investigation should approach the matter from a neutral position; the purpose should not be to establish that a violation has occurred or has not occurred. It is particularly important that the Investigation not be undertaken from the position of an advocate seeking to defend the company or particular individuals within the company.

*Appearance of Independence and Objectivity.* Because the effectiveness of an Investigation in many instances turns upon the confidence third parties will have upon the quality of the Investigation, it is essential that the Investigation not only be independent and objective, but also appear independent and objective.

*Timely.* Investigations must be completed as quickly as possible for a number of reasons: a fast Investigation may stop wrongdoing from continuing and mitigate any damages caused; over time memories fade and evidence “disappears;” prompt Investigations tend to be far more efficient. Importantly, all parties with an interest in an Investigation deserve a timely resolution.

*Thorough.* Obviously an Investigation must exhaust all reasonable sources of information. The extent of a thorough Investigation will depend upon a variety of factors, including the complexity of the matter, as well as whether wrongdoing or other “red flags” have been uncovered during the course of the Investigation. This concept also means, however, sufficient judgment to end an Investigation when further examination would be unnecessary and costly.

*Appropriate Resources.* The person controlling the Investigation must have access to appropriate resources, including additional investigative resources when necessary, as well as resources that are knowledgeable and skilled in the particular subject matter being investigated.

*Verifiable.* It is imperative that the independence and objectivity of a particular investigator, as well as the particular findings and conclusions of the Investigation, be independently verifiable to the extent possible from the investigative report itself. In other words, the Investigation report needs to contain enough information to “speak for itself.”

The commitment to having a strong Investigation process requires specificity as to the mandatory components. The next section addresses several of the key components that will help the company achieve the above qualities.

### **A. Conducting the Investigation: Critical Issues**

Although the specific technical and legal requirements in conducting a given Investigation require more detailed analysis than covered in this Guide, several general issues relating to the context of an Investigation will be addressed below.

#### **1. Document and File Preservation**

The very first step in conducting an Investigation should be to preserve documents and electronic files (including email, databases, spreadsheets, and graphics) that may contain information relevant to the subject matter being investigated. As soon as practicable, in-house counsel managing the Investigation (“Investigation Counsel”) should transmit instructions to potentially affected employees to preserve any potentially relevant documents and electronic files. The notice should identify the matter being investigated with enough specificity to ensure that relevant files are preserved, but in an effort to preserve the confidentiality of the Investigation, the issues under investigation should be defined with a sufficient amount of breadth to conceal the specific nature of the Investigation. For instance, if activities

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of a particular foreign sales agent are being investigated, the document preservation instructions might relate to all foreign sales agents, or all foreign sales agents in a particular region. In most circumstances, Investigations Counsel should designate a particular individual as the keeper of all of the documents associated with the Investigation. If such a procedure is followed, care should be taken to record the source and file from which the documents were obtained and the date they are obtained.

### 2. Whether to Engage Outside Counsel to Conduct the Investigation<sup>3</sup>

Though the majority of Investigations can be conducted by in-house counsel there may be instances in which the nature of the alleged or potential violation or the persons alleged to be involved make it appropriate for the company to engage outside counsel to ensure the appearance of total independence of the investigator. A protocol should be adopted to refer an Investigation to outside independent counsel if, at any stage of the Investigation, a substantial question arises as to the independence of the legal department or the Investigation Counsel. Other factors which should be considered in deciding whether to engage outside counsel include the potential dollar value of harm to the company or the public, the seriousness and pervasiveness of the alleged wrongdoing, and how the alleged wrongdoing relates to the company's business.

In some cases, in-house counsel may engage outside counsel to provide additional resources or expertise with respect to various matters, including the conduct of internal investigations and laws and regulations implicated by the allegations of misconduct. The decision as to whether to engage outside counsel should normally be made prior to commencement of the Investigation but may need to be revisited as additional information comes to light.

Once the determination has been made to engage outside counsel to conduct an Investigation, the general counsel or a designee of the general counsel usually will continue to play a significant role in the Investigation by defining the scope of the Investigation, selecting the appropriate outside counsel, tracking the progress of the Investigation, and reporting to senior company management. In selecting between potential outside counsel, the company needs to be cognizant of the actual and perceived independence of the investigating attorney and should therefore, depending on the scope and significance of the matter to be investigated, consider outside counsel that does not perform a significant amount of other work for the operational unit or program being investigated. From a pragmatic perspective, however, we recognize that a company may view it as desirable to have an ongoing relationship with an outside lawyer or firm for "routine" Investigations. Particularly where a company, like General Motors Corporation, is large with diverse operations, having knowledgeable outside counsel helps to ensure an investigator who has real time responsiveness, knowledge of the company's business, and capacity to handle variations in volume of assignments. However, such familiarity and the ongoing relationship present an obvious risk to independence. In this regard, a company must balance the competing interests of independence and efficiency and use its best judgment to determine whether a matter is sufficiently significant to require outside counsel who does not have the appearance of significant economic ties to the company.

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<sup>3</sup> If there is a conflict of interest between the company and its employees, it may be appropriate for the company to retain separate outside counsel to represent those employees. When this situation arises, the company should consider whether to have a joint defense agreement between counsel for the company and counsel for its employees.

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Where the investigation will be conducted by or under the supervision of in-house counsel, Investigation Counsel should assemble the investigative team promptly. Investigation Counsel should consider whether the investigative team should include one or more of the following:

- Internal Audit, Security, and Human Resources to conduct factual inquiries;
- Outside counsel with appropriate expertise in conducting internal investigations and/or in the subject area implicated in the investigation;
- Private investigators, but only subject to appropriate precautions and after obtaining specified approvals; and/or
- Forensic Accountants and Experts.

In the event that outside personnel such as counsel, investigators, forensic accountants, or experts are used to conduct or assist in an Investigation, a letter (known as an Upjohn Letter) should be sent to them at the outset of the investigation. The letter should communicate that the Investigation is being conducted for the purpose of the company obtaining legal advice, the communications are privileged and confidential, and that the recipient of the letter should apply a legend to all documents related to the Investigation stating that the document is privileged and confidential.

### 3. The Object and Scope of the Investigation

At the outset, it is important to frame the scope of the Investigation in as much detail as possible to set the boundaries for what subjects or issues raised by the allegations under investigation will be investigated as well as what subjects or issues raised by the allegations under investigation are beyond the scope of the Investigation. Investigation Counsel should take the following steps in assessing the nature and scope of the subjects or issues raised by the allegations under investigation, and take immediate action where necessary:

- Collect, organize, and analyze potentially relevant documents and electronic files (including email).
- Identify the potential financial consequences of the alleged misconduct.
- Eliminate the risk of ongoing misconduct or physical or economic injury to the company or to any third party.
- Take any urgent remedial action warranted if, for instance, there is an ongoing risk of injury.
- Determine whether there is a risk of future physical or economic injury to the government or other third parties or whether there is a risk of an ongoing violation of the law, if so immediate disclosure to government authorities may be appropriate.
- If there is a pending criminal investigation consider advising affected employees of the possibility they may be contacted by law enforcement and provide guidance on handling these law enforcement officials.

If outside counsel is involved in the Investigation, Investigation Counsel should reach and document an agreement with outside counsel on the scope of their role in the Investigation. If there is no

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outside counsel involved, Investigation Counsel should communicate the scope of the investigation to the investigative team.

This solid and detailed description of the scope of the Investigation is vital because it will be very difficult to determine if the resulting Investigation has been completed thoroughly without a detailed description of the scope of the Investigation. If for some reason during the Investigation the scope should be increased or limited, the decision to change the scope of the Investigation should be made explicitly and referenced in the final report of the Investigation.

#### 4. Investigation Plan and Allocation of Resources

After defining the scope of the Investigation, Investigation Counsel should prepare a written plan for conducting the Investigation and determine the resources necessary – both in terms of skill and knowledge and in terms of total number – to efficiently and thoroughly conduct the Investigation.

The written plan for conducting the Investigation should include the specific issues to be investigated, a schedule for conducting the relevant stages of the Investigation, and the witnesses to be interviewed and the order in which they should be interviewed. With regard to the witnesses to be interviewed and the order in which they should be interviewed, depending on the need for confidentiality, it may be appropriate for the company to limit the witness interviews to current employees of the company. By interviewing former employees or third parties, the company runs a greater risk of having the Investigation disclosed to the public since there is no incentive, such as continued employment with the company for these former employees or third parties, to keep the Investigation confidential.

The sequence of witness interviews is another vital component in conducting an Investigation. Witnesses should be interviewed according to the breadth of their knowledge of the subjects or issues being investigated. Typically, witness interviews should begin with “overview” witnesses followed by lower-level, fact-intensive witnesses followed by more senior witnesses concluding with interviews of individuals suspected of wrongdoing. The company would like to have as much information as possible before interviewing the latter category of individuals to ensure that the company can dictate the terms of the interview and ask questions that lead to the specific information that company needs to obtain from the individuals.

As soon as practicable after the interview of a witness in an Investigation, one of the interviewers should plan to create a witness interview memorandum that should include information such as the date, time, and location of the interview, all persons in attendance at the interview, note that the memorandum is a privileged and confidential summary of the interview and that the memorandum contains the thoughts and impressions of the author, and note that counsel informed the witness that he or she represents the company and not the witness individually and that the company, not the individual, owns the attorney-client privilege and the right to waive it. The company should ensure that witness interview memoranda are uniform throughout the company to ensure that the witness interview memoranda will have the maximum protections allowed under the law. It should be kept in mind that circumstances may arise where the attorney-client privilege and work product protections may be waived.

In determining the type and amount of resources required, Investigation Counsel should take into account the nature and the seriousness of the alleged or potential violation and should draw from appropriate resources within and outside the law department to effectively gain a full understanding of the facts and to speedily and thoroughly conclude the Investigation.

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### 5. Timing of the Investigation

If a matter qualifies as an alleged or potential violation warranting an Investigation, it is imperative that it be treated as a top priority by those involved; the Investigation should be commenced immediately and completed as soon as possible. Though Investigations of complex issues may take time, to ensure that each Investigation is proceeding at the appropriate pace, the company should adopt a policy that requires the Investigation Counsel to complete the Investigation within a specified period of time (for example, sixty days) or to obtain an extension of time within which to complete the Investigation.

### 6. Memorializing the Results of an Investigation

Deciding how to memorialize the findings of an Investigation is a critical step in the investigative process. As a general rule, Investigations should conclude with some form of written report. At a minimum, a report should contain a description of the alleged or potential violation and the conclusion of the Investigation. In most cases, however, a report should contain additional information, including some or all of the following: (1) a description of the steps taken in the course of the Investigation; (2) identification of the most important individuals and documents involved; (3) a factual discussion (usually chronological); (4) a discussion of controlling legal authority; (5) an analysis of facts and law in support of conclusion; (6) recommendations regarding required or discretionary disclosures; (7) recommendations regarding employee specific and system wide corrective measures; and (8) exhibits. Which of these elements a report will contain will depend largely on factors specific to the Investigation, including whether a violation was found, the intended audience(s) of the report, governmental agency and third party disclosure requirements, anticipated third party litigation, the potential that the report will become public, and the extent to which the company seeks to maintain the confidentiality of attorney-client privileged communications and attorney work product.

### 7. Using the Results of an Investigation

Investigations are a valuable compliance tool only if a company properly manages the results of each Investigation. A company should have mechanisms in place to ensure that the results of an Investigation are communicated to appropriate persons within the company and, when required, to third parties. It must be able to use the results of an Investigation to discipline employees, to remediate any specific violation, and to assess and improve its compliance program. Accordingly, both during the Investigation and at its conclusion, decisions must be made regarding the form of the report, compliance with internal reporting requirements, remediation, impact on potential litigation, external reporting and disclosure requirements, and privacy issues associated with the identity of the witnesses and the accused. Each of these decisions must be considered throughout the Investigation and at the conclusion of the Investigation. Moreover, when deciding how to use and whether and how to disclose the results of an Investigation, the company must keep in mind the potential impact of any disclosure on attorney-client privileged communications made and attorney work product created during the Investigation.

### 8. Tracking and Oversight

Investigation Counsel should maintain an internal tracking system that identifies each incident that is reported to the legal department for potential Investigation. Detail for each incident should include the department or business unit involved, the source of the incident, the nature of the incident, and the disposition – i.e., whether an Investigation was initiated, the identity of counsel responsible for the Investigation, the results of the Investigation, etc. It is equally important that the system track carefully the disposition of matters that are referred to the legal department but are determined by the legal department to not warrant an Investigation. Data from the tracking system should be shared with other

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members of the compliance system to identify risk areas and ways to prevent any future violations. All of the foregoing should be subject to assuring that the innocent are protected and that names of the individuals under investigation are only revealed on a “need to know” basis.

### **B. Special Considerations Surrounding Attorney-Client Privileged Communications and Attorney Work Product.**

Investigations of alleged or potential violation should be conducted in a manner consistent with the confidentiality afforded by the attorney-client privilege and the attorney work product doctrine. Both of these protections enable investigators to conduct efficient and thorough Investigations without the risk of the dissemination of information (and potentially misinformation) prior to the conclusion of the Investigation.

#### **1. The Attorney-Client Privilege**

The attorney-client privilege is vital for uncovering facts and for the effective rendering of legal advice because it minimizes the risk that any parties involved in an Investigation will be forced to reveal the information exchanged between the parties. The attorney-client privilege applies with equal force to individuals and companies. As the Supreme Court stated in *Upjohn v. United States*:

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.<sup>4</sup>

The value of the attorney-client privilege in allowing an investigator to gather the facts is amplified in the context of Investigations. Violations often involve sensitive subject matter, and allegations of wrongdoing against specific individuals. Accordingly, the ramifications to the company, both in terms of legal consequences and publicity, and to the individuals allegedly involved in the wrongdoing, are very serious and potentially ruinous. It is in the best interests of all involved – company, individuals at the company, government agencies, and the public – to structure Investigations in such a way as to maximize the speed, accuracy and efficiency of the Investigation and to avoid the dissemination of any misinformation during the Investigation. The attorney-client privilege allows the investigators to gather information freely and to discuss candidly with company personnel the facts and issues involved in the Investigation, and helps ensure that the results of the Investigation will be accurate and verifiable.

#### **2. Attorney Work Product**

The attorney work product doctrine protects documents and other tangible things prepared by lawyers, their staff, or client representatives at the direction of the lawyer and in anticipation of litigation. Although actual litigation need not be pending for the attorney work product protection to apply, it is clear that “a general apprehension that litigation may be brewing, a general concern that litigation may

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<sup>4</sup> *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

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sometime occur and a general belief that litigation is in the air are not enough.”<sup>5</sup> Moreover, documents that would have been prepared regardless of anticipated litigation are not protected.<sup>6</sup> However, a pending or anticipated federal investigation or a pending or threatened lawsuit is generally sufficient to invoke the protection of the attorney work product doctrine. Similar to the attorney-client privilege, the attorney work product doctrine is critical to conducting thorough and efficient Investigations.

### 3. Preserving the Attorney-Client Privilege and Work Product Protections

There are several actions that should be taken from the outset of an Investigation to maximize the protections afforded by the attorney-client privilege and attorney work product doctrines. First, the company should document that the Investigation is being conducted for the purpose of obtaining legal advice. Second, the company should document that the Investigation is being conducted in anticipation of litigation, and should identify pending and possible government investigations and proceedings and private litigation. Third, to the extent possible, Investigation Counsel should minimize the use of non-lawyers in the Investigation, and all non-lawyers should be supervised directly by lawyers and should conduct themselves at the direction of the supervising lawyer. Fourth, all privileged communications and their contents should be limited in distribution to only those who must have access to the communication and should be marked clearly as privileged communications. Moreover, any witnesses interviewed should be informed that the subject matter of the interview is confidential, that the interviewee should not communicate to others regarding the interview, that the attorney interviewing the witness does not represent the witness, and that the company has the privilege, and right to waive such privilege, with regards to the information disclosed during the interview. Fifth, business advice and legal advice should not be commingled in the same communication. Sixth, to the extent disclosure to a government agency is required or otherwise deemed appropriate, the company should carefully consider what information to provide the government, should attempt to enter into a limited disclosure agreement with the government entity, and should request that all privileged information provided to the government entity be housed with the company.

### 4. Disclosure of the Results of an Investigation and Waiver of the Attorney-Client Privilege and Attorney Work Product Doctrine

Companies frequently are required or strongly encouraged to report to a government entity the results of an Investigation. In addition to disclosing facts and results of Investigations (whether mandatory or voluntary), companies often are pressured to waive the protections afforded by the attorney-client privilege and attorney work product doctrine. These pressures can particularly arise when a company is in settlement negotiations with federal law enforcement and regulatory agencies.

If, along with the results of an Investigation, a company intentionally discloses any attorney-client communications or attorney work product, the company risks that any waiver of privileges with respect to government entities will be considered a waiver as to other third parties as well. Disclosing a privileged communication generally waives the attorney-client privilege as to the privileged materials disclosed and may waive the attorney-client privilege as to any other privileged materials relating to the subject matter contained in what was disclosed. The attorney work product doctrine is waived when disclosure of otherwise protected work product is made to an adversary.

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<sup>5</sup> *A.W. Chesterton Co. v. Allstate Ins. Co.*, 2001 WL 170460, \*1 (Mass. Super. Ct. 2001).

<sup>6</sup> *E.g., United States v. Aldman*, 134 F.3d 1194 (2d Cir. 1998).

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With each disclosure there is increased risk that that potentially hostile third parties will have access to otherwise protected information and documents. This scenario has been dubbed the “Litigation Dilemma;” because cooperation to avoid one type of litigation leads to unintended adverse consequences in other, often dissimilar litigation. Because of the risks of waiver and the “Litigation Dilemma,” our company must evaluate each situation separately to determine the best way to protect privileges in light of each specific required or contemplated disclosure. We should limit, to the extent permissible or practicable, disclosure of attorney-client communications and attorney work product made in conjunction with the results of an Investigation. At the same time, however, there will be situations in which the facts suggest that an Investigation should not be subject to the protections of the attorney-client privilege or work product protection or where our company feels its interests are served better by waiving its privilege rights when a privileged Investigation is concluded.