



PROGRAM MATERIALS
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Corporate Internal Investigations

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Internal Corporate Investigations CLE

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Internal Corporate Investigations

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I. The Evolution And Importance Of Internal Investigations

Internal corporate investigations are a critical tool for companies to address allegations of misconduct, comply with regulatory obligations, and maintain public trust.

Over the past five decades, landmark legislation, court decisions, and shifting enforcement priorities have transformed how companies conduct internal reviews.



The Early Days of Internal Corporate Investigations

The concept of internal investigations emerged in the 1960s when corporations settled SEC enforcement actions by agreeing to court-supervised investigations.

The Watergate scandal in the 1970s brought corporate misconduct into the national spotlight. In response, the SEC launched its "voluntary disclosure program."

The passage of the Foreign Corrupt Practices Act (FCPA) in 1977 further cemented the role of internal investigations.



How Regulators Reward Cooperation

The SEC's Seaboard Report

SEC factors considered:

- Whether the company self-detected misconduct
- The thoroughness of the internal investigation
- Remedial measures taken
- Level of cooperation with authorities

The DOJ's Filip Factors

[Named after former Dep. AG Mark Filip]

The Department of Justice takes a similar approach, weighing various factors in determining whether to bring a criminal case and/or take a plea and if so, what the plea offer should be.

These factors include:

- ***Nature/Seriousness of Offense***
- ***Pervasiveness of Wrongdoing***
- ***History of Misconduct***
- ***Cooperation***
- ***Compliance Program***
- ***Remediation***
- ***Collateral Consequences***

Adapting to Modern Challenges

Today's internal investigations face new complexities:

- **Cybersecurity & Data Privacy**
- **Remote & Hybrid Work**
- **Emerging Industries**
- **Shifting Political Priorities**

Companies are also using advanced technology—such as data analytics and AI—to streamline fact-finding while maintaining legal compliance.



Why Companies Conduct Internal Investigations



- Government inquiries from the SEC, DOJ, IRS, or other agencies
- Shareholder demands or derivative lawsuits alleging misconduct
- Whistleblower tips
- Routine compliance checks in high-risk areas

Best Practices for Conducting an Internal Investigation

- i. Obtain Proper Authority
- ii. Define the Scope
- iii. Gather and Preserve Evidence
- iv. Interview Witnesses
- v. Analyze Findings
- vi. Report Results
- vii. Implement Remediation



The Value of a Proactive Approach

The most effective internal investigations aren't just reactive damage control—they're part of a broader compliance culture.

Companies that regularly review their operations, train employees on ethics and compliance, and maintain open reporting channels are better positioned to:

- Detect misconduct early
- Avoid regulatory penalties
- Maintain strong relationships with investors and stakeholders
- Protect their reputation



II. Deciding Whether And How To Conduct An Internal Investigation

The Critical First Step

When corporations learn of potential misconduct inside their organization, one of the most important—and sensitive—decisions they face is whether and how to conduct an internal investigation.

A well-planned investigation can uncover wrongdoing early, help meet legal duties, and protect the company's reputation before regulators or shareholders intervene.

Why Choosing to Investigate Is Not Really Optional

A thorough internal investigation helps management assess the full scope of any problem and take corrective action to prevent recurrence.

In many cases, federal, state, or local laws effectively require an investigation once allegations arise.

For example:

- **Section 10A of the Securities Exchange Act .**
- **SEC and DOJ policies**
- **Fiduciary duties**
- **Occupational Safety and Health Administration (OSHA)**
- **Title IX**



These overlapping obligations make the decision to investigate a matter of both legal compliance and sound corporate governance.

Balancing the Costs and Risks



Internal investigations can be expensive and disruptive. Legal fees, forensic accounting costs, and the time executives spend on interviews and document reviews can add up quickly. For smaller companies, the cost of investigating may seem higher than defending a government inquiry.

Who Should Control the Investigation



Determining who oversees and controls an internal investigation is a crucial step that affects credibility and independence. Control may rest with:

- **Management**, for routine or low-risk matters
- **The Board of Directors** or an **Audit Committee**, for more serious issues
- A **Special Committee** of independent directors, when allegations involve senior management
- **Independent outside counsel**, for maximum impartiality

Who Should Conduct the Investigation

The professionals who handle the day-to-day work of an internal investigation play an equally important role.

Options include:

- i. In-House Counsel**
- ii. Regular Outside Counsel**
- iii. Special Outside Counsel**
- iv. Auditors or Consultants**

Building Credibility Through Independence and Transparency

- Involve individuals with no personal stake in the outcome.
- Maintain confidentiality and privilege to the fullest extent possible.
- Provide the board with regular updates and document all investigative steps.
- Implement prompt corrective measures once findings are established.

III. The Best Practices Involved In An Internal Investigation

Preliminary Procedures

Establishing Authority to Conduct an Internal Investigation

- Clearly defining the authority to investigate and the scope of the inquiry
- Identifying the client (e.g., full board, special committee, or management)
- Establishing a legal basis for confidentiality and privilege
- Conducting an initial factual and legal assessment to shape next steps

Documents That Form the Investigative Plan

Disclosure of Internal Investigations

When Disclosure Is Required

Disclosure is typically mandatory when the investigation arises from a government settlement, consent decree, or formal regulatory inquiry. In those cases, SEC filings or public disclosures may be required.

Voluntary Investigations and Strategic Disclosure

For voluntary investigations, disclosure is often a matter of business judgment.

Internal Communications and Document Preservation

Management should notify relevant employees that an investigation is underway, even if no public disclosure is made.

This allows the company to:

- Issue document preservation notices
- Reduce speculation and misinformation
- Reinforce cooperation expectations
- Emphasize confidentiality obligations

Notices should also warn against document alteration or destruction and, where appropriate, insider trading.

Conducting a Preliminary Inquiry Before Full Investigation

Consulting With Management

Limited consultation with essential management helps identify:

- Key personnel with relevant knowledge
- Locations of documents and data
- Former employees with relevant information
- Prior or parallel investigations

Reviewing Prior Investigations for Efficiency and Accuracy

Reviewing prior investigative records serves several critical purposes:

- Accelerates fact-finding by leveraging existing work
- Avoids duplication of effort
- Identifies gaps or errors in earlier investigations
- Helps determine what went wrong and how to prevent recurrence

Prior investigations should inform—not replace—the current inquiry.

Preparing a Preliminary Report to the Board or Committee

The report should:

- Explain the events and legal obligations necessitating the investigation
- Summarize prior investigative findings and unresolved issues
- Recommend scope, methodology, and timeline for the full investigation

The preliminary report should remain confidential and protected to the fullest extent possible.

IV. Conducting the Investigation.

What now???

Preserving Attorney-Client Privilege During an Investigation

- The privilege belongs to the company—not the employee and employees must be given proper “Upjohn warnings” to explain that.
- Counsel must clearly explain that they represent the company

Document Review: The Foundation of Every Corporate Investigation

Corporate documents frequently provide the roadmap for witness interviews, timelines, and key decision points.

These may include:

- Governance documents (bylaws, board minutes, SEC filings).
- Prior litigation or regulatory productions.
- Outside counsel and auditor files.
- Employee emails and messaging platforms
- Contracts, invoices, receipts, and accounting records
- Organizational charts, compliance manuals, personnel files



Implementing a Litigation Hold and Preserving Evidence

If litigation or regulatory action is anticipated, immediate preservation steps are legally required, but in any event, preservation is key to the investigation itself.

Failure to properly preserve electronic data can result in sanctions, adverse inferences, or regulatory penalties.

Reviewing Employee Files and Electronic Communications

Employee-maintained files often contain key evidence. These may include:

- Emails and messaging apps
- Handwritten notes
- Calendars and phone logs
- Expense reports and receipts

Counsel—not employees—should determine the parameters of email searches, often using eDiscovery vendors. Allowing employees to self-select responsive documents creates risk.

Using Questionnaires in Corporate Investigations

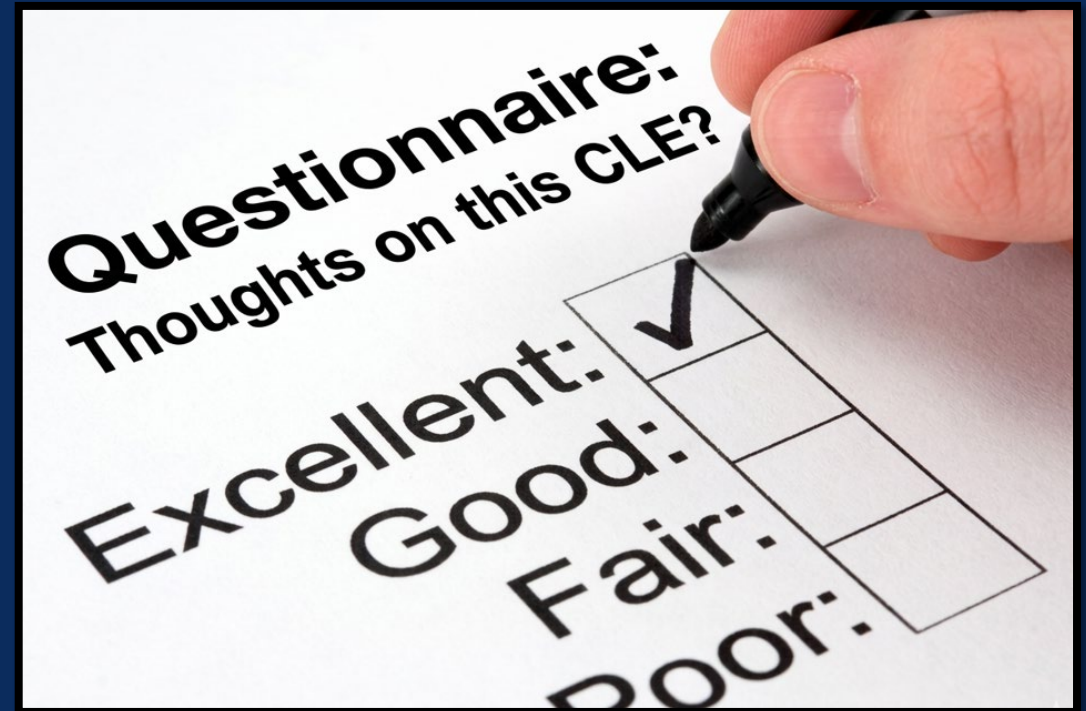
In large organizations, questionnaires can efficiently gather information from a broad group of employees.

Benefits of Questionnaires

- Generate investigative leads
- Narrow or expand scope
- Collect information quickly and cost-effectively

Limitations

- No ability to assess demeanor
- Risk of misunderstanding questions
- No opportunity for immediate follow-up



Conducting Effective Employee Interviews

- Conduct interviews in person or via video when possible
- Have two professionals present (one asking questions, one taking notes)
- As discussed earlier, provide clear Upjohn warnings at the outset explaining that the privilege belongs to the company
- Avoid audio recordings or court reporters in most cases



Preparing and Protecting Interview Memoranda

To preserve work product protection:

- Avoid purely verbatim note-taking
- Incorporate attorney impressions and strategy
- Mark documents as privileged and confidential
- Avoid circulating drafts unnecessarily

Using Private Investigators in Corporate Investigations

Private investigators may assist with:

- Background checks
- Asset tracing
- Public records searches
- Financial lifestyle analysis



To preserve privilege protections, investigators should be retained through counsel.

Use of undercover agents in internal investigations is uncommon and raises ethical concerns.

Balancing Thoroughness, Efficiency, and Legal Risk

No two internal investigations are identical.

The sequence of document review, questionnaires, interviews, and expert involvement depends on:

- Nature of the allegations
- Regulatory exposure
- Size of the organization
- Likelihood of litigation

A strategic approach ensures credibility while minimizing unnecessary cost and risk.

V. Maintaining Confidentiality of Information



When conducting an internal investigation, it is important to consider the confidentiality (and potential privilege) of the information collected.

Several privileges that we want to discuss include:

- the attorney-client privilege
- work product doctrine,
- the joint defense (or "common interest") privilege,
- the self-evaluative privilege as means to protect confidentiality.

Reasons to Insist on Confidentiality

The reasons to maintain confidentiality are often evident:

- An internal investigation may reveal legally damaging or embarrassing facts for the company involved as well as invoke privacy considerations for the individuals involved.
- Maintaining confidentiality helps to preserve the overall integrity of the investigation
- An internal investigation often involves the collection and examination of confidential customer or supplier information, trade secrets, or competitively sensitive financial and commercial information – the publication of which can expose a company to numerous lawsuits.
- An investigation can also tap into personal information about individuals, thus necessitating that the company be aware of privacy laws and as well as the legitimate business and regulatory-compliance reasons for keeping this information confidential

Reasons to Not Insist on Confidentiality

Sometimes information obtained from an internal investigation must or should be proactively reported to the appropriate entities – such as, for example:

- Evidence of criminal wrongdoing
- Evidence of prior SEC filing which were inaccurate
- A company may decide to initiate an internal investigation to encourage investor confidence and protect its position in the market. When allegations of product quality or corporate integrity are raised, disclosing the results of the investigation may restore investor, employee, or customer faith in the company or dispel a cloud of suspicion.
- Finally, state or federal law enforcement agencies might insist on disclosure, either directly to them or to the public, as part of the company's cooperation efforts with law enforcement.

Attorney-Client Privilege



"The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice."

To be privileged, a purpose of the investigation must be to obtain confidential legal advice.

See Federal Trade Commission v. Boehringer Ingelheim Pharmaceuticals, Inc., 892 F.3d 1264, 1267 (D.C. Cir. 2018)

Attorney-Client Privilege

Materials protected by Attorney-Client Privilege in Internal Corporate Investigations include:

- confidential communications between a lawyer and the client
- communications made by employees to counsel for the purpose of obtaining legal advice,
- and, even, routinely “communications made by and to non-attorneys serving as agents of attorneys in internal investigations[.]” This protection extends to interview notes, memoranda, and written responses to questionnaires prepared by counsel during the investigation.

Existence of Attorney-Client Relationship

- When a corporation on its own initiative retains counsel to conduct an internal investigation, there is ordinarily little question that an attorney-client relationship exists between the lawyers and the company.
- It is only slightly less certain that an attorney-client relationship exists when a corporation retains counsel to conduct an internal inquiry pursuant to agreement with any governmental agency in order to forestall an enforcement action.

Attorney Work-Product Doctrine

The work product doctrine, codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, is broader than the attorney-client privilege and serves two primary purposes:

- i. to protect documents prepared by attorneys in anticipation of litigation for the purpose of analyzing and preparing a client's case; and
- ii. to protect an attorney's thought processes and mental impressions in order to limit the ability of one party to benefit from the investigative efforts of another.

There are two classifications of protected work product:

- **Non-opinion work product.**
 - includes items such as witness statements, fact chronologies and investigative reports that do not include an attorney's legal opinions or mental impressions (i.e., nonprivileged facts).
- **Opinion work product.**
 - includes "a lawyer's opinions, conclusions, mental impressions, and legal theories," and is afforded "substantially more protection" in order to not reveal any litigation strategy.

Joint Defense or Common Interest Privilege



The joint defense or common interest privilege allows different persons (both individuals and corporations) with common interests in a legal matter, who are the objects of an investigation, and who have separate lawyers to communicate factual information, legal theories, and information about the progress of the investigation with each other without losing the protections of the attorney-client privilege or work product doctrine.

See *In re Blue Cross Blue Shield Antitrust Litigation MDL 2406*, 85 F.4th 1070, 1096 (11th Cir. 2023).

“Self-Evaluative” Privilege.

Another possible ground for protecting the reports or records of internal investigations undertaken by corporations and other institutions in various circumstances is the “self-evaluative” privilege (referred to in some jurisdictions as the “self-critical analysis” privileged).

Whether the privilege applies depends, first, upon whether it is a recognized claim of privilege in the relevant jurisdiction. If so, it then will depend on the following four factors:

- i. whether the information results from a critical self-analysis undertaken by the party seeking protection;
- ii. whether the public has a strong interest in preserving the free flow of the type of information sought;
- iii. whether the information is of the type whose flow would be curtailed if discovery were allowed; and
- iv. whether the document(s) at issue have been prepared with the expectation that it would be kept confidential.

Waiver, Confidentiality Agreements and Exceptions

Waivers

Although the courts remain divided, a previous trend has been to hold that disclosure of internal investigation materials to the government will ordinarily waive both the attorney-client privilege and work product protection.



Confidentiality Agreements

Properly worded, a confidentiality agreement may also block requests under the Freedom of Information Act, which exempts trade secrets, privileged or confidential information, and materials obtained in discharge of the agency's enforcement duties.



Crime-Fraud Exception

The protections of the self-evaluative, attorney-client privileges and work product doctrine will also be held inapplicable if there is probable cause to believe that disclosures made to counsel or contained in the investigation report are in furtherance of a crime, fraud, or other serious misconduct inconsistent with the purposes of the protection.

VI. What To Do When An Internal Investigation Reveals Misconduct

When an internal investigation reveals misconduct, there are a number of steps that should be taken promptly – all with the guidance of legal counsel.

- First, a determination needs to be made as to whether the misconduct violates any laws or regulations and, if so, what reporting obligations the Company may have.
- Next, a determination must be made as to the appropriate punishment to be meted out.
- Finally, and just as important, a determination needs to be made about what steps must be put in place to remedy the harm from the misconduct and to prevent such misconduct from occurring in the future.

Addressing Compliance and Regulatory Obligations

Regulatory compliance means adhering to all federal, State and local rules and regulations.

Implementing Corrective Measures and Policy Changes

Once an organization's workplace investigation has determined that misconduct has violated relevant laws and rules, it is important to not only to take corrective action regarding the specific misconduct (and report it as required) and also develop an ongoing compliance plan.

A compliance plan should do the following:

- Outline and distribute a set of guidelines and best practices that ensure a company's employees are following all relevant laws and regulations.
- Train all employees on those guidelines.
- Create a system of ongoing monitoring to ensure the guidelines are followed.
- Provide for optimal communication between employees and those who oversee the program.
- Create a clear corrective action plan for if the compliance program is breached.



Preventing Retaliation and Protecting Whistleblowers



It is important that the company make sure that there is no retaliation against Whistleblowers.

In many instances, Whistleblowers are protected by law and even where they are not, it is important that there be no retaliation, not only for ethical reasons but to ensure that the company is not subject to investigations by government regulators and civil lawsuits for that retaliation.

E.g., OSHA provides whistleblower and anti-retaliation protections for those reporting incidents or issues worthy of inspection.

See, generally, Occupational Safety and Health Administration: Whistleblower Protection Program, <https://www.whistleblowers.gov/>; see also the "Sarbanes Oxley Act," 18 U.S.C. § 1514A (2010); see also Lawrence Hecimovich et al., Whistle Blowers and Other Retaliation Claims, PLI 32d Annual Institute on Employment Law 1025 (2003).

Monitoring and Auditing for Future Compliance

Once misconduct has been identified and steps have been taken to remediate the situation, there are a number of additional steps that should be taken to ensure future compliance.

- First is to make sure there is an employee handbook that informs employees of the relevant rules and regulations and that employees have been trained on the handbook.
- Second is to monitor changes to all rules and regulations that apply to your industry in your geographic area.
- Third is to make sure new procedures are in place when rules and regulations change.
- Fourth is to train staff on new rules and regulations.
- Fifth is to make sure there are well known consequences for failure to follow the rules and regulations.
- Sixth is to have a clear corrective action plan if the rules are ever breached

VII. Internal Investigations in Government Contracting: Key Risks and Strategic Considerations.



Companies that contract with federal, state, or local governments operate in a heightened enforcement environment.

Understanding when to investigate, when to disclose, and how to respond strategically is critical to protecting both compliance posture and long-term viability.

Why Government Contract Investigations Require Special Care

Government contracts involve public funds and strict regulatory oversight.

Common Government Contract Issues That Might Trigger Internal Investigations

Internal investigations often arise from allegations involving what may *appear* to be:

- Inaccurate pricing or cost data
- Improper, duplicative, or false invoicing
- Failure to meet testing or quality requirements
- Product or service substitution
- Improper payments or kickbacks involving subcontractors

Federal Laws That Increase Contractor Exposure

False Statements Act (18 U.S.C. § 1001)

The False Statements Act makes it a crime to knowingly submit or maintain materially false statements or documents within the jurisdiction of the federal government.

False Claims Act (31 U.S.C. § 3729)

The False Claims Act (FCA) is a primary enforcement tool in government contracting matters.

Major Fraud Act (18 U.S.C. § 1031)

The Major Fraud Act applies to procurement contracts valued at \$1 million or more and targets schemes intended to defraud the United States or obtain money through false representations.

Anti-Kickback Enforcement Act (41 U.S.C. §§ 8701 - 8707)

The Anti-Kickback Act prohibits offering, soliciting, or accepting anything of value to obtain favorable treatment in connection with a government contract.



The Benefits of Voluntary Disclosure

Strategic disclosure can:

- Reduce civil and criminal penalties
- Limit False Claims Act exposure
- Avoid or mitigate suspension and debarment
- Prevent or weaken whistleblower lawsuits

Suspension and Debarment Risks for Government Contractors

Agencies consider several mitigating factors, including:

- Whether the contractor conducted a thorough internal investigation
- Timely disclosure of misconduct
- Cooperation with government authorities
- Disciplinary action against responsible individuals
- Implementation of remedial compliance measures

Managing Whistleblower and Qui Tam Exposure

Qui tam lawsuits under the False Claims Act are often filed by current or former employees and initially remain under seal.

Voluntary disclosure and early engagement with the government may limit or eliminate exposure to these claims, particularly when the government has already investigated and resolved the matter.

Remediation and Compliance Going Forward

- Employee discipline or termination
- Updated internal controls and compliance policies
- Targeted government-contracting training
- Enhanced reporting and supervision procedures



QUESTIONS?



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