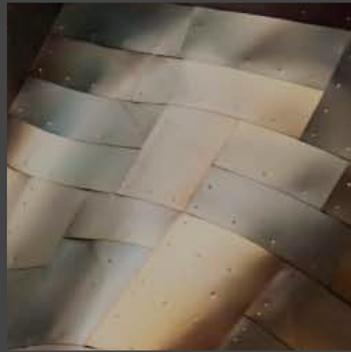


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A Briefing Guide to

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# Internal Investigations

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With the world of business under more scrutiny than ever before, the likelihood of allegations being made is an increasing possibility. Companies, organisations and individuals need to react to any such allegations or reports of wrongdoing by establishing the facts and then making the most appropriate response. Internal investigations play a vital role in achieving this.

The right response can take all manner of forms. But the best and most suitable response can only be determined after a thorough and objective internal investigation has been carried out to establish the credibility of any allegations. Only an internal investigation can establish if there has been improper conduct, pinpoint who carried it out or allowed it to happen, assess the damage, identify how to prevent it happening again and send out a clear signal that it will not be tolerated in the future.

An investigation can establish if there is a genuine problem and how best to resolve it. Its findings can identify what well-informed decisions need to be made to protect innocent parties from allegations of complicity, promote openness, ensure the right remedial action is taken and conduct the most appropriate dialogue with the authorities in the UK or abroad.

An internal investigation is about establishing the facts so, if there has been wrongdoing, the reasons for it can be identified and steps taken to prevent it happening again. It also ensures that the company is in the strongest possible position if the authorities or a regulator begin their own investigation. The findings of an internal investigation can also be of proactive value when it comes to reassuring investors, trading partners or third parties. If a company self-reports any wrongdoing and gives the authorities full access to its investigation's findings, its openness and cooperation will be taken into account when any future penalty is decided.

What must be remembered is that undertaking an internal investigation is a big decision. Once it has commenced, it is difficult to stop or reverse the effects it can have. There is no one-size-fits-all to internal investigations, regardless of whether its scope is limited to one country or covers a number of jurisdictions. The scope of it may

change as the size and nature of the problems become apparent – and the investigation must be tailored to the specific problems as and when they arise.

## The Needs To Tailor An Investigation To The Issues

Tailoring an investigation to the specific issues that have been reported means ensuring it is conducted in a way that is of least damage and disruption to the company. Initially, this means considering whether the allegations are based on fact or are merely hearsay and rumour and whether an internal investigation is actually necessary.

As soon as a corporate is aware of the allegations it is prudent to appoint a committee to oversee and steer the investigation that is to be conducted. And it is important that the committee does not include anyone who may later have to remove themselves from it as they become part of the investigation.

If an investigation is deemed to be necessary, the structure of it and the sequence of events need to be determined:

- Who will head the investigation? Will outside counsel be required?
- Who will assist with the investigation and what will their duties be?
- Which individuals, documentation and other materials will be required by the investigators?
- What order shall individuals be interviewed in? What should they be told about the investigation? What

questions should they be asked? And in what order?

- How can the investigation best be conducted within the law and in a way that does not breach company procedures or policies?

Arrangements also need to be made to cover:

- Note taking and record keeping.
- Document copying, storage and security.
- Arrangements for follow-up questioning of interviewees if new evidence emerges that requires them to be asked for more information.
- Analysis of the behaviour, body language or emotional response of those interviewed.
- Systematic reviewing of the evidence.
- Decision making regarding if and when findings should be reported to outside authorities.

## The Importance of Confidentiality

Confidentiality is vitally important when any internal investigation is conducted. Its importance goes beyond the need to protect a company's reputation. If an investigation is carried out in a confidential manner, it reduces the chances of information leaking out, which can make it easier for any evidence of wrongdoing to be covered up. Later on, the fact that an investigation was carried out in confidential circumstances may be of importance should a law enforcement agency decide to carry out its own investigation or if the company is later required to defend a related legal action.

The need for confidentiality should be explained and emphasised to both all those carrying it out and all those questioned as part of it.

## The Need for Professionalism

Every internal investigation has to be conducted in a professional manner. Those carrying it out must be respectful to all parties at all times and act with fairness, objectivity and integrity. They must work in a diligent, efficient and ethical way and explain to those they interview the reason for them being asked to attend.

The task is to ask the right questions of the right people in the right way. Investigators must be responsive as new facts and evidence emerge, determine the true picture and report on it in a clear and concise way. These tasks can only be carried out by individuals who are impartial and have no conflict of interest.

## Why Promptness is Crucial

The length and complexity of an internal investigation will depend on a number of factors. But it is important that any such investigation is started and conducted promptly once a potential problem has been identified.

When it comes to establishing whether someone has been correctly or incorrectly accused of wrongdoing, preventing any further wrongdoing, taking any remedial action or liaising with external agencies, analysing the situation promptly will provide the opportunity to identify the

correct course of action as early as possible. And this is in everyone's interests.

## The Aims Of An Investigation

When conducting an investigation, it is important that those carrying it out know what it is they are looking for. But is also vital that everyone associated with conducting it is aware of the aims.

Investigations can be carried out for a variety of reasons, including:

- Establishing the circumstances surrounding a specific event or allegation.
- Ensuring the board or other senior figures are kept fully informed of what has happened.
- Enabling the organisation to announce that it has thoroughly investigated an issue and taken any action necessary.
- Giving the organisation the ability to respond to concerns or criticism from shareholders, potential investors, trading partners or other third parties.
- Determining whether legal action and / or disciplinary needs to be taken against anyone.
- Making sure all regulatory obligations are being complied with.
- Discouraging regulators or law enforcement agencies from beginning their own formal investigation.
- Discovering what, if any, remedial action needs to be taken, including self-reporting.

## Taking the First Steps

If an internal investigation is to be conducted, there has to be total clarity about its purpose. Everyone involved in an investigation at a

company must be in no doubt about its objectives – or how it is to be carried out.

Those involved must agree who needs to know about it, whether any immediate action is required to stop any obvious wrongdoing and if and when any outside organisations need to be made aware of it. There must be clear procedures about how evidence should be sought, recorded and stored – which can be especially relevant given recent legal rulings on the issue of privilege. Whether any internal regulations have been breached and how any disciplinary action needs to be implemented are also issues that have to be considered.

Of immediate importance is also the matter of who will lead the investigation and how (and until when) its findings will be kept confidential. Appointing an external legal team to head an investigation can give it more credibility, avoid any conflicts of interest and ensure any potential legal issues - such as, for example, privilege – are managed appropriately. A timescale and a schedule need to be devised and acted on in a way that ensures the minimum disruption to a company's staffing and performance and causes least damage to its reputation and standing in the markets in which it trades.

## Planning an Investigation

Anyone conducting an internal investigation has to make themselves familiar with the organisation it is examining: the way it functions, its position in the market, its relationships with trading

partners and third parties, its record keeping, financial arrangements and internal policies and practices. This knowledge can then inform the planning of the investigation. Planning an investigation is not something that is set out rigidly at the start and followed regardless of what develops. Planning needs to be ongoing during the course of an investigation in response to developments and the emergence of new facts and evidence. The planning of any investigation should reflect the nature of both the company (and any individuals) being investigated and the allegations that have prompted it.

All aspects of an investigation have to be subject to careful planning, including:

- The goals and scope of the investigation.
- What information needs to be sought and how it should be obtained.
- Who should be kept informed of its progress.
- Who within the company should not be involved in the execution of the investigation.
- The timescale and schedule of activities; including the order and subject matter of interviews and the obtaining of documents.
- How revisions to the initial plan should be suggested and adopted.
- If, when and how law enforcement agencies should be notified.
- Who will be involved and their exact duties.
- Establishing the resources required and ensuring they are available.
- Ensuring the company can function as normally as possible during the investigation.
- Measures to ensure confidentiality.
- The use of external experts, such as IT specialists or forensic accountants.
- The precise format of the final report.

- Intelligent planning of an investigation helps those conducting it determine whether it is fulfilling its purpose and will make it easier to produce a properly-structured final report.

## Investigation Interviews

Interviewing an individual is a primary way to obtain the facts, assess the credibility of any allegations and ascertain the importance and meaning of any documentation considered relevant to the investigation. But in order to gain the maximum benefit from an interview, an investigator must have researched the subject matter and the interviewee thoroughly and carefully prepared their lines of questioning. They need to be adept at putting the interviewee at ease and capable of recognising and responding to any new developments that emerge during questioning.

A list of who needs to be interviewed must be drawn up. This should include anyone who has left the company shortly before or after the suspected wrongdoing was committed.

Careful thought must be given to who will be present at the interview. Ideally, the same team of people should conduct all interviews, as this will bring consistency and will ensure any contradictions in testimony are immediately recognised. Thought should also be given to where and when an interview will be held, who will record it or take notes (which will have privilege implications) and in what order the planned questions should be asked.

Anyone interviewed should be told that it is a fact-finding exercise that all relevant past or present staff are being asked to assist with. The importance of confidentiality should be stressed and it should be explained that the interview itself is not part of any disciplinary process. The interviewer should not be aggressive to the person they are questioning and should use any available documentation to help an interviewee remember and recount facts. But those interviewed should not be given any information they do not already have or be told what other interviewees have said.

There is an argument that interviews should be conducted in an order that goes from the most junior personnel to the most senior. By doing this, the interviewers have the most comprehensive picture by the time they question those at the top of a company. Ideally, the interviewing of those expected to have the most information relevant to the investigation should be conducted as soon as possible. This is because such interviews will give investigators much-needed insight into what has happened. It will also ensure that each person gives their version of events while it is still fresh in their mind and has not been distorted by discussions with others. This also reduces the chance of important information not being identified due to facts being forgotten, witnesses becoming unavailable or the loss of or damage to potential evidence.

An interviewer must determine what exact details the person being interviewed knows about the allegations, how they know these details, what evidence they can produce or cite to corroborate their version of events, what other witnesses can support their account and just how credible their testimony is when

compared to that given by other interviewees. Strategies should also be in place to ensure that the law and any contractual obligations are complied with if an individual refuses to take part in the investigation, requests legal representation, declines to answer certain questions or asks for an amnesty before giving answers.

## Document Management in an Investigation

Documentation can be a vitally important part of any investigation. For that reason, careful consideration must be given to the sourcing and obtaining of all relevant documents. Great care must be taken regarding their storage. Ideally, copies of all original documents should be made. These copies should be the ones the investigators work with on a day-to-day basis so as not to put the originals at risk. If possible, efforts should be made to obtain original documents from more than one source, in order to verify their authenticity.

In companies that are large or located in many places, great emphasis must be placed on tracking the movement and location of documents relevant to an investigation. The making of notes when studying documents as part of an investigation is another area where the issue of legal privilege can arise.

Issues such as the searching of an employee's desk and work space or the accessing of their email accounts need to be approached carefully. A company's staff manual may include rules regarding

searches and a company's right to inspect documents created on their equipment. Searches should, ideally, be conducted in a discreet manner, with an observer present and notes taken. The Regulation of Investigatory Powers Act 2000 and the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 must be followed when it comes to intercepting communications without consent. Businesses can monitor and intercept communications without consent if this is necessary to establish facts relevant to the business.

An individual may refuse to hand over a document on the basis of privilege against self-incrimination, as they believe it to be theirs. They may even try to destroy relevant documentation. Documentation possessed by a former employee can lead to issues of confidentiality arising. In such circumstances, the investigators need access to relevant legal expertise to assess the validity of an individual's refusal to help the investigation.

## Analysis of Investigation Findings

Analysis of all relevant facts, witness testimony and evidence produced is crucial in ensuring an internal investigation achieves its objectives. It enables conclusions to be drawn and can help investigators decide what, if any, action needs to be taken.

Analysis of any aspect of an investigation can also involve relevant expertise. Forensic accountants, IT specialists, data analysts and business advisors are among those who can be brought in to provide insight regarding an

individual's testimony or any relevant documentation. It is important that any analysis helps establish the truth if there appears to be contradictory evidence or testimony. It will involve examining just how subjective or objective an individual's version of the facts is, how reliable a witness they can be considered to be and what, if any, motivations they may have for making statements that appear to contradict those made by others.

## The Final Report

The final report has to be drafted, written and presented in a way that addresses how the investigation has achieved its aims and met its objectives.

It should give background to the reasons for the investigation, explain how it was conducted and outline its findings. It must then explain in detail its recommendations and explain both the thinking behind them and the benefits of taking such action.

When it comes to the facts that have been established, these must be explained in detail. Any areas of doubt should be outlined and reasons given if some evidence has not been obtained or some facts have not been able to be established. The report should contain analysis of all relevant evidence.

The findings of a written report must – unless specifically stated – be the facts and views of the entire investigating team. Any recommendations must be communicated clearly with reasons given

for them. This is the case whether they are matters of an internal, regulatory or legal nature.

For reasons of privilege, it is best if the report is drafted by lawyers. It may also be worth having the factual element of the report separate from the legal advice or analysis for reasons of privilege. If any parts of the report are privileged, they should be marked as such and only distributed to certain people deemed to be the investigation clients.

Having numbered copies of the report and asking for their return after a set amount of time is one way in which the report's contents can be restricted to those it is deemed necessary to share it with. Careful consideration should also be given to the issue of privilege if the report is to be shown to a regulator or organisations in a different jurisdiction.

## The Issue Of Corporate Liability

In order for a company to be considered liable for an action by one of its representatives, the act needs to be within the scope of an employee's employment activities and to have been done in the interests of or for the benefit of the company. Only then will corporate liability exist.

In the UK, a company can be held liable for the criminal acts of those who represent its directing mind and will and who control what it does. The Bribery Act 2010 and Part 3 of the Criminal Finances Act 2017 both introduced offences of failure to prevent by an "associated person", committed on behalf of the corporate unless the corporate can demonstrate that it

had adequate or reasonable procedures in place to prevent such an offence occurring.

## Managing Employees

If an employee is implicated in the issue that has prompted an investigation, it is likely that they will be suspended.

Suspension is a reasonable course of action if that individual is suspected of serious misconduct and their presence in the workplace creates a threat to the continued functioning of the company, other staff or the investigation itself.

In the UK, the Code of Practice on Disciplinary and Grievance Procedures, produced by the arbitration service ACAS, sets out the principles for handling staff discipline and grievance matters. It is important to remember that suspended employees are still bound by their contracts, which will include a duty of fidelity (including confidentiality) and an obligation to obey any orders that are lawful and reasonable.

## Self-Disclosure and the Joined-Up Approach to Investigations

Depending on the findings of an investigation and any recommendations included in the resulting report, a company may need to consider whether it needs to disclose what it has found out to an external agency.

Examples of such agencies in the UK include the police, Serious Fraud Office

(SFO), National Crime Agency (NCA), Financial Conduct Authority (FCA) and HM Revenue and Customs (HMRC), to name just a selection. On an international scale, the likes of the United States' Department of Justice and its Securities and Exchange Commission, Interpol and police forces and enforcement agencies across the globe could take a serious interest in what an internal investigation discovers. It is important, therefore, that a "joined-up" approach is planned and carried out so that no agencies feel they have been ignored or treated less favourably.

The agency to whom wrongdoing should be reported will depend largely on the nature of the illegal behaviour, the type of company where that behaviour has been committed and whether it has been conducted by an individual acting for themselves or on behalf of the company. In many cases, a company will require informed advice on the most appropriate agency to report the wrongdoing to first. A whole range of factors can determine how and when a company should report a problem to a particular agency. And yet there will also be times when the decision may be out of the company's hands. The right legal advice is equally important in these situations.

If the allegations involve activity in more than one country, the corporate must take care to ensure it is open in its disclosure with all the agencies involved. For example, if an agency in one country subpoenas documents, the corporate must consider carefully whether those documents should then be voluntarily disclosed to other agencies in other countries who are investigating the same allegations.

Making the decision to self-report wrongdoing is a major one. A number of factors must be

considered, including the criminal charges individuals or the company could face, how the matter can be resolved, any potential criminal fines or civil settlements, damage to reputation, loss of investor confidence, possible law suits and the chances of receiving lenient treatment for self-disclosure.

## The Skills We Offer

The key to managing any investigation is to be in full control of your affairs so you can either respond appropriately to an external investigating authority or take the action to put right internal issues.

As a firm, our experience in this field and our proven expertise has led to us being recognised as a respected authority when it comes to investigations. As a result, we regularly contribute chapters to legal books on conducting corporate investigations and provide advice pieces to many business, professional and legal media outlets. When it comes to regulatory investigations, seeking a deferred prosecution agreement or any other aspect of internal investigations and self-reporting, our knowledge and our achievements have made us the obvious choice for many who require such expert advice.

We would emphasise that the right legal advice has to be sought as early as possible to ensure you can give a comprehensive explanation of your affairs, if and when it is required, and minimise any damage and disruption.

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