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CONCLUDING AN INTERNAL INVESTIGATION

Steps taken at the conclusion of an internal investigation may be critical to avoiding unnecessary risks in related civil litigation and regulatory or criminal proceedings. The authors discuss issues surrounding memorialization, attorney-client privilege, and remedial actions.

By David Bayless and Tammy Albarrán *

Internal investigations are unique because they are subject to a high level of scrutiny after they are completed. Third parties – including skeptical regulators, prosecutors, shareholders, courts, auditors, and even trustees and receivers – will often demand to see the results of a completed investigation. Because of this, steps taken at the conclusion of an investigation are just as critical as the investigation itself. The investigating team must consider the broader implications of the investigation's findings to ensure that the company does not unnecessarily expose itself to increased risks.

This article first addresses why an internal investigation should be memorialized, the content of such memorialization, and the different ways this can occur. We then discuss the difficult issue addressing third-party requests for copies of the memorialization. Finally, we discuss the importance of ensuring that proposed remedial actions are taken.

Why Memorialize an Internal Investigation?

Memorialization of a legal activity is not the norm. When litigation is concluded, for example, the client does not tell its lawyers to memorialize what they did and why. One can imagine a rare case where litigation

has an unexpected result and the client wants a post-mortem. But the typical situation is that when a piece of litigation is completed, or a deal is done, the lawyers stop their work – and they and the client move on to other business.

When an internal investigation is completed, however, it is essential to memorialize what has been done. This memorialization should include the scope of the investigation, the documents reviewed, the witnesses interviewed (and when), meetings (if any) with regulators or auditors, and the like. This memorialization should also include recommended remedial actions.

The main reason to memorialize an internal investigation is that, as noted, an internal investigation will be analyzed after the fact by regulators and prosecutors. So it is essential for the firm that conducts the investigation to have a clear internal documentation of its scope, what was done and why, and the recommendations made. You do not want to rely on memory for the important task of persuading regulators and prosecutors that the investigation was thorough and complete.

* DAVID BAYLESS and TAMMY ALBARRÁN are partners in Covington & Burling LLP's San Francisco office. Their e-mail addresses are dbayless@cov.com and talbarran@cov.com.

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Should the Memorialization Be Done in a Written Report?

The purpose of such memorialization is to satisfy one or more of the various constituencies that has an interest in the internal investigation. Often, however, the client (either the board as a whole, a committee of the board, or an independent committee) specifically requests a written report to review. This report, in essence, takes the memorialization and puts it into a memorandum format that the client can read and understand. Companies and/or their board members often automatically request a written report from the investigative team.

While it is important to memorialize the investigation, step back and consider whether a written report to the board (or other client) is necessary. Indeed, there are often good reasons for preferring an oral report.

First, while a written report may be easier to follow and appear to be the logical conclusion to an investigation, it is an expensive and time-consuming endeavor that comes with risks. For example, it is much easier to waive inadvertently the attorney-client privilege. It is often difficult to control the circulation of a written report, especially given technology today. This potential circulation places at risk the privileged nature of a report. In the wrong hands, the report can serve as a road map to a plaintiff.

Second, findings and conclusions set forth in a written report are set in stone. If additional information comes to light that has an impact on the report's conclusions, altering the conclusions may undermine the credibility of the entire investigation. So, retaining flexibility to change the investigative findings if further information is later learned is a real advantage of an oral report.

Third, it takes time to prepare a well-written and thorough written report. When an internal investigation must be conducted quickly, spending time on a written report may not necessarily be an efficient use of time.

Finally, consider that it may be appropriate and sufficient for the investigators to present their

conclusions orally at a board or committee meeting, which can then be documented in the meeting minutes.

All this said, there are instances in which, given the nature of the allegations, the complexity of the matter, and its public nature, a written report is necessary. An example is the recent Penn State investigation, in which a written report was made public. Counsel and its client should balance the need for a thorough and timely investigation with the client's need for a written report.

Protect the Privileged Nature of the Investigation

It is important to ensure that at the end of an internal investigation no missteps occur to jeopardize the attorney-client privilege. Third parties, such as the government, auditors, or shareholders, often clamor for copies of the investigatory report, witness interview notes and memos, and attorney-client communications. It's important to know how to navigate these requests.

Communications with third-party witnesses, the company's auditors, and the regulators are not protected by the attorney-client privilege. For materials that are protected by the privilege, if there is a waiver of the privilege, the company may be required to produce these materials to outsiders who will then use the information against the company.

Privilege issues arise when third parties make requests at the conclusion of an investigation. Waiver is particularly problematic when dealing with the auditors, something that management and the investigating lawyers often must do both during and at the conclusion of an investigation. Communications with the auditors are not privileged. You might be able to argue that there is a "common interest," but that position is not a clear winner. So this necessarily limits what may be shared with the auditors. At the same time, auditors are understandably nervous about signing off on a company's financial statements without knowing the results or the findings of the internal investigation. They often will want assurances, sometimes in writing, that no illegal activity has occurred. This leads to tricky negotiations between the lawyers conducting the investigation and the auditors.

Waiver is also an issue when dealing with the regulators. Currently, neither the Department of Justice nor the SEC requires that the client waive the attorney-client privilege in order to receive cooperation credit. It is nevertheless important to remember that communications with the regulators are not privileged, and for protected materials it is essential that the privilege be preserved. Also, keep in mind that any information given to one regulator is likely to be shared with other regulators or prosecutors. For example, it is safe to always assume that information provided to the SEC will be shared with the U.S. Attorney's office or Department of Justice, and vice versa.

To ensure that there is no inadvertent waiver of the attorney-client privilege, the disclosure of any investigation materials should be limited to individuals within the company (*i.e.*, the board or committee and the general counsel). If possible, these materials should only be shared with a small group of senior management on a need-to-know basis. And when dealing with third parties, including the auditors or the government, disclose only *facts*, which may include key documents collected during the investigation. Do not disclose any attorney analysis or attorney-client communications.

Ensure That Remedial Actions Are Taken

Recommendations for remedial actions are normally part of the conclusion of an internal investigation. The goal is to ensure that problems do not arise again and to show that the company takes seriously any wrongdoing by its employees. Examples of recommended changes include strengthening internal controls, implementing new compliance programs, ensuring better documentation, and improving employee training. Recommendations also include disciplinary actions against wrongdoers, proportionate to their conduct and their role in the company. So, for example, conduct that might warrant a letter of warning in a low-level employee's file might warrant much stronger action (including termination) against a member of senior management. Such remedial actions should be memorialized, but not necessarily included, in the final written report (assuming such a report is prepared).

A key goal of ensuring that remedial actions are taken is to obtain cooperation credit from the government. Both the Department of Justice and the SEC base cooperation credit, in large part, on a company's commitment to ensuring the implementation of remedial measures.

A tricky issue with respect to disciplinary actions is how to handle a whistleblower. It is not uncommon for an investigation to uncover that the whistleblower who came forward with evidence of misconduct was in some way implicated in the wrongdoing. This poses a difficult choice for the company. Both Sarbanes-Oxley and Dodd-Frank provide whistleblowers with protection from retaliatory action. This may mean that a whistleblower, though involved in the wrongdoing, gets a free pass. Or, perhaps the disciplinary action is much less than it would have been but for the person coming forward.

But less onerous treatment of a whistleblower (or even a free pass) can be justified by the rationale behind whistleblower statutes, as well as the rationale underlying internal compliance programs. The need to encourage reports of wrongdoing may warrant disparate treatment. It also addresses the employee who is involved in wrongdoing but then has a change of heart. If he knows he'll get credit for blowing the whistle, even though he was involved in the misconduct, it encourages him to come forward instead of thinking that, because he was involved, he cannot report problems. These are difficult judgments to make, and your investigative team will need to advise you on the best course to take.

CONCLUSION

An internal investigation is just one (important) piece of what is likely to be a much larger problem the company is trying to solve. It is important to be mindful of how the steps taken at the conclusion could expose the company to unnecessary risks in related civil litigation or regulatory investigations. Keeping the bigger picture in mind will help ensure that the investigation and its results do not pose unnecessary risks to the company going forward. ■