Presented to the SCCE

Internal Investigations
Updating Your Approach to Achieve Better Outcomes

February 2020

Kevin R. Feldis
Kfeldis@perkinscoie.com

Note: This presentation is for informational purposes only and should not be considered legal advice. Not for public distribution.
Common Business-Unit Concerns

- “Investigations are too expensive/divert company resources.”
- “Do we really need to do interviews, review emails, etc.?”
- “How long will this take?” / “We need to wrap this up.”
- “Sue was employee of the month – we can’t investigate her!”
- “It was wrong, but that’s how business is done in [Country].”
- “That person is a troublemaker – why can’t I give employees an update on the investigation findings?”
- “Do we really need to report this to [the board, shareholders, our auditors, authorities]?”
Update Your Approach

- Why Companies Investigate
- Elements of an Effective Investigation
- Handling Complaints
- Preparing for an Investigation
- Evidence Collection and Review
- Effective Interviewing

Concluding the Investigation:
- Communicating Findings (while maintaining privilege)
- Designing an Effective Remediation Plan
Why Companies Investigate

Purpose of Investigations

- Identify potential violations of policy or law
- Discipline or remove problem actors
- Safeguard your company (business, brand, reputation)
- Signal and pursue constant improvement
- Gather important facts for leadership
- Demonstrate corporate engagement and commitment to oversight from the top down
Why Companies Investigate: Consequences of “Bad” Investigations

- Miss Fixable Problems
- Damage Legal Position
  - Shareholder derivative lawsuits; wrongful termination claims
  - Also in criminal investigation
- Increase Penalties
  - Failure to investigate/bad investigations can lead to greater fines, personal liability and higher long term costs
- Failure to Identify Ineffective Controls (operational issues)
- Likely Problems Will Repeat
- Brand-Damaging Press
Elements of Effective Investigations

- Approach is neutral, fair, appropriate in scope
  - Relevant parties are interviewed
  - Data preservation, collection, and review targeted to relevant issues
- Confidentiality is maintained
- Investigation has (and is viewed as having) integrity: results are reliable and evidence-based
  - Appropriate follow-up with all relevant parties
- Root Cause Identified
- Effective remedial action taken to address misconduct and deter similar conduct
  - Any remedial actions are supported by evidence
Handling Complaints: Source and Form of Complaint

- Complaints need not be through formal channels
  - Anonymous letters/emails
  - Complaints to supervisors
  - Whistleblower complaints
  - Hotline or media reports
- Not always in writing
- No “magic words” needed to warrant investigation
  - Knowledge of potential misconduct may be enough to trigger need to investigate
Handling Complaints: Choosing an Approach

- **Does complaint require investigation?**
  - Key considerations include credibility of source, and nature and seriousness of allegations

- **Does complaint involve:**
  - Government, regulatory, ethical, or safety violations (corruption/bribery, fraud, trafficking/child labor)?
  - Misappropriation of trade secrets/confidential info?
  - Harassment, discrimination, retaliation, violence?
  - Violations of Code of Conduct or Handbook?
  - Conflict of interest (financial or administrative)?
  - Breach of contractual agreements?
Preparing for an Investigation: Selecting an Investigator

- Investigators are not “one size fits all”
  - Select appropriate investigator for each matter

- Possible investigators:
  - Human Resources
  - Internal Audit
  - In-house Legal department
  - Outside counsel/investigators
Preparing for an Investigation: Selecting an Investigator (cont’d)

Things to consider:

- Type of complaint being investigated
- Positions, personalities, and backgrounds of people involved
- Potential witness considerations (will those conducting investigation need to serve as fact witnesses?)
- Scope of investigation/number of investigators
- Likelihood of detection/risk to company image
- History of similar issues
- Likelihood of subsequent litigation
- Likelihood of disclosure to authorities
- Legal privilege protections
Preparing for an Investigation: Selecting an Investigator (cont’d)

- **Investigator must be:**
  - Neutral (free of any conflict of interest)
  - Experienced/credible
  - Able to conduct investigation and complete it in a timely manner (availability and resources sufficient for scope)
  - Comfortable with the subject matter

- **Who will review the results?**
  - Will investigation results be shared with the Board
  - Will result be shared outside the organization
Preparing for an Investigation: Other Pre-Investigation Steps/Considerations

- Document the complaint; acknowledge receipt
  - Particularly if complaint comes from an anonymous source or whistleblower

- Consider potential need for disclosure to auditors, shareholders, authorities
  - Prepare media statement if allegations are public

- Consider whether to remove/suspend accused parties (if in company’s best interest)
  - Timing: Before confronting accused?
  - Disclosure: What should accused, others be told?
  - Form/Terms: Written notice? With pay? Access to company systems?
Preparing for an Investigation: Ensuring Alignment

- Written investigative work plans help define scope; ensure alignment

- **Work plan should address/include:**
  - Summary of the issue(s) being investigated
  - Scope and scale of investigation
  - Sources of evidence – people and form of data
  - Plan for preserving, collecting, and reviewing evidence
  - Potential interviews
  - Reporting process and form (interim and final)
  - Need for experts or other service providers
  - Confidentiality/privilege
  - Schedule/Expectations
Evidence Collection and Review

- **Data Preservation Matters**
  - Consider legal hold to reduce risk of data loss
  - Interrupt regular data retention practices

- **Identify Potential Sources of Evidence**
  - **Who is likely to have relevant information?** – Consider current/former employees, assistants, supervisors
  - **What form may evidence take?** – Employee email, share files, voicemail, data from company-issued computers/phone, policies and procedures, Internal Audit files, vendor due diligence files, contracts, personnel files, expense reports/invoices/other accounting records

Confidential: Not for Publication
Evidence Collection and Review (cont’d)

- Review should target potentially relevant data
  - For electronic records, use keyword search terms
- If more than one reviewer, prepare and follow review protocol (ensure consistency)
- Develop system to track/summarize key documents
- Document everything
  - What was collected, from who, when, how, etc.
  - Explain any limitations in scope (intentional or not)
- Beware of foreign data privacy laws
  - Permission may be required to collect/review data in other countries
Effective Interviewing: Structure and Approach

- Do not record interview or allow recording
- Initiation of interview
  - Explain purpose of meeting (only necessary facts – accused parties not entitled to know who reported them)
  - Fairness is key – create appropriate environment
  - Provide “Upjohn advisements” – clarify that you represent the company, not interviewee; explain privilege; etc.
  - Reference “no retaliation” policy – confidentiality considerations
  - Confirm interviewee understands advisements
  - Be prepared for “Do I need a lawyer?” and other questions
Effective Interviewing: Structure and Approach (cont’d)

- Ask open-ended questions – don’t assume facts
- Get precise answers to questions
  - Don’t permit evasion - obtain specifics, sources of info
- Use documents to corroborate
- Allow interviewee to explain documents/facts
  - Avoid pre-judgment but probe answers that seem suspect
- Avoid confrontation – maintain neutrality
- At conclusion of interview:
  - Ask who else to talk to/documents to obtain, and encourage witness to follow up with additional thoughts
  - Inform witness that company is working to resolve issue
Effective Interviewing:
Memorializing What You Learned

- **During the interview:**
  - Take clear and copious notes
  - Note time of interview, length, location, people present
  - Document *Upjohn* advisements and witness agreement
  - Only record facts and observations – do not interpret
  - Observe and note witness behavior
  - Note use of documents

- **After the interview:**
  - Promptly after the interview, interviewer should prepare summary (formal memorandum or informal summary)
Concluding the Investigation …

- How do companies use investigation results?
  - Remediate identified problems (terminate/discipline wrongdoers; improve internal controls, etc.)
  - Address other potential legal risks (amend public filings; report to government regulators)

- How can the results (or work product) be used against you – and what you can do about it?
  - Government Investigations
  - Shareholder Derivative Suits
  - Employee Lawsuits
  - Whistleblower Protections
  - Transnational Investigations (and Lawsuits)
  - Privilege Waiver
Relaying Findings
(While Maintaining Privilege)

- **Determine form of reporting (privilege)**
  - Written report, verbal readout, or presentation?
  - Do results warrant readout to auditors, shareholders, creditors, regulators? – stick to facts

- **Substance of report – are facts in dispute?**
  - Corroborate, corroborate, corroborate
  - If facts are conflicting, be ready to present mixed, well-documented findings

- **Interim reporting while investigation is ongoing**
  - Status updates should focus on process; avoid “findings”
  - Only update those who “need to know” (i.e. not investigation targets) – protect privilege
Report of findings should:

- Identify all parties involved in investigation; roles (including outside vendors)
- Identify what was reviewed (and what was not); any other limitations to the investigation
- Create a chronology – complaint, preparation, document collection, interviews, corroboration, findings, and remedies/actions
- Written reports should focus on facts; avoid legal conclusions
  - Any discussion of wrongdoing should focus on company policies and procedures
Designing an Effective Remediation Plan

- Did investigation identify misconduct?
  - Remember: governance/process/internal controls issues

- If yes, consider:
  - Desires of complainant (and reaction of authorities/board members/management/jurors)
  - Presence or risk of regulatory action/civil litigation
  - Existence of similar violations within the company/industry
  - Determine goals (deterrence, punishment, restitution)

- Use existing company policies and procedures
Designing an Effective Remediation Plan (cont’d)

- Possible remedies
  - Written warnings/reprimand
  - Acknowledgement of wrongdoing
  - Administrative leave
  - Reduction/elimination of bonus
  - Additional training
  - Transfer
  - Suspension
  - Termination
  - Reporting to authorities
Questions?