

## Chapter 1

# Anatomy of a Quality Internal Investigation

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**§ 1.01. Introduction.**

Public scrutiny over the nation’s largest corporations has never been greater. The post-Enron, Sarbanes-Oxley and Dodd-Frank regulatory environments reflect the government’s heightened interest in utilizing criminal and civil remedies to punish corporate abuses.<sup>2</sup> Over 2,500 public companies have conducted internal investigations since 2001 in response to allegations of impropriety, and the trend suggests more to come.<sup>3</sup> This surge in internal investigations by the nation’s largest corporations is the manifestation of the government’s efforts to curb corporate abuse.

The goals of an internal investigation are to ascertain the pertinent facts, assess the legal implications, and mitigate the harm to the company. The inquiry may show that the organization is a victim of actions by its employees, agents or others. Or, it may reveal potential civil or criminal liability on the part of the organization. Essential components of an effective internal investigation differ depending upon whether the events render the organization a victim or culpable actor.

If the organization is a victim, the primary internal investigative goal is to identify the culpable parties, quickly implement measures to cease further victimization, and take employment action, which may include referring the matter to law enforcement. This creates an essentially adversarial relationship between the culpable employees and the organization. Law enforcement’s role, if any, may be passive until the inquiry is complete and the results reported to it.

Where the events create the prospect of organizational liability, civil or criminal, the dynamics of the investigation differ. It may be that the

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<sup>2</sup> See Law360, *Outside Counsel and Internal Investigations*, (Oct. 16, 2009); Robert S. Bennett, *et al.*, “Internal Investigations and the Defense of Corporations in the Sarbanes-Oxley Era,” *The Business Lawyer*, vol. 62, p. 55 (Nov. 2006).

<sup>3</sup> American College of Trial Lawyers, *Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, p. 1 (Feb. 2008).

organizational interests coincide at more points with the allegedly offending parties because the organization's liability is derivative of the employee's or agent's action. Interaction with those parties is affected by the looming presence or possible active involvement of law enforcement. Without a doubt, the focus of law enforcement on the organization and its employees as putative defendants alters the dynamics of the internal investigation.

What follows is a discussion on the steps to take in an internal investigation. Areas where a different focus is required when the organization is a subject or target of law enforcement actions are identified. They include (1) deciding whether, and to what extent, an internal inquiry should be conducted; (2) determining when a regulatory or civil matter may develop into a criminal issue; (3) determining the scope of the inquiry; (4) assembling the investigative team; (5) interacting with employees; (6) executing the investigative plan; (7) analyzing the results; (8) reporting the matter; and (9) dealing with the government.

### **§ 1.02. When Do You Need to Do an Investigation?**

The need for an investigation can come to the attention of the organization through a variety of means and the manner in which it comes to the organization's attention will often influence the investigation's scope. For example, government action, in the form of a subpoena, search warrant or interview, will typically necessitate a thorough investigation. In contrast, if the organization is a victim, then it may choose to limit the scope of the investigation and conduct the inquiry through its security or audit department as opposed to its General Counsel's office. Media attention, non-governmental litigation, whistleblower complaints, or internal memoranda and complaints, may also identify matters that require an investigation. The need to investigate may be ever present, but the scope of the effort is determined by the seriousness of the issues.

### **§ 1.03. How Do You Recognize a Significant Problem?**

Identifying whether a problem will be viewed by the government as one that should be the subject of a criminal investigation or possible quasi-criminal penalties is critical. Having a sense of the government's view may influence significantly the scope and scale of the investigation.