

The Investigations Playbook: Considerations for Boards

By John Carlin, Harris Fischman, and Jeannie Rhee

THOUGH USED ONLY IN SELECT CIRCUMSTANCES, investigations can be an important first step in addressing serious, credible allegations of corporate wrongdoing or executive misconduct. When necessary, an internal or independent investigation can be used to manage a potential crisis, take strategic action, and mitigate potential legal and reputational risk. While the approach should always be tailored to the specific incident or allegation, investigations generally follow a similar playbook or set of steps. Understanding the spectrum of investigatory options and the board's role throughout the process is essential to good corporate governance if and when a crisis strikes.

When an Investigation Is Truly Needed

Many allegations of misconduct lack merit and can be dealt with quickly and effectively internally. But an internal or independent review may be advisable when allegations are particularly damaging to the company, have attracted media or government scrutiny, appear likely to lead to high-profile litigation, or take aim at the core business or workplace culture. The credibility and severity of the claimed misconduct dictate the scope and contours of the investigation.

Many investigations can be handled without board involvement, at the discretion of management, with and without the assistance of outside counsel. However, if a matter implicates members of management or members of the board, the board may want and need to engage outside counsel for an independent investigation.

In these circumstances, there are numerous, highly customizable options to ensure the integrity and independence of the investigation. For example, the company's general counsel might retain outside counsel but direct them to report their findings only to the board.

Another tried-and-true option is to have the board, or a committee of the board, engage outside counsel. Depending on the situation and whether some subset of the board may be involved or aware of the underlying facts or conduct, there may be circumstances that call for the formation of a special committee of the board, including a special committee comprising only independent directors.

Scoping Is Key to a Successful Independent Review

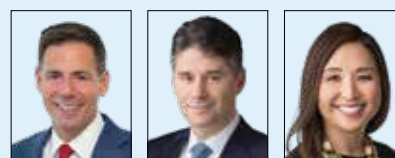
Because one size does not fit all when it comes to independent investigations, the first step for outside counsel is to scope or assess the severity of the issue. When engaging outside counsel for any type of investigation, scoping the situation will allow them to assess how much or how little work is needed to address the problem. Sometimes an issue calls just for containment and could take a matter of hours to resolve; other times, the situation is far more consequential and could require intensive work, including document collection, witness interviews, or retaining specialist cyber or forensic accounting consultants.

Part of scoping also involves assessing the company's immediate needs in terms of timeline. For example, if the company is public, is it due to file its 10-K next week, or does it have more flexibility?

The Board's Role in an Investigation

In any internal or independent investigation, an agile and open-minded approach will best fulfill the board's fiduciary obligations of care, loyalty, and good faith. During the scoping phase, for example, being responsive and forthcoming with investigators will help facilitate a review that is best suited to the situation.

When the findings are reported, boards may want to consider any recommendations made for specific actions their companies can take to address misconduct or gaps in policies or practices. These may include changing policies, sharing information and cooperating with government agencies, or carefully developing an internal and external communications plan, among other possibilities. [D](#)



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