

Five Ways to Meet Heightened Government Expectations

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Corporations seeking cooperation credit from regulators in internal investigations are now required to disclose “all relevant facts” on individuals involved in wrongdoing. However, the U.S. Department of Justice (DOJ) has not established standards for how and by whom these facts are gathered. As counsel and companies work through these decisions, they must also defend the adequacy of investigations and should consider how properly assessing risks and improving controls can help to meet the heightened expectations.

The issuance of the Individual Accountability for Corporate Wrongdoing memorandum by Deputy Attorney General Sally Quillian Yates (more commonly referred to as the Yates Memo) in September 2015 marked a watershed moment in the pursuit of individual accountability—a topic hotly debated since the fallout from the financial crisis. Building upon the Yates Memo, the DOJ re-issued its Principles of Federal Prosecution of Business Organizations (DOJ Principles), which set forth the factors federal prosecutors must consider to determine whether to file charges and negotiate plea agreements and other dispositions of criminal investigations of corporate targets.

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The DOJ Principles require that organizations seeking cooperation credit disclose in a timely manner all “relevant facts about the putative misconduct.” The policy is not prescriptive and leaves the organization to decide “how and by whom the facts are gathered.” Ultimately, as has been the case for many years, prosecutors assess—and company counsel must defend—the adequacy of an investigation.

Here are *five practical ways* counsel and organizations can better meet

heightened expectations of internal investigations:

1. Determine the Full Extent of Wrongdoing

Experienced practitioners understand wrongdoers often engage in a variety of misconduct and rarely come completely clean even when they have made a confession. In order to capture the full extent of misconduct, it’s important to employ a multidisciplinary team with the right risks and controls expertise to

conduct a thorough internal investigation. The internal investigation generally includes the following five steps:

- Identify potential risks by examining the wrongdoers' pressures, incentives and opportunities;
- Examine the design and operating effectiveness of the organization's risk response;
- Create risk indicators and red flags for residual risks;
- Develop forensic auditing procedures, including forensic analytics, transaction testing, accounts and balances testing, walk-throughs, observations and interviewing; and
- Provide negative assurance, if forensic auditing procedures do not identify risk indicators.

2. Determine Extent of Similar Misconduct Elsewhere In the Organization

Prosecutors will also ask whether the internal investigation considered similar misconduct elsewhere in the organization. These extended inquiries are more akin to a "forensic audit" than an

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investigation, because the team does not have the benefit of a specific allegation or suspicion. When conducting an investigation on behalf of an international organization, the investigative team also needs to be cognizant of cultural differences around the globe.

With the right forensic support, begin by assessing the flaws in the controls that gave rise to the misconduct. Assume, for example, the controls were well designed, but not operating effectively. Under these circumstances, the internal investigative

team would test operating effectiveness in a sample of other locations. Assurance that the controls *were* operating effectively would support a conclusion that the wrongdoing was limited to a single individual or location.

Answering "who else?" becomes more challenging when control weakness pertains to design effectiveness; that is, the control, even though it operated effectively, did not adequately prevent or timely detect misconduct. Under those circumstances, forensic experts must undertake substantive procedures to determine whether others in the organization exploited the design flaws. The risks and controls processes are similar to those used to determine the extent of the wrongdoing, that is, apply forensic audit procedures to search for risk indicators and red flags.

3. Understand the 'Why' And 'How'

Internal investigations typically answer "who, what, where and when." Be prepared for prosecutors also to ask "why" and "how." Various frameworks are available for root-cause analysis to identify underlying causes of the wrongdoing.

For example, Cressey's Fraud Triangle—developed by criminologist Donald Cressey—is the most commonly applied model. According to Cressey, three circumstances exist when misconduct occurs: (1) pressure or incentive; (2) opportunity; and (3) rationalization.

In assessing pressure and incentive, it's important to examine the organization's compensation system, job security concerns and, of course, the individual motives of the perpetrators. Consideration of opportunity includes assessment of the design and operating effectiveness of the policies, programs and controls, as well as the competency of the personnel performing the controls, and evaluating the quality of information technology systems. Factors typically include job dissatisfaction, denial of consequences, revenge for an actual or perceived prior harm or slight, family and health priorities, "everybody

does it," "I deserve it" and "I won't get caught" rationalizations.

4. Diving Into the Data: Forensic Analytics

Companies can expect prosecutors and regulators to inquire about the scope of the investigation, particularly around the use of forensic analytics, if the investigation involves numerous transactions or large amounts of data. Questions around "structured and unstructured data," "assimilation of disparate data," "common data platforms," "data cleansing," "SQL," "ACL," and other programming languages are also likely to arise. If you are unfamiliar with these terms, it may be worth embedding a forensic analytics expert on your investigation team, as the DOJ regularly takes data considerations into account. Forensic analytics, the melding of forensic techniques and data analytics, is a critical piece of a credible financial investigation.

5. Show Me the Money!

Complex internal investigations commonly involve financial issues. Counsel and the organization, for example, must be prepared to defend the calculation of earnings and losses, as these impact calculation of fines, disgorgement and other penalties. In recent years, the need for forensic accounting assistance in investigations involving antitrust and FCPA violations, asset misappropriation and financial statement misstatements, for example, has increased.

Conclusion

The full effects of recent DOJ pronouncements are still unfolding. In the meantime, companies and counsel should conduct robust investigations to secure cooperation credit for their efforts, as the continued emphasis on individual accountability is not expected to be abandoned any time soon.