



Laying the Groundwork for an Effective Investigation: Initial Considerations

Strategies to Consider When a Problem Emerges

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THE FACT-FINDING AND ASSESSMENT PHASE IS CRITICAL.

This phase may dictate whether a company can proactively manage a potentially serious problem, or whether it will wind up in a reactive mode that presents even greater challenges.

1. BE MEASURED, BUT ACT QUICKLY

- The impact of a problem will not always be immediately clear. It is important to assess the problem and its potential scope as soon as possible to assure that it will be handled appropriately.
- Failing to act on a “small problem” may exacerbate the problem; failing to recognize a “big problem” can lead to even more serious issues.

2. DEFINE THE PROBLEM AND ITS POTENTIAL CONSEQUENCES

- Discrete fact-finding by in-house or outside resources will help the company understand the problem and the potential scope of its consequences. A better understanding of the problem gives the company a better opportunity to develop an effective strategic response.
- Take affirmative steps to *protect the company's privilege*, which typically can be addressed through a directive by in-house legal counsel overseeing the initial assessment.
- Ultimately, counsel should: (i) assess the legal, business, and reputational implications of any problem, and (ii) develop a sound strategy to address those risks.

3. CONSIDER THE FOLLOWING QUESTIONS IN THE INITIAL ASSESSMENT:

To investigate the allegations:

- If the problem is an “allegation,” is there evidence to corroborate the problem?
- What is the potential scope and seriousness of the problem?
- Does the problem involve potential violations of laws, regulations or the company’s code of conduct?
- Is the problem contained, or could it be more widespread?

To assess and mitigate risk:

- Are the allegations public or likely to become public?
- Who are the internal and external stakeholders who may become interested in the issue? What is their likely reaction?
- Are any senior managers implicated? Should anyone be walled off from reporting?
- Is there a risk of harm to customers?
- Is there risk to company assets or compromise of confidential information?

To prepare to respond:

- Is there a risk the government will be interested in the issue?
- What is the potential impact of any public allegations?
- Are there any steps the company can take to prepare for it now?
- If there is a drop in share price due to the allegation, are you prepared for shareholder litigation, regulatory inquiries, lender questions or other problems?

Consult outside counsel as soon as possible when:

- In-house resources are not sufficient
- The problem in question is already public
- The problem has known serious implications
- The matter has other sensitivities
- You need a “gut check”
- You don’t know what to do

4. PRESERVE EVIDENCE

- Take steps to *preserve evidence*. Re-evaluate scope of any litigation holds as facts are developed (e.g., dates, other custodians).
- To avoid unnecessary challenges, companies should:
 - Regularly update company IT policies;
 - Understand IT’s capabilities to retrieve, preserve and restore data; and
 - Stay abreast of the way employees communicate (e.g., texts, third party messaging services).
- Create a record and document each step of the preservation process, including any issues that arise with loss or destruction of evidence, and any key decision points on what and how to preserve the evidence.

Do

- Preserve evidence
- Take problems seriously
- Consult trusted advisors to evaluate strategy
- Evaluate the credibility of an allegation before sounding the alarm
- Be proactive to avoid surprises and manage issues

Do Not

- Ignore the problem
- Disregard evidence
- Fail to act

5. EVALUATE POTENTIAL NOTIFICATIONS

- Throughout the assessment period, consider whether the problem may need to be escalated within the company and, if so, when?
- Avoid unnecessary surprises to the extent possible, especially if there is a potential for the problem to be made public.

6. IF A PROBLEM IS IDENTIFIED, IMPLEMENT A PLAN TO INVESTIGATE IT, UNDERSTAND IT, FIX IT AND MANAGE RISK.

- If the allegations are confirmed, stop the offending activity, and then develop and implement a plan to fully investigate and understand the root cause of the issue and any prior indications or “red flags” of the problem.
- Fully assess the current and prospective legal, business and reputational risks, incorporating outside counsel and key stakeholders within the company as appropriate (e.g., legal, communications, human resources, directors).
- Document the remediation to provide a record of what actions the company took and why. This record will be useful if the problems become public, become the subject of another reinvestigation, or recur.
- Companies are expected to be transparent, accountable, and judicious in their documentation. The absence of one of these factors may count against the company.

7. CONSULT OUTSIDE COUNSEL, UNDERSTAND YOUR LEGAL DUTIES AND DEVELOP A HOLISTIC STRATEGY

- Get advice, as needed, to understand legal duties and obligations, and to evaluate potential legal, business, reputational, and brand risks.
- Gather information that may be needed for key stakeholders (internal and external).

If the problem is serious or may become public, prepare a holistic strategy aimed at defining and remediating any problems and addressing any direct and collateral consequences that may arise.

Who are Internal Stakeholders?

- Senior Management
- Board of Directors
- Communications
- Corporate Security
- Information Technology
- Human Resources
- Employees

Who are External Stakeholders?

- Shareholders
- Investors
- Auditors
- Regulators
- Lenders
- Insurers
- Customers
- Business partners

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