

Leadership in the Crosshairs

A Guide to Evaluating Allegations of Misconduct Against Executives and Board Members

Allegations that corporate executives, senior management, or board members have committed misconduct expose a company to civil and criminal liability and — depending on their nature and scope — have the potential for catastrophic reputational harm. Addressing the situation requires immediate attention and decisive action.

It is important to remember that in-house counsel does *not* represent the alleged wrongdoer.

- In-house counsel represents the company — not its employees, executives, or board members in their individual capacities.
 - In-house counsel must clearly inform the accused individual(s) that they do not represent them.
 - In-house counsel must inform the individual of the privilege implications. Specifically, in-house counsel is not obligated to keep confidential any information the individual may share; and, to the extent in-house counsel receives any privileged information from the individual, that privilege belongs to the company and may be waived by the company at its discretion.
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The legal department may, and in many cases should, assist the individual in retaining an attorney.

- Individual(s) may need to retain an attorney if their interests conflict with the company's interests.
 - The company may assist the individual in selecting an attorney — for example, by providing a slate of qualified candidates. However, the individual must make the decision.
 - The company's indemnification and advancement policies and the individual's employment contract must be reviewed to determine whether, and to what extent, it will cover the individual's legal expenses.
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The company must determine the nature and scope of the alleged misconduct.

- It is important to consider whether the individual's actions were (1) within the scope of the individual's duties, and (2) intended, at least in part, to benefit the company.
 - The company must determine whether it should provide notice under their Directors and Officers insurance, or other potentially applicable insurance policies.
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- The company's independent internal investigation into the alleged misconduct must isolate the root cause, examine internal controls, and develop an effective remediation plan.
 - When the government inquiry targets a C-suite executive or a member of senior management, the board of directors (the Board) should engage independent outside counsel to oversee the investigation to ensure impartiality and avoid the appearance of impropriety.
 - The Board should convene a special committee of independent directors if a board member is implicated in the alleged misconduct. Independent outside counsel should report to the special committee.

Follow established investigatory processes and practices.

- The company should investigate its executives and board members just as it would any other employee. Leadership should not be given special treatment, but the nature and subject of the investigation may make it necessary to deviate from standard policies and procedures. For example, allegations against the company's general counsel may require outside counsel to report directly to the chief executive officer and/or the Board.
- Depending on the nature of the alleged misconduct, it may be appropriate to collect documents and communications pertaining to the accused executive that are within the company's possession, custody, or control without the executive's express knowledge and potentially even before they are made aware of the investigation
- Refer to our accompanying internal investigations guide for additional information on creating an effective internal investigations process.

Scope the investigation to maximize cooperation credit from the government.

- The interests of the company and the individual may diverge at any point during an investigation, and under certain circumstances, the company may be held criminally or civilly liable for the individual's illegal conduct.
- Prosecutors often offer "cooperation credit" (*i.e.*, a lesser sanction) to companies that have assisted the prosecution in its investigation.
- The government will want to know which individual(s) at the company were involved in and/or responsible for the misconduct. For example, to receive cooperation credit from the U.S. Department of Justice (DOJ), a company must disclose "all relevant, non-privileged facts about individual misconduct" regardless of the individuals' role or position within the company. Similarly, "the need for companies to share information on individual wrongdoers in order to receive cooperation credit... has long been a central tenet of cooperation with the SEC."
- To receive *maximum* cooperation credit from the government, a company must make these disclosures and produce all relevant evidence on a *timely* basis.
- When assessing a company's eligibility for full cooperation credit, the DOJ will consider whether the "company promptly notified prosecutors of particularly relevant information once it was discovered, or if the company instead delayed disclosure in a manner that inhibited the government's investigation."

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- The company should structure its internal investigation — breadth and depth — to maximize its efficacy and allow for scaling up or down as the facts unfold.

Develop a public relations strategy to mitigate reputational harm.

- Depending on the nature and scope of the alleged misconduct, a company should convene a team that includes at least one communications professional to vet all public statements about the matter.
- In addition to protecting the company’s reputation, this team should ensure the consistency of all external communications — including statements to the press, disclosures to investors, regulatory filings, and representations to government investigators.

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