Giammittorio, McDonald and Moody in CCI: When Misconduct Reaches the C-Suite, Who Investigates?

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Haynes Boone attorneys **Carrington Giammittorio**, **Taryn McDonald** and **Miles Moody** authored an article for *Corporate Compliance Insights* discussing the situations that may call for independent counsel and the practical steps organizations can take to conduct effective internal investigations while protecting privilege and preparing for potential regulatory scrutiny.

Read an excerpt below.

When allegations of serious misconduct surface within an organization, few decisions carry greater consequence than how to investigate them. While routine compliance concerns can often be handled internally, certain matters may require an independent approach.

In-house counsel plays a critical role in recognizing when an independent investigation may be necessary, selecting outside counsel to lead it, assisting outside counsel with access to information and witnesses and safeguarding privilege throughout the process.

When an independent investigation is warranted
While a variety of circumstances may warrant an independent investigation, the most clear trigger is when the allegations implicate senior management, including C-suite executives, board members or individuals with authority over compliance functions. In these situations, an internal team may face real or perceived conflicts of interest that undermine the investigation's efficacy and even its credibility.

Similarly, when allegations are likely to attract regulatory scrutiny from agencies such as the DOJ, the SEC or state attorneys general, an independent investigation signals to regulators that the organization is taking the matter seriously and conducting a thorough, unbiased review.

Other situations warranting retention of independent counsel include matters involving potential financial restatements, significant whistleblower complaints, allegations of systemic compliance failures and cases where litigation is anticipated or already underway. In each of these scenarios, the perceived independence of the investigation can be as important as the substantive findings themselves.

Structuring the investigation for credibility and effectiveness

Once in-house counsel decides to pursue an independent investigation, they must ensure that the investigation's structure supports its objectives. Several key elements require careful consideration from the outset.

Selecting outside counsel
Outside counsel should have deep experience in internal investigations and, if applicable, familiarity with the relevant regulatory landscape. When the investigation touches on regulatory

issues, retaining a firm with credibility before the regulators' scrutiny can pay dividends if the investigation's findings are later presented to the government.

Equally important is that counsel be free from conflicts of interest, not only with regard to the potential subjects of the investigation but also with regard to the company's regular business. This means that in-house counsel may need to look beyond the company's usual outside counsel relationships if their independence could be questioned. In-house counsel should conduct thorough conflicts checks, evaluate candidates' relationships with the relevant regulators and ensure that the engagement terms clearly define the scope, responsibilities and reporting lines.

Establishing oversight and defining scope

In-house counsel should ensure that independent counsel reports to the board of directors, an independent committee of the board or a specially formed committee rather than to management. This reporting structure reinforces the investigation's independence and helps insulate its findings from accusations of bias.

In-house counsel should work with the relevant company committee to clearly define the scope of the investigation and the committee's authority. Defining these parameters early helps prevent scope disputes and role confusion as the investigation progresses and can help streamline privilege determinations later.

The scope should be broad enough to address the core allegations and any reasonably related conduct but sufficiently focused to avoid the investigation becoming unwieldy. The scope should also be documented in writing at the outset of the investigation and revisited periodically, as new facts may necessitate expansion or refinement. Overly narrow scoping risks missing related misconduct, while an unbounded investigation can drain resources and delay resolution.

Counsel should also ensure that the scope and engagement clearly indicate the company's reason for the investigation, which will further assist in protecting privilege down the road. Finally, in-house counsel should establish a process for outside counsel to flag scope questions in real time so adjustments can be made promptly to avoid delaying the investigation.

Read the full *Corporate Compliance Insights* article **here**.