

CORPORATE GOVERNANCE

A Business Imperative: Strategies for Using Corporate Investigations to Manage Brand and Reputational Risk in the Social Media Age



BY AMY CONWAY-HATCHER

Corporate investigations are a fact of life for business enterprises – across industries, big and small, public or private and regardless of the regulatory environment. As many companies know, they are an important tool to identify, address and remediate problems that could create financial losses, litigation and government enforcement risk. Of even greater importance in our current environment, however, corporate investigations are becoming a business imperative to also help manage against potential damage to a business's reputation and brand and to avoid major business disruptions and share price impact that can be caused by troubling allegations and sustained negative (and sometimes targeted) coverage by the press or through social media.

Surveys show that a top concern – if not the highest concern – of Boards of Directors and senior business leaders today is protecting a company's brand, reputa-

tion and share price. The potential threats are wide-ranging – from allegations of fraud to sexual harassment, ethical violations by top management, cyber intrusion, anti-competitive behavior, theft of intellectual property, customer information or other assets, national security and money laundering issues, product defects, insider trading, securities fraud, bribery, environmental disasters, whistleblower claims, an acquisition or merger that creates compliance challenges, negative customer interactions that go viral or even negative commentary on a company's culture. The potential trouble spots are endless regardless of whether the business and its employees are the victims or the problem. And, unfortunately, sometimes regardless of whether the public reporting is true.

We live in a rapidly evolving era of information sharing and dissemination and, in many instances, uncharted territory that taxes the ability of business leaders and their advisers to quickly assess the quality and accuracy of "information" (or misinformation). As a result, we are seeing a shift in the way sophisticated businesses use corporate investigations. Often thought of as primarily a means to identify and root out criminal behavior to avoid prosecution or enforcement actions, corporate investigations are increasingly being used to help senior leadership and Boards of Directors address a wide range of potential business, ethical and other problems that can quickly and without much warning wreak havoc on an otherwise profitable and reputable

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company. Why? Because corporate investigators are trained to critically evaluate information, track down evidence (even when hidden), assess the credibility of evidence, and determine the facts. The more sophisticated investigation teams also work with companies to develop strategies to anticipate and manage the risk of negative media attention generated by newsworthy revelations.

As the use of corporate investigations evolves, so too must our thinking about how we define an effective investigation. While targeted and objective fact-finding remains critical, it is no longer enough. Companies and their investigative teams must be more tactical in their approach, assume their problems will become public (if they are not already) and prepare to manage through the myriad direct and collateral impacts that can quickly dwarf and overtake the original problem. While every investigation is different and there is no “one size fits all” approach, this article offers some practical steps to maximize the value of corporate investigations as a strategic tool to manage against not just legal risk but also brand and reputational risk. While these tips are laid out in numerical order, in more serious matters, the considerations often are intertwined or occur in parallel, and will require lateral thinking and multi-tasking by those responsible for managing the problems.

1. When Problems Emerge, Lay the Groundwork for an Effective Investigation.

a. Ask Thoughtful Questions and Be Measured – But Act Quickly. When problems arise, it is not always easy to discern the potential impact. Most problems will not create an immediate crisis situation. That said, we see many instances where potentially significant problems are not recognized or acted on quickly enough and escalation occurs – sometimes at a rapid and unexpected rate. It is important to strike the right balance. When a potential problem surfaces, take a step back to understand what the issues are, ask thoughtful questions, get information and think through potential implications – including legal, business and reputational. Sometimes the implications are obvious; sometimes they aren't. Consult counsel as needed and develop a plan of action. Don't ignore the problem or leave things to chance. Give the problem the level of priority needed. Be deliberate in your thinking and decision-making for actions you take or decide not to take.

b. Take Initial Steps to Define the Problem and Any Potential Immediate Consequences. In many instances, some initial, discrete fact-finding will be advisable. This can be done by outside counsel but more often is being handled in the initial stages by in-house resources under the direction of the Legal Department (thereby protecting the privilege) to help assess whether additional steps are necessary. Questions to answer include: Is there evidence to corroborate a particular complaint? If so, what is the scope of the problem, and how serious is the issue? Are any senior managers implicated who should be walled off from reporting? Is there a risk of harm to customers? Are there potential risks to company assets or compromise of confidential information? Is there a risk the government will become aware of the issue? Are the allegations public or likely to become public? What are the likely impacts of any public allegations? Are there any steps the company should

take to prepare for them now? What is the likely stakeholder reaction? Will the plaintiffs' bar be interested? If there is a drop in share price due to the allegation, is there potential for shareholder litigation, regulatory inquiries or other problems? The importance of this fact-finding and assessment phase cannot be overstated. It will dictate whether a company can get in front of or keep pace with a potentially serious problem (or credibly refute an untrue or unfounded allegation), or whether it will wind up in a reactive mode that presents even greater challenges.

c. Seek Experienced Counsel, Understand Your Legal Duties and Develop a Holistic Strategy. Consult experienced, trusted legal counsel who can help identify legal duties but who also is attuned to business, reputational and brand issues. Boards and senior leadership don't like uncertainty and they will bristle at “legal only” solutions. Making sure that leaders understand the company's legal duties and triggers for disclosure is critical, but any strategy must consider the range of potential direct and collateral consequences to the business and its brand, as well as impacts or implications for key stakeholders. Many companies will focus initially on the facts and fail to think through stakeholder issues early enough and in parallel. As a result, they miss an opportunity to stay ahead of important needs and reactions if the matter becomes public or may receive significant social media attention. Are you prepared for the potential public dissemination of information (or misinformation) and how will you respond? Do you need to notify your communications leads? As part of your strategy, are you gathering necessary information to address issues that could arise in the near term? Are there mandatory disclosure obligations? If the issue has potential materiality or regulatory disclosure implications, what are your auditors likely to ask? Are customers affected? What questions are employees likely to ask? Is there a possibility that a regulator would become interested? Experienced counsel will help navigate these issues and can help anticipate other issues so that the company is well equipped to manage potential business and reputational challenges that may complicate an already delicate situation.

d. Evaluate the Advisability of Notifications. No one likes surprises. Maintain a list of potential internal and external notifications that need to be considered in the event of a serious problem. Leadership, directors, legal/compliance and communications teams should have a shared understanding of triggers that may warrant an informal versus formal notification of problems a company may face, particularly where the problem has a media element or may impact reputation or brand. Opening key internal lines of communication early and as appropriate will instill trust and confidence that people are focused on the right issues, give the company an opportunity to proactively manage public interest, and may help navigate any unexpected twists in the investigation. Maintaining a list of external stakeholders and needs also will be important if disclosure obligations arise or the matter becomes public. In the worst case scenario, communications may be required on a number of levels to assure stakeholders that the company is focused on the right issues, is acting responsibly and has the matter under control.

e. Preserve Known Evidence Immediately. Preserving evidence seems intuitive but evidence often can be missed or preservation directives delayed because the

team's efforts are focused on managing other priorities. For example, during the early assessment stages, "evidence preservation" may be delayed until there is a determination that an allegation has merit and the scope of the issue is better defined or it may get lost in the shuffle. Be attuned to these issues and keep them at the top of your checklist. The timing of issuing "litigation holds" may require a delicate balance but must be managed correctly. Unintended evidence spoliation not only will affect the quality of any investigation, but also can raise serious legal problems for the company. Identifying, preserving and accessing critical evidence are a "must". Remember to revisit any preservation decisions; as the investigations evolves, additional evidence may need to be preserved and collected. Take steps to prepare in advance. Stay abreast of how employees are communicating on business matters – especially if you find that they are using new applications that are not yet on company systems. Update your company IT policies, hold notices and consent forms annually. Work with your IT department, data storage and security teams to prepare a list of key search areas. Prepare updated protocols to request data pulls from known sources and build in plans for exigent circumstances. Make sure employees understand the importance of these protocols and comply with them for routine and non-routine events. Review company processes periodically. Make improvements based on assessments of past investigations and advancements in technology. Data storage and methods of communication are changing rapidly. Stay apprised of technology changes and be prepared to change with them.

2. Execute an Effective Corporate Investigation While Proactively Managing Risk.

a. Define Your Goals and Develop an Investigative Plan to Fully Understand the Problem, Its Scope and Implications. Investigations evolve with events and information. Adopting a phased plan allows the company and the investigation team to properly scope the investigation and to adjust, as needed. What may initially appear to be a small problem can quickly escalate, requiring more resources; in other instances, allegations that present significant risk may be proven wrong or inaccurate and can be quickly managed. As a first step, agree on an objective. (For example, to corroborate (or not) an initial allegation, to assess whether publicly reported allegations are true or to find out what happened, or to defend against a government investigation). Documenting the investigation goals and a plan of action will help focus the team and allow the company to defend, among other elements: (i) the investigation process and decisions that are made to review certain evidence (or not); (ii) lines that may be drawn in the investigation; (iii) steps taken to protect attorney-client privilege or the attorney work product; (iv) decisions or advice regarding employee, ethical and other important issues; (v) the reliability of conclusions; and (vi) the effectiveness of remediation. This approach avoids the risk of investigations that "meander" without critical thought or purpose, or that are overly reactive – either of which creates significant business disruption and unnecessary cost. Revisit the plan often. Adjust, as needed, to appropriately scale the investigation and manage risk. Make

sure there is an understanding about deliverables and reporting to keep the team focused. Manage the expectations of the business leaders, the Board and, as appropriate or needed, key stakeholders. Being proactive, anticipating and adjusting to developing issues, and managing expectations are key to effectively guiding the process and proactively protecting the company's reputation and brand – while also mitigating legal risk.

b. Develop Budgets. Revisit Them Often. Investigations can be expensive, even if managed well, but not all investigations require significant expenditure of resources. Frequent communication is key to manage expectations. Scoping and phasing investigations, and working with experienced investigation teams who know how to get to the answers is critical. At the same time, it is equally important to understand that sophisticated schemes are harder to detect, complex or old data systems may present efficiency challenges, and cultural issues or witness challenges (e.g., embarrassment, fear, etc.) may create barriers that need to be overcome. The goals of an investigation will drive initial budgets but challenges encountered will impact the work plan and costs. Take time to periodically review budgets and strategy to ensure the two are aligned as the investigation progresses. Enlist the help of your financial teams to track updates. The more predictability you can add to a process that is by nature unpredictable, the more efficient and effective your teams will be.

c. Preserve Privileges and Work Product Protection, Where Possible. Prepare documentation at the outset making it clear that the investigation is being handled at the direction of the General Counsel and adjust reporting lines for investigative team members or supervisors, as needed. Provide guidance to the team about how to document the investigation, necessary witness instructions and rules for how and when investigative information can be disseminated. The earlier these procedures are established the better. If investigation materials are disseminated outside the investigation team, think carefully about the impact to the company's privileges and the extent to which additional steps are advisable to avoid unintended waivers.

d. Anticipate Issues But Be Prepared for the Unexpected. Although investigations are unpredictable, experienced counsel should be able to anticipate issues that are likely to arise or risks the team may need to manage. For example, the team should expect certain questions from management, the Board, employees, auditors and other stakeholders depending on the nature of the problem; information needed should be gathered as the investigation progresses. Is the loss or impact material? How high up did the misconduct go? Were internal controls compromised or weak? Who engaged in the wrongdoing? Who knew about it or had reason to know? Is there a potential whistleblower problem? Is the matter already public and, if so, what are the likely questions? How likely is it that the issue will be of interest to or come to the attention of regulators? Have we monitored or seen any reports about the issue on social media? Is that necessary? If an employee made a loud exit, is there any indication that he or she took company documents with them? Investigations that narrowly focus on the underlying factual event may fail to capture other information necessary to understand the big picture impact for the company. Put together the right team that will know how to juggle these issues and identify areas where additional support may be needed.

A company's risk is likely to be multi-faceted; the team's composition needs to reflect that risk.

e. Prepare a Standby Communications Plan for Key Stakeholders. If the matter has not yet been publicly disclosed, remember that every problem has the potential to go public and cause disruption to the company. Even if the matter is being handled with the utmost discretion, expect that others will eventually find out, and prepare for it. Brand and reputation management are too important to get caught flat-footed. In the early stages of an investigation, develop a standby statement and Q&A in the event they are needed – not just for the public but for key stakeholders who may solicit information or need to be informed. Preparing early, anticipating questions and updating standby statements as new information is learned will lessen the likelihood for serious missteps if and when the allegations become public. Make sure selected members of the communications team are aware of the issues when the investigation is ongoing so they are not caught by surprise and are prepared to help the company tell the story. Keep in mind that as the investigation progresses and more people become aware of what the company is looking at, it is more likely that information will leak out. In certain instances, you may also need the communications team to monitor social media so you know when information leaks and what is being said so the company can react appropriately.

f. Remediate. If You Find a Problem, Fix It. Fix any problems – whether they are public or not. What you do is as important as what you say. Think through litigation and discovery risk, but don't shy away from documentation. Instead, be thoughtful in how you document actions taken, decisions made and why. If the matter

becomes public later or the problem repeats or persists, it will be important to be able to explain and defend what was done. Today, there is a higher an expectation of transparency, accountability and, in many instances, documentation. The absence of any of these elements will count against you.

3. When It is Over, Look in The Rearview Mirror.

The need for companies to quickly discern fact from fiction, and to be able to address reported problems has never been more important, complicated or fraught with risk. As we have seen over and over, the failure to recognize, appreciate the severity of or react appropriately to a problem (or to be in a position to refute it) can make all the difference in a company's ability to protect its brand and reputation. Corporate investigations have become critical risk management tools so it is wise to take the time to review past investigations, learn from mistakes and improve processes and efficiencies.

In addition, think ahead and anticipate where the trouble spots may be for your organization. Consider whether you are sufficiently prepared to meet the problems you may face and invest the time to prepare. On a related note, proactively build a team of experienced, trusted, sophisticated and strategic counsel who will know how to investigate the facts but also will understand the bigger picture to meet the challenges of facing harmful allegations in the public eye. Don't settle for less. Effective responses in these situations are challenging but critically important for protecting an organization's brand and reputation.