

CLIENT ALERTS

“Do’s” and “Don’ts” of Conducting an Internal Investigation

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Earlier this week, the Consumer Brands Association sent a letter to U.S. Attorney General William Barr asking the Department of Justice (DOJ) to more actively pursue retailers looking to take advantage of the coronavirus outbreak through price gouging on essential products. In a subsequent memorandum to U.S. Attorneys throughout the country, the Attorney General not only made the investigation of fraud and price gouging a priority, but also reinforced the need for DOJ to “remain vigilant in detecting, investigating, and prosecuting wrongdoing related to the crisis.” With the DOJ reaffirming its commitment to holding businesses accountable during this pandemic, here are some reminders of “do’s” and “don’ts” if you are confronted with an internal or external complaint or allegation of wrongdoing at the company:

- **Do:** Act promptly.

Bad news does not improve with time. Actions should be taken to promptly preserve evidence, identify witnesses, and determine who will conduct the investigation. Note any legitimate reasons for delay in your record of investigation.

- **Do:** Preserve evidence.

Regardless of when the alleged violation took place, upon complaint, swift action should be taken to ensure evidence is preserved. Delivery of litigation holds to relevant individuals is a prudent early step in your process. **Don’t** let the passage of time or individual acts of self-preservation hinder the availability of evidence or information.

- **Do:** Be thorough.

Whether it is the Board of Directors or audit committee, the government, an outside auditor, or another entity that ultimately examines the results of an investigation, none will be satisfied if the investigation appears to be a whitewash or is otherwise

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incomplete. **Don't** make promises regarding results, culpability, or outcomes. Chase down reasonable leads, interview relevant witnesses, and review relevant evidence, good or bad. The investigation and any follow-on actions will benefit from a comprehensive, independent, fair, and unbiased process.

- **Do:** Document steps taken, interviews, and results.

Timely recordkeeping, notes, and memorandums facilitate the investigation process and lay the groundwork for any decisions or actions to be taken upon the investigation's conclusion. Furthermore, these records become useful tools if the matter proceeds beyond an internal corporate investigation, for example, if the government initiates an investigation and/or if civil litigation ensues.

- **Don't** underestimate the allegations.

Depending on the nature of the allegation, the results of the investigation may have significant consequences for the company, including dismissal of implicated employees or leadership, implementation or updating of compliance and training programs, and required government reporting and cooperation in accompanying government investigation. Additionally, while conducting an internal investigation can come at a significant cost of time and money for the company, it is almost always money well spent in bringing the matter to ultimate conclusion. Hiring outside counsel is the most prudent step to ensure a thorough, independent, fair and proper investigation from the start, and may prevent inefficiencies and save costs down the line.

- **Do:** Protect the confidentiality of the investigation.

While this can be done in a number of ways, the best practice is to engage outside counsel from the start. With experienced outside counsel leading the investigation and participating in communications relevant to the investigation for the purpose of providing legal advice, the investigation will be properly secured by attorney-client confidentiality protections. In-house counsel also bring attorney-client privilege protections, however, protecting that privilege can be difficult if there is a question as to which "function," legal or business, the in-house counsel was performing during a communication.

For more information on responding to a corporate fraud allegation or complaint, or conducting an internal investigation, please contact Butzel Long's White Collar and Internal Investigations team.

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