

THE CORPORATE BOARD

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THE LEADING JOURNAL OF CORPORATE GOVERNANCE

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Leading The Board Investigation

By David Dunn and Eric Hines

It is the moment board members hope they never have to encounter. A financial restatement, allegations of fraud, or top executive misdeeds, a government subpoena. The company faces serious allegations with too little information, and the board must launch an internal investigation. The stakes are high... how will your board proceed?

Many corporate investigations never reach the boardroom. They are often handled capably by in-house counsel, internal audit teams, or compliance officers, with findings presented to the board. At times, however, the nature of the allegations, the people involved, or the stakes to the company demand that the board itself, or an appropriate subcommittee, take the lead.

When those moments arrive, directors (who may have limited experience overseeing complex investigations) must ensure investigative work is thorough, in the best interest of the corporation, and defensible to outside scrutiny.

The landscape around corporate investigations has changed considerably, and on multiple fronts. Government enforcement priorities have shifted. Whistleblower programs now create financial incentives for employees to report directly to regulators, sometimes before the company itself has a chance to respond. Technology has expanded both the volume of data and the tools investigators can bring to bear. Boards that wait until a crisis emerges to consider how they would manage an investigation are already behind the curve.

As noted, not every investigation calls for board involvement. A complaint about expense report padding, a single vendor dispute, or a routine compliance inquiry often is managed by internal teams in partnership with legal and external advisors. Some conditions, however, make the board's role essential.

The most common trigger is an allegation that implicates senior management. If the CEO, CFO, or another member of the leadership team is the subject

of the complaint, it is far more challenging for other managers to conduct the investigation credibly. Or, allegations that may touch the integrity of the company's financial statements. Accounting irregularities that could affect public filings can create duties that belong to the audit committee or the full board, rather than to the executives who certified those filings.

A government inquiry or subpoena is another situation that may warrant board oversight, particularly when the matter involves potential criminal liability or significant regulatory exposure. Furthermore, the board should be involved if new financing or the existing balance sheet comes into question. These actions are a more recent phenomenon pursued through more permissive credit documents, but often end in litigation.

The value of a board-led investigation lies in its independence from management. It will ultimately be judged on whether it was thorough, objective, and credible.

Board involvement in these scenarios is often case-specific, contingent on the nature of the issue and on the independence, capacity, and depth of compliance or internal audit. Directors should also consider taking the lead on matters where retaliation by senior employees is alleged, when outside auditors have raised concerns about management's cooperation, or when the company faces overlapping government investigations.

The value of a board-led investigation lies in its independence from management. Structural decisions should reinforce that independence, because the investigation will ultimately be judged (by regulators, courts, shareholders, or counterparties) on whether it was thorough, objective, and credible.

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The first decision is who on the board will oversee the investigation. In many cases, this falls to the audit committee. For larger or more complex investigations, the board may form a special committee of independent directors, or may need to have independent directors appointed in the first instance. Broadly speaking, directors overseeing the investigation will have no connection to the conduct under review. If even one member of the committee has a true conflict, the entire effort's credibility can suffer.

Competent and experienced legal counsel is paramount for complex investigations, and selecting outside counsel deserves more thought than boards sometimes give it. Directors should seek counsel with significant experience in internal investigations, a background in the relevant area of law, knowledge of the subject matter at hand, and ability to think like an investigator (rather than purely as a company advocate).

Counsel must be someone who follows the facts wherever they lead, even if those facts are uncomfortable for the company. Boards should ensure that they and their counsel have put in place adequate processes and ground rules to maintain independence throughout the investigation.

Beyond counsel, the investigation team often requires expertise of specialists, such as forensic accountants for financial issues, or forensic technologists or data analysts to assist with technology-related matters.

Forensic accountants bring skills that differ from that of auditors or general financial advisors. They are trained to trace funds, interpret accounting records, apply data analytics to large volumes of transactions, and evaluate internal controls with an eye toward how those controls may have been circumvented. In matters involving potential financial statement manipulation, revenue recognition issues, or asset misappropriation, forensic accounting is essential.

Companies in financial distress also benefit from advisors who understand the broader financial picture and complex business issues associated with potential restructuring. Restructuring professionals can help the board assess how investigation findings interact with creditor obligations, potential litigation,

disclosure requirements in a bankruptcy or workout, and the practical constraints on time and resources.

They are well versed in capital transactions, financing arrangements, forecasting, strategic analysis, valuation, asserting or defending against claims. Where the potential for restructuring in or out of court is a real possibility, competent financial advisors are a must-have for protecting the interests of various stakeholders (including directors) whose decisions will be under a microscope post hoc.

The board committee should receive regular updates from counsel and investigators, and be prepared to expand or narrow the scope.

One of the earliest and most consequential decisions is defining the scope of the investigation. Establish a roadmap for the areas in focus, procedures undertaken, timing, and the resource demands on the company, among other things. Defining scope too narrowly risks missing related misconduct or inviting regulatory criticism. Defining it too broadly wastes time and money, and can expose the company to additional liability or operational disruption.

Outside counsel and expert advisors generally provide guidance on this process. A typical approach is to start with a clear statement of the allegations, develop an initial scope that covers those issues and related matters, and revisit it as new information emerges. The board committee should receive regular updates from counsel and the investigative team, and be prepared to expand or narrow the scope based on the facts.

Document preservation is an immediate priority. The company should issue a litigation hold as soon as a board-led investigation is contemplated, directing employees and custodians to preserve all potentially relevant documents, including electronic communications and financial records. Forensic technologists can assist in collecting and preserving electronic data in a defensible manner, with clear chain of custody, which is critical if the evidence may later be used in regulatory proceedings or litigation.

Witness interviews are typically the backbone of the investigation. Alongside counsel, the board and investigators should prepare a witness list that prioritizes people with direct knowledge of the conduct in question. Generally, work from the periphery inward, interviewing supporting witnesses before confronting subjects or targets. Each interview should be documented carefully.

Counsel will typically provide “Upjohn” warnings, advising the witness that the lawyer represents the company, not the person. These are more than a legal formality. It sets the terms of the relationship, protects the privilege that attaches to the investigation, and notifies witnesses that witness statements can be protected, or waived, at the discretion of the board or committee. Directors should ensure that counsel administers these warnings consistently.

Financial analysis and forensic data work often proceed in parallel with interviews. Forensic accountants examine transaction records, journal entries, and supporting documentation to test the allegations.

In a financial reporting investigation, this may involve tracing revenue through books and records, analyzing reserve estimates, or comparing reported results against underlying data. In a fraud investigation, it may require following the flow of funds across bank accounts, identifying unusual payment patterns through data analytics, or reconstructing records that have been altered or deleted.

Artificial intelligence tools are increasingly used for document review, communications analysis, and unstructured data analysis. These dramatically reduce the time and cost of processing large collections of evidence.

Boards should ask their investigative teams about the methodologies being used, and understand both the capabilities and limitations of these tools. AI is powerful at identifying patterns, but it requires experienced human judgment to manage the process, interpret findings, and draw conclusions.

Throughout the process, the board committee should insist on regular, substantive reporting from the investigation team. The committee should understand the progress of the work, the key findings to date, any obstacles encountered, and whether the

scope needs adjustment. The committee should also be mindful of privilege. Communications between the board and its counsel are generally protected, but that protection can be waived if the substance of those communications is shared too broadly within the company or with outside parties.

The DOJ’s whistleblower program gives companies a 120-day window from the time they receive an internal report to self-disclose.

One of the most consequential developments in corporate investigations has been the expansion of government whistleblower programs. The Department of Justice launched its Corporate Whistleblower Awards Pilot Program in August 2024, and expanded it in May 2025. The program offers financial awards of up to 30 percent of the first \$100 million in forfeited proceeds to people who provide original information about corporate crimes in designated areas. These include financial institution fraud, foreign bribery, and healthcare fraud. In July 2025, the DOJ’s Antitrust Division launched a separate whistleblower rewards program for antitrust offenses.

These programs have direct implications for boards. For example, the DOJ’s pilot program gives companies a 120-day window from the time they receive an internal whistleblower report to self-disclose the underlying allegations. If the company does so within that window and cooperates fully, it remains eligible for a presumption that it will not be prosecuted.

If the company does *not* act in time, and the whistleblower has already reported to the DOJ, the company may lose that benefit. The DOJ will also strongly consider whether a company retaliated against the whistleblower when evaluating cooperation credit, so directors must pay careful attention to ensure the company has anti-retaliation policies and procedures that are operating effectively.

The practical effect is that boards can no longer afford to respond slowly to internal complaints. A running clock creates urgency around triage, scoping, and the threshold question of whether to self-disclose.

Directors who oversee the investigation should understand the timelines from the outset and ensure the investigative team works with them in mind.

For boards, this means reviewing and strengthening the company's internal reporting mechanisms well before an investigation arises. Hotlines and reporting channels should be accessible, well-publicized, and trusted by employees. The process for receiving and escalating complaints should be documented and tested. When a complaint arises, the audit committee needs a clear protocol for assessing it, preserving evidence, and (within a reasonable timeframe) deciding whether the matter warrants a formal investigation and potential self-disclosure.

A well-conducted, board-led investigation remains one of the most effective ways to demonstrate the cooperation that regulators reward.

The enforcement environment has also shifted in ways that matter for boards. At the SEC, leadership has moved away from technical violations and corporate penalties toward traditional fraud and individual accountability. The Commission reversed a 2009 delegation that allowed the Enforcement Division to open formal investigations without full Commission approval, a change likely to produce fewer but more targeted cases. At the DOJ, new policies provide enhanced incentives for voluntary self-disclosure and cooperation.

For boards, this carries a paradoxical message. Fewer enforcement actions do not mean less risk. The government is concentrating on the cases it considers most serious, and directors and officers face greater personal scrutiny when misconduct occurs on their watch. A well-conducted, board-led investigation remains one of the most effective ways to demonstrate the cooperation that regulators reward. Boards should also note that enforcement priorities now extend beyond traditional areas. They now include trade and tariff compliance, sanctions violations, and procurement fraud.

Financial distress adds its own dimension. When a

company is already under strain, allegations of fraud or mismanagement carry heightened consequences, and creditors and other stakeholders will scrutinize how the board responds. Board-led investigations take on additional complexity in these situations, as directors must balance the demands of the investigation against limited cash, competing stakeholder interests, or even a bankruptcy filing or out-of-court restructuring.

In a restructuring, the credibility of the investigation can determine whether stakeholders cooperate or litigate, and the extent to which the company emerges with its reputation, business relationships, and operations intact. An investigation perceived as a whitewash will erode trust with the very stakeholders whose cooperation may be necessary for the company's survival, and could subject the board to fiduciary duty claims. On the other hand, an investigation that drags on without resolution, consuming professional fees and management attention, can exacerbate the financial problems that brought the company to the brink.

In these situations, it is especially valuable to have advisors who understand the complex legal, investigative and financial dimensions. Engaging experienced legal counsel ensures the board receives appropriate advice on legal matters and fiduciary responsibilities. Doing so also ensures that work product is afforded protection of attorney-client privilege.

Restructuring professionals help the board manage competing priorities, ensuring the investigation proceeds with rigor while preserving the company's ability to operate, meet payroll, and negotiate with creditors. Complex solvency analyses at different points in time may also be warranted. Counsel guides the board on these, while forensic specialists can tailor their work to the urgency of the situation.

When fraud or mismanagement is found to have contributed to the distress, the investigation's findings can shape the trajectory of the restructuring, the allocation of losses, and the prospects for recovery. Creditors, or the debtor itself, may pursue claims against former officers and directors. The risk that a bankruptcy court will appoint an independent examiner or trustee is heightened if the board has

not investigated credible claims or run a truncated process. Boards that conducted a thorough, credible investigation are in a far stronger position to navigate these challenges than those that avoided hard questions or moved too slowly.

Board-led investigations can fail for reasons that are largely avoidable, as noted above. Perhaps most damaging, though, is lackluster or nonexistent action on the findings. An investigation that uncovers serious misconduct creates an obligation to respond.

Directors must consider whether to disclose the findings to regulators, report to shareholders, take personnel action, revise financial statements, enhance controls, or implement other remedial measures. Regulators and other stakeholders are far more likely to give credit to a company that identified a problem, investigated it thoroughly, and took decisive corrective action than to a company that tried to manage its way around bad news.

In the wide-ranging world of corporate misconduct risk, the best offense is a good defense. Thus, the most effective step a board can take is to prepare before an investigation becomes necessary. The audit committee's charter should include clear authority to retain independent counsel and advisors, to conduct or direct investigations, and to report findings to the full board and to regulators, as appropriate.

The committee should periodically review the company's internal reporting mechanisms (including hotlines, online portals, and other channels) to confirm they are functioning and that employees trust them. The ability to receive, triage, and escalate complaints quickly is no longer a theoretical advantage; it is a practical necessity.

Directors should also maintain relationships with experienced outside counsel and forensic advisors before an urgent need arises. Vetting and retaining qualified professionals takes time, and time is precisely what boards do not have in a crisis. Understanding the landscape of available expertise—investigation counsel, forensic accounting firms, forensic technologists, restructuring advisors—and

knowing which combination a given situation may require puts the board in a much stronger starting position. Leveraging their expertise for training or pre-emptive fraud risk management advice before an incident occurs can help shore up your control environment.

Periodic tabletop exercises can also be valuable. A half-day exercise in which the audit committee walks through a hypothetical scenario can expose gaps in the board's preparedness and build the muscle memory that directors will need. These exercises are especially useful for newer directors who may not have prior experience with investigations.

Finally, boards should ensure that the company's compliance program is designed not only to prevent misconduct but also to detect it and support an investigation when one is needed. That means maintaining sound internal controls, preserving documents, investing in data governance, and fostering a culture in which employees feel safe raising concerns. A compliance program that looks good on paper but fails in practice will not help the board when it matters most.

Board-led investigations are among the most consequential responsibilities a director can face. They test the board's judgment, independence, and willingness to confront and act upon difficult facts. The standards for what constitutes a credible investigation continue to evolve, driven by new government programs, advancing technology, and an enforcement environment that places a premium on cooperation and self-policing.

These challenges are not insurmountable, but none can be addressed in the moment. Boards that navigate investigations most effectively are those that have thought carefully about the process before the crisis arrives. These boards have built relationships, established protocols, and cultivated the institutional willingness to follow the facts wherever they lead. Those boards will be well-positioned to protect both the company and its stakeholders when the moment arrives. ■

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