

Managing the investigation and decision-making process – an essential companion to the corporate compliance program

BY ALLEN B. ROBERTS

In the United States, the principle of accountability energising legislation and regulatory guidance and enforcement has operated to consolidate responsibility and promote upstream delegation. Corporate boards, and their audit and compensation committees in particular, are held to heightened standards of autonomy and diligence. Chief executive officers and chief financial officers are charged with certifying to regulators, investors, and broader communities that they have mastered the details of the businesses they run, and the financial affairs and internal controls of those businesses. In separate spheres, compliance officers may be newly empowered and ombudsmen newly enfranchised.

At a time when good governance, independence, best practices, and transparency have become instilled in the organisational mindset, the companion exercise of assuring a process that fulfils internal and external compliance objectives is necessary, not optional. Complaints or reports of wrongdoing may emerge from routine audits, an audit committee's whistleblower hotline (mandated for corporations subject to the Sarbanes-Oxley Act of 2002), a compliance committee's mailbox, an ethics control mechanism, an anti-harassment monitor, or an ombudsman. Irrespective of its source or the channel through which the information flows, the receipt of a complaint or report of wrongdoing is not an end unto itself. It is merely an early stage of risk management to detect misconduct, correct it, and prevent repetitions of it.

This means that after investing significant resources in crafting compliance programs with their companion codes of conduct, codes of ethics, and related orientation, training, and monitoring programs, adopting organisations need to assure the successful attainment of compliance objectives and management of risk with similar attention to the investigative and decision-making processes and the related receipt and dissemination of information asso-

ciated with these processes. The designation of individuals to receive and process information should be a purposeful and deliberate action reflective of the subject matter, its urgency and sensitivity, as well as its importance to the corporation and its shareholders.

At the outset, a program designed to receive complaints or reports of wrongdoing should have a clear definition of intended processes and results, with designated lines of communication and information access. This requires delineation at each of three stages: (i) The Complaint or Report – What is the nature of the complaint or report? Does it affect corporate or individual interests? Who needs to know about it and who needs to address it? (ii) The Investigation – What is the purpose of the investigation? Is it intended to create a factual record, an investigative report, a basis for decision-making, or a defence in a potential legal proceeding? (iii) The Decision – Does it raise legal or regulatory issues? Does it affect matters of significance to current operations and results or strategic plans? Does it affect shareholders, board members, executives, managers, or employees? Does it impact customers, clients, suppliers, or competitors?

Answers to such threshold questions help define the contours of an approach to a complaint or report of wrongdoing. The selection of investigators and decision-makers should be a product of thoughtful assessment of answers that help control enterprise risk. Independence considerations require that there be no conflict of relationship or interest influencing the ability of an investigator or decision-maker to perform required tasks. As appropriate, those selected should be qualified and competent to address the substance of the complaint or report, witnesses, the fashioning, implementation, and communication of an appropriate response, and any detection, preventive, or remedial action to be taken. Those safeguards bespeak a commitment to arrive at complete, thoughtful, and untainted investigative results

that conduce to appropriate decisions and responsive action.

Equally important are other forward-looking considerations. Board members and executives not having a need-to-know in furtherance of their corporate responsibilities should receive only those communications that are consistent with their fiduciary and organisational responsibilities. Not only does this allow them to function fully in the performance of duties unrelated to the matter that is subject to investigation and determination, but it narrows the organisational group subject to becoming embroiled as witnesses in any ensuing litigation. Additionally, clearly established controls should be in place to preserve applicable privileges for information and communications should any civil or criminal proceedings ensue.

Appropriate to the characteristics of a matter, the selection of those who will conduct and participate in an investigation, as well as those who will be privy to investigative materials and reports, should be by affirmative, purposeful action. Even more compellingly, individuals participating in decision-making or aware of its progression should be identified and included intentionally and not by inadvertence or default. Involvement of others who have been excluded or insulated from investigations, decision-making, and related information should be limited to authorised purposes.

Transparency and openness do not equate to all-inclusiveness and indiscriminate sharing of information simply because of one's title or role in an organisation. As a practical matter, organisations paying attention to their compliance programs do well by assuring that the separate stages of managing an investigation and decision-making are controlled to advance the objectives of the compliance effort without an undesirable or unintended consequential exposure. ■

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This article first appeared in FinancierWorldwide's *Corporate Governance Review* 2006.
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