

# INVESTIGATIONS MANAGEMENT:

## Principles for Compliance Programs to Remember



# Introduction

## WELL-RUN INVESTIGATIONS ARE FUNDAMENTAL TO EFFECTIVE CORPORATE COMPLIANCE PROGRAMS

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Compliance investigations help a company avoid regulatory enforcement action, absolve the company of legal liability, or just illuminate how something went wrong, so executives won't make the same mistake in the future.

The challenge, of course, is how to deliver well-run investigations at scale — as a defined, repeatable process, that consistently applies the same set of standards to every matter that needs investigation.

That's no easy feat. A large organization can have dozens or hundreds of matters under investigation at any given moment, on a wide range of issues,

To assure that all of the company's investigations keep moving in the right direction, investigations management needs to happen along two dimensions:

1. Proper execution of each individual case
2. Proper oversight of all investigations as a whole

Let's consider how compliance officers can achieve that.

# 1

# Triage and Scoping

Proper care and oversight of investigation begins at the beginning. Every case should be triaged and scoped correctly so that compliance officers know how important the matter is and what resources to devote to the investigation.

Without that understanding, urgent issues might be ignored or trivial matters might consume far more time and resources than necessary. Neither scenario helps a compliance officer maintain his or her credibility, so compliance officers should invest the necessary time and attention to get this phase of investigations management right; the return on that investment will be worth it.

The goal in this phase is to understand:

- The severity of the allegation in question
- Any potential disclosure requirements, such as to the board of directors, regulators, law enforcement, outside auditors, investors, or other stakeholders
- Potential consequences such as financial damage, regulatory enforcement, operational disruption, and harm to corporate reputation
- The resources necessary for a competent, thorough, timely investigation

**That's a lot of information to obtain and process quickly, so compliance officers should leverage other, pre-existing parts of the compliance program to handle this task as efficiently as possible.**

# 1

# Triage and Scoping

## START WITH THE INTAKE SYSTEM

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Design your internal reporting system to help triage an allegation even as someone is filing the allegation.

Intake systems can start by asking questions on the nature of the issue, and then use branching logic so subsequent questions extract more precise information about the nature and severity of the offense.

Along similar lines, the company should develop protocols for managers to report allegations of misconduct that employees bring to them directly. Be sure to train managers to ask triage questions at the time an employee speaks up.

In both instances, complaints should be categorized according to whatever risk taxonomy the business uses to classify complaints: workplace harassment, procurement fraud, accounting fraud, bribery, cybersecurity weaknesses, and so forth. Then the complaints can be reviewed in light of the risks and requirements for those issue types, and escalated for proper triage more quickly.

# 1

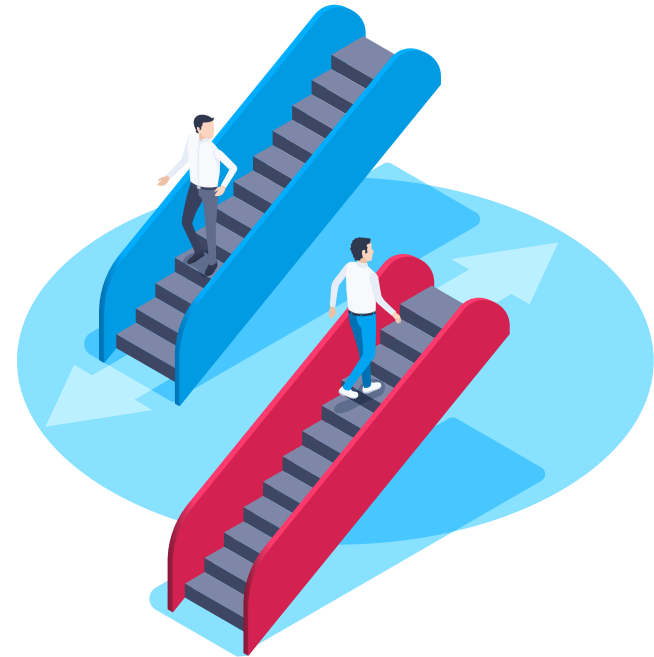
# Triage and Scoping

## ESCALATE ACCORDING TO SEVERITY OF THE ISSUE

The company should also have policies and protocols about who investigates what types of issues, and notify the appropriate people promptly once an allegation has arrived.

For example, any allegations of bribery to foreign governments should immediately be flagged for the audit committee's attention; allegations of workplace harassment can go to the HR function; and so forth.

Those protocols should also define who else is notified of a matter: for example, a senior management committee of the general counsel, compliance officer, and CISO, so no single issue is bottled up (or covered up) by one particular department.



# 1

# Triage and Scoping

THE GOAL IS AN OBJECTIVE, INDEPENDENT, REPEATABLE PROCESS

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Rules are needed that establish which executives are alerted to investigative matters, as well as which ones aren't. The point is not so much to allow a culture of secrecy around sensitive investigations, but rather a culture of independence and objectivity for all investigations — and one way to support independence and objectivity is to define investigation protocols before any specific matter arises.

You should consider investigative policies the first step to ensuring proper behavior, rather than the final one.



Expect that additional training, monitoring, and coaching will also be standard; then you're more likely to set reasonable expectations around both overall compliance and the resources (including time) needed to build consistency.

## 2

# Conduct Investigations Wisely

Once an investigation is triaged and scoped, the actual work of investigating begins.

At this juncture, the watchwords are speed, objectivity, completeness, and competence. Whole books have been written about how to conduct effective investigations, so we will focus on a few important best practices here.



# 2

## Conduct Investigations Wisely

### DEVOTE APPROPRIATE RESOURCES AND PERSONNEL

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Consider the evidence that you'll want to collect and analyze for the issue at hand.

- How much information can be collected electronically, versus how much to be gathered by personal interviews?
- How complex is the material that you might need expertise in cybersecurity, forensic accounting, fraud scams, or other subjects?
- How quickly must the investigation be completed, either because of its potential severity or because regulatory requirements dictate prompt action?

### GATHER FORENSIC EVIDENCE QUICKLY

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Consider what litigation holds might be necessary on employees' electronic communications and other corporate records.

Implement those holds promptly. (This means, of course, that the company should already have litigation hold processes in place that the IT department can implement directly.) The company will need a way to preserve **all relevant data**, including video evidence or paper records, securely.



# 2

## Conduct Investigations Wisely

### CONDUCT INTERVIEWS PROFESSIONALLY AND EMPATHETICALLY

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Interviewing witnesses, especially hostile witnesses or targets of an investigation, can be an incredibly delicate task. COVID-19 made the job even more difficult since many interviews had to occur via video conference calls, which blunted investigators' ability to build rapport or watch body language. Interviews should be done by competent personnel who know details such as when to deliver an Upjohn warning, how to take notes, how to focus objectively on the issue in question, and so forth.



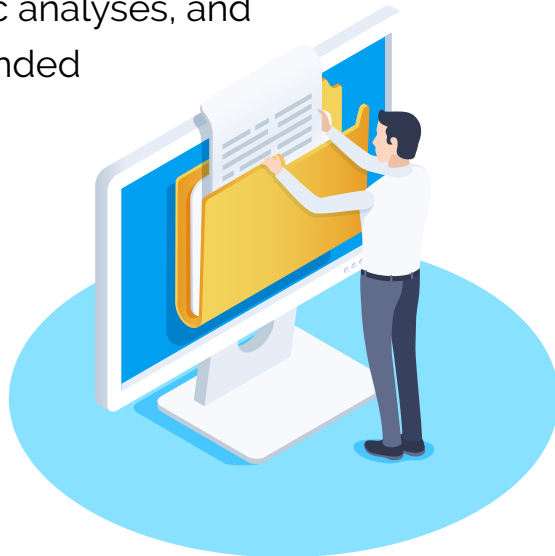
# 3

## Reporting and Resolution

### WRITTEN REPORTS

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Every investigation should culminate in a written report. The report doesn't need to be long, but it does need to be clear, logical, and complete. For example, a report might begin with a summary of the allegation and findings; then recap the facts found to be true; then analyze possible violations of law, regulation, or government policy. Extra information such as audit reports, forensic analyses, and so forth can be appended at the end.



### DISCIPLINARY ACTION

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One common question is whether an investigation report should include any recommendations on disciplinary action, including no action at all. There is no right or wrong answer here; it's a question every company should decide for itself. The important point to remember about discipline is that it should be proportionate to the offense and applied consistently from one case to another.

Arbitrary discipline, or discipline meted out without documentation of how it was decided, invites accusations of favoritism, discrimination, or harassment. So even if disciplinary recommendations aren't part of your standard investigation protocols, having a formal disciplinary policy is wise.

# 3

## Reporting and Resolution

### COMMUNICATING BACK

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Once the investigation is complete, also consider what the company will want to say either to the reporter who submitted the allegation, or to employees generally. For example, if someone submits a report about possible fraud that's later found to be based on erroneous understanding of accounting, you may want to tell the reporter that no fraud occurred — or explain in an employee newsletter how fraud and financial reporting work. When used sparingly, these full company messages can provide dual benefits: give employees (including those involved in the recent investigation) reminders about what matters, and reinforce full company commitment to ethical practices. Just remember that if they're too frequent (or too long), you risk losing the signal in the noise.

In many instances it can be sensible to share findings of an investigation, even if those findings put the company in an unflattering light. Communicating the results, even in general terms with names or sensitive information anonymized, **supports the notion of a strong corporate culture**. It shows respect for the reporter and employees, and prevents the erosion of corporate culture through gossip, speculation, or anxiety. Many company cultures are moving away from the secretive siloes of last century, and many employees see strength and relatability when leaders admit and are authentic about mistakes.

# 4

## Managing the Investigations Function

Compliance officers also need to manage the investigations function as a whole, as many individual investigations unfold at the same time. This requires several capabilities, largely driven by shrewd use of technology and data analytics.

For example, **use some sort of issue and investigation case management system** that can track the progress of each case against standard benchmarks. Occasionally cases will take longer than usual, and that's fine. You should have a running sense of both your internal averages and industry compliance benchmarks. Ultimately, the compliance officer should be able to know when and why a case is starting to veer off track, so you can deliver any extra resources or simply know what to report to others following the issue.



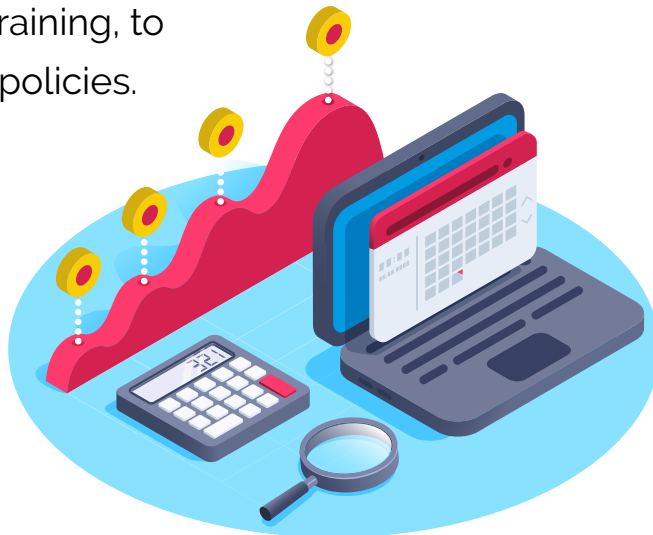
# 4

## Managing the Investigations Function

### USE DATA ANALYTICS

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Data analytics helps you to see larger trends in the issues affecting the company. Which complaints are submitted most often? Against whom, or from which parts of the corporation? Which ones are substantiated most often, and which ones aren't? The answers to those questions can suggest a range of concerns, from unclear policies, to ineffective controls, to poor training, to weak disciplinary policies.



### MONITOR YOUR PROGRAM'S CAPACITY AND PERFORMANCE

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Monitoring can assure that your program has the proper resources and skills for the investigations that arise. For example, if you find that many cases end up taking longer than expected or take surprising turns, your triage and scoping, or staffing, of investigations may need attention. If certain subjects always end up unsubstantiated or indeterminate, your investigators might not understand the issues involved, or you may need to improve the depth of your intake or employee trust in your process.

# 4

## Managing the Investigations Function

### PERFORM ROOT CAUSE ANALYSIS

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For any serious matter such as financial fraud or corruption, perform a disciplined root cause analysis to understand why the misconduct happened — it could be for reasons very different from the proximate cause, and the remediation to fix that weakness might be different from what you'd expect.



### LOOK FOR AREAS OF IMPROVEMENT, AND IMPROVE THEM

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Department of Justice guidance on effective compliance programs and U.S. Sentencing Guidelines both stress the importance of periodic assessment of the program's effectiveness. That's just as true for investigations functions as it is for the rest of the compliance program. The most immediate areas of improvement might be better intake of complaints, for faster triage; better training and guidance for how certain matters should be handled; faster reporting, and the like.

# Conclusion

## INVESTIGATIONS WILL ALWAYS BE A PART OF CORPORATE COMPLIANCE PROGRAMS

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Each case is unique, but as leaders we can add reliability, accuracy, and predictability by managing the predictable and repeatable aspects of the program. The management of those cases succeeds by following basic principles of good investigative practice, good management, and good use of technology.

Investment in the quality of your investigations performance supports the success of the company, certainly. It's also an investment in a culture of trust and transparency that makes each employee better positioned to support the strategic direction of the whole enterprise.

That's yet **another way compliance programs can provide a strategic advantage to their organizations** and help to drive performance forward.



# About Ethico

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