

A Checklist of Diligent Directors¹

✓ DO Pay Attention to Hot-Button Areas

Pay special attention to areas under increased scrutiny by regulators, shareholders and the media, including: Compensation and Benefits, Travel and Entertainment, Conflicts of Interest and Personal Relationships.

✓ DO Respond Promptly to Danger Signs

Directors have a fiduciary duty to investigate danger signs. Danger signs include civil suits, government investigations and inquiries, inquiries by self-regulating organizations, internal tips and reports, anonymous tips and whistleblowers, media reports and issues that may call into question the accuracy of Financial Statements.²

✓ DO Assure the Independence of Decision Makers

Directors should consider their personal and/or professional relationships with potential investigatory targets. Directors should also consider their relationship to the subject matter of the investigation, for example, whether the director approved a decision that is now under attack. Beware of bias and hidden agendas.

✓ DO Assure the Independence of Counsel

Consult with counsel early in the process.³ Investigating counsel should not have a personal relationship with or depend professionally in any way on the targets of the investigation.⁴ A company's regular outside counsel may not be perceived as independent, especially when it was involved in approving the subject matter of the investigation.

✗ DON'T Leave it to Others

Participate actively in the investigation. Even if counsel is independent don't follow counsel or other advisors blindly. A director's fiduciary duty extends to the exercise of care when conducting an investigation. Look for danger signs in the investigative process. If it feels wrong, inquire.

✗ DON'T Rush to Judgment

Directors have a fiduciary duty to deliberate and make a reasonable inquiry before taking decisions. Ask questions, get both sides of the story, and don't rush to blame or to exonerate.

✗ DON'T Spin the Investigation to Match a Preferred Result

The results of an investigation may appear to lack integrity if there are obvious holes in the fact-finding process or if the conclusions are implausibly rosy or obviously inaccurate.

✗ DON'T Ignore the Value of a Fair Process

If the target of an investigation is entitled to a fair process by contract, or according to the by-laws or regulations of the organization, provide that process. Fair process can also lend credibility to the integrity of investigation.

Additional Sources:

External Consequences: Internal Investigations after Sarbanes-Oxley, by Paul R. Bessette, Jennifer R. Brannen and Michelle A. Reed of Akin Gump Strauss Hauer & Field LLP. Available at <http://www.akingump.com/docs/publication/670.pdf>

How to Conduct Internal Corporate Investigations After Sarbanes Oxley, ALI-ABA Business Law Course Materials, by Ronald L. Marmer, Robert R. Stauffer, Erin R. Schrantz and Molly J. Moran of Jenner & Block, LLP. Available at http://www.jenner.com/news/pubs_item.asp?id=000012891424

Internal Investigations in the Spotlight, by Jonathan C. Dickey and Wendy Houle of Gibson, Dun & Crutcher LLP. Available at http://media.gibsondunn.com/fstore/documents/pubs/DickeyJ-Stanford2004-Int_Investgns.pdf

Issues In Internal Investigations for Company Counsel in the Post-Enron Era, by Eugene Illovsky of Morrison Foerster. Available at <http://www.mofo.com/events/speaking/files/7084.html>

The Director's Handbook, by Thomas Dougherty. Available for purchase at <http://bookstore.lexis.com/bookstore/product/58885.html>
Tips for a Successful Internal Investigation in a Post-Sox World, by Jay A. Dubow and Myles A. Seidenfrau, Legal Intelligencer. Available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1161853520159>

What In-House Lawyers Should Know About Internal Investigations, by Darryl P. Rains and Ryan G. Hassanein of Morrison Foerster. Available at <http://www.mofo.com/news/updates/files/update1104.html>

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² A director's fiduciary duty also extends to the establishment and maintenance of compliance programs designed to prevent violations of the law before they occur.

³ Internal investigations can give rise to complicated issues concerning attorney-client privilege and document retention and production. These areas should be part of early discussions with counsel.

⁴ Outside counsel or special outside counsel may not be necessary when directors and senior management are not potential targets of the investigation.