

## **INTERNAL INVESTIGATIONS – SOME LEGAL CONSIDERATIONS**

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### **1. Introduction**

Due to a steep rise in white collar crimes in India, robust measures to prevent and remediate these are being taken by corporations, one of which is conducting internal investigations. The decision to conduct such an investigation may be driven *inter alia* by one or more of statutory or regulatory obligations that an entity in India is subject to (in addition to internal policy requirements or other considerations). Although these laws may not explicitly mandate an internal investigation, fulfilling obligations under these laws typically requires such action. These laws include:

- Companies Act, 2013 (“**Companies Act**” and rules/orders thereunder, for companies).
- Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (for listed entities).
- Securities and Exchange Board of India (Prohibition of Insider Trading Regulations), 2015 (for listed entities).

**Note:** Enquiries under Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (“**POSH Act**”) or disciplinary inquiry for misconduct under employment laws have separate requirements, these have not been covered hereunder, but also often involve internal investigations.

### **2. Key triggers and underlying allegations:**

There are several matters which may trigger the need for an internal investigation. Set forth below are some of the key triggers for an internal investigation:

- Whistle blower complaints made by employees or any other stakeholder within the company<sup>4</sup>

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<sup>4</sup> References to companies include other legal entities, as appropriate, depending on legal requirements applicable to them.

- External whistle blower complaints raised by relevant stakeholders such as vendors, customers or otherwise
- Any concerns raised audit, finance or any other internal control function
- Concerns raised by statutory auditors (pursuant to any matters disclosed to them, or in the course of their audit)
- Inquiries/communications from regulatory authorities
- Media reports/information in public domain
- Inquiries/communications from key external stakeholders like lenders and investors

Allegations leading to such triggers may relate to a wide range of matters - some key heads include:

- Bribery/corruption involving public servants
- Private bribery (kickbacks) paid by/to personnel of the company/entity
- Breach of law (by the company/ its personnel)
- Breach of company's policies
- Falsification of accounts
- Siphoning/misappropriating company funds
- Operational matters (e.g., procurement and supply chain related matters)
- Matters concerning individual behavior (including favoritism and harassment)
- Misuse of company's confidential information
- Insider trading.

### **3. Anonymous/pseudonymous whistleblower complaints – way to address**

While the whistleblower(s) may choose to identify itself/themselves, a large majority of the whistleblower complaints received in practice are anonymous or pseudonymous in nature. It is important for companies to have a proper framework (through policies and standard operating procedures) on addressing anonymous or pseudonymous complaints received – this would cover all relevant aspects, like which complaints would be considered, manner and stage of considering such complaints, investigating such complaints, their closure and other matters.

### **4. Key procedural and legal aspects for an internal investigation**

Currently, there are no statutory mandates or procedural directives which lay down the procedural aspects of an internal investigation to be followed by companies (except for employment law/POSH Act related matters, which are not covered here). Larger and well-governed companies often have laid down policies and procedures on conducting internal investigations (whether these are done internally by company personnel or by external parties/external counsel), clarifying several relevant matters which are key to conduct an efficient internal investigation.

Each internal investigation is quite different, depending on its specific facts, concerns and other circumstances – set forth below are some common points to be considered by companies at different stages:

*Review and scope:* Prior to the investigation, the scope, nature and purpose of the investigation should be identified and formulated. Necessary information and relevant documents need to be identified, assembled and verified in order to assess the purpose and scope. While deciding the scope of an internal investigation, it should be kept in mind that the triggers leading up to an internal investigation may also unearth other relevant matters, which may also require a separate factual and legal review.

Other legal/administrative steps as required would also need to be undertaken – these may include legal hold notices and any immediate steps required in terms of personnel actions, safeguarding the whistleblower(s) and business continuity/minimizing business disruption.

Securing data in a lawful manner is a key part of the initial work steps (and remains relevant through and post the investigation) – the data should be capable of being handed over to a court or regulatory authorities, if required to initiate or defend a litigation or otherwise comply with reporting requirements.

*Putting together the appropriate team:* Each investigation is different, and requires the requisite attention of relevant personnel, depending on the criticality of the issue(s) potentially involved – however, the relevant team members should collectively have the expertise required to proactively identify and address issues that arise/may arise from the investigation. The personnel typically involved in an internal investigation include: (i) the investigation professionals undertaking/supervising the investigation internally; (ii) in-house counsel; (iii) personnel from finance, internal audit or other relevant support functions (if and to the extent required); (iv) external counsel (across all relevant jurisdictions involved), who can monitor and proactively advise the company on key issues/pitfalls; and (v) external agency to conduct the investigation, if required for purposes of availability of technology/scale/expertise not otherwise

available in-house or with external counsel. While putting together the team, it is important that there is no perception of conflict of interest (as an example, if the complaint is against personnel in the finance function, then involvement of any person(s) from the finance team should be carefully considered.).

At the outset (through the investigation), multiple legal aspects including data privacy, employment laws, financial reporting, disclosures and other relevant legal (or contractual) obligations may become relevant – making the role of the in-house and external counsel increasingly relevant and key for risk management.

Preservation of confidentiality and attorney-client privilege is paramount, and an important part of a company's defence blueprint. The position on availability of attorney-client privilege for in-house counsel remains unclear.

*Identification of "client" by the outside counsel/agency:* Questions may arise in one's mind whether the outside counsel/agency represents the company, the employees in question, the whistle blower or any other relevant participant in an internal investigation. At this juncture, it is important to note factors such as disclosure and reporting obligations of the company, the need to preserve legal privilege, identification of the department responsible for the relevant compliance concern and its implication on the relevant "client".

*Updating directors / auditors of the internal investigation:* Suitable mechanism for updating the senior management, board and auditors of the complaint, investigation and findings on an ongoing basis would need to be put in place.

*Strategy for questioning of witnesses, whistle-blower(s) and persons against whom the allegations have been made:* Given the nature and extent of information available, there may be one or multiple rounds of interviews with the witness(es), whistle-blower(s) (if known) and the person(s) against whom the allegations have been made. This needs a tailored strategy, specific to each investigation, which may need to be revisited depending on how the facts evolve. This needs thorough preparation and record-keeping, including preparing detailed interview questionnaires with relevant supporting documents and keeping detailed interview notes.

*Analysis of investigation findings and statutory obligations:* This involves summarizing interview findings (in a report or otherwise), and conducting a detailed legal analysis of the findings to *inter alia*: (i) identify legal or contractual reporting obligations; (ii) identifying and addressing legal risks; (iii) deciding on personnel action(s), if any required; (iv) remediating any other weakness(s) identified; and (v) any other matters relevant for the company.

## 5. **Way-forward**

There is an increasing regulatory focus on internal investigations – onerous obligations have been placed on company auditors (and consequently on company management) under various provisions of the Companies Act and the Companies (Auditor’s Report) Order, 2020. For companies which are subsidiaries of entities outside India, requirements of the jurisdiction of their holding companies are also relevant. Listed entities are subject to additional requirements of securities law and regulations. Certain key/sensitive sectors have sectoral regulators who have also set forth detailed requirements on fraud prevention and mitigation, which also require prompt detection and correction of any wrongdoing. Importance of a robust compliance framework is also illustrated by it being a potential defense to certain charges against a company under the Prevention of Corruption Act, 1988 (“**PCA**”) – although detailed guidelines for the same have not yet been prescribed. Lastly, even large and sophisticated contractual counterparties (Indian and global) seek confirmations on having a robust compliance framework in place, and often seek contractual audit rights on the same.

Internal investigations (and addressing related legal issues through the lifecycle of an internal investigation) are hence now an inescapable part of corporate culture, especially in large and well-governed companies (and is increasingly being adopted by mid-sized and smaller companies as well). These also play a role in fostering a culture of ethics and compliance within the company, and enabling a culture to report wrongdoing (as personnel see action being taken, in case wrongdoing is found).