

APPLE INSIDER TRADING CASE UNDERSCORES BASICS OF EFFECTIVE INTERNAL INVESTIGATIONS

Lesson From Apple

The Securities and Exchange Commission recently filed a lawsuit against a former Apple executive alleging he engaged in insider trading. According to the SEC's complaint, as the previous global head of corporate law and corporate secretary, he was responsible for ensuring that employees complied with the company's policy on insider trading. He also received material non-public information about Apple's finances as a member of the company's disclosure committee. The SEC alleges he, on at least three occasions, traded Apple stock relying on confidential insider information. In one example, after he learned that Apple would miss its quarterly estimates for iPhone sales, but before those results were publicly released, he sold about \$10 million worth of Apple stock from his personal brokerage account. He was placed on leave in July and fired by Apple in September of 2018. The [SEC filed a complaint](#) against him on February 13, 2019.

To Apple's credit, the corporation immediately assembled a team of outside experts, launched a thorough internal investigation, fired the rogue employee, and cooperated with the government. Apple stated, "[a]fter being contacted by authorities last summer we conducted a thorough investigation with the help of outside legal experts, which resulted in termination."

Apple's situation serves as a lesson to every corporation to always be ready to swiftly address allegations of internal misconduct with both tenacity and grace. Improperly handling an investigation can cause greater exposure to the corporation.

To strike this unique balance, it is important for corporate counsel, compliance officers, and HR professionals to remember the following **five essential hallmarks of a well-executed internal investigation**:

- Thoroughness
- Timeliness

- Objectivity
- Accuracy
- Credibility

Thoroughness

An effective internal investigation must be thorough. A critical first step is a well thought out investigative plan that is tailored to ensure that the investigation is both full and fair. It is important that the scope of the investigation be set out in writing at the start of the process. An investigative plan should delineate the subject matter of the investigation, define the authority of the investigators, and detail the investigative methods and strategy. The investigative plan is a living document. As new information is uncovered, the plan should be reassessed and revised accordingly. An investigative plan is also valuable proof that a thorough investigation was conducted in the event of a regulatory inquiry or litigation. If a regulator sees that a thorough investigation was conducted, it may be less inclined to repeat the effort. While a corporation is not required to turn over every stone, a corporation is expected to thoroughly investigate all pertinent issues within an appropriate scope.

Timeliness

Equally important to thoroughness is timeliness. It is always best to conduct fact gathering while the events and issues are fresh. Memories fade and evidence gets stale (or lost) as time elapses. Starting an investigation immediately may allow the corporation to stop any further misconduct from occurring. Timeliness may also be critical if statutory or regulatory reporting deadlines are looming or a Whistleblower seeks to be first in line. Slow investigative response time may inflict a personal toll as well. Delay may discourage employees from reporting issues, vex a complainant, or cause someone who is falsely accused unwarranted extended anguish.

Several factors may influence the timing of an investigation, including, the scope of the investigation, staffing resources, document review, or witness availability. Nevertheless, time is of the essence. Generally, regulators and courts have considered immediacy as a factor in determining whether a corporation took a reasonable and thorough approach to misconduct allegations.

Objectivity

The investigation must be unbiased and impartial. No one on the investigative team should be in the reporting chain of the complainant. Likewise, if a law firm previously provided legal advice on an issue central to the investigation, it is wise to hire independent counsel or investigations specialists. The appropriate composition of the investigative team (whether corporate HR, compliance, inside counsel, outside counsel, or third-party investigators, or some combination thereof) must have three important traits: impartiality, integrity and independence.

In-house counsel and internal employees have the advantage of intimate familiarity with the corporation. However, depending on the nature of an investigation, the inside perspective may cloud the appearance of impartiality due to the employment relationship. Outside counsel or investigations specialists may be necessary to eliminate any perception

of bias by the investigative team. Further, the investigation must embody integrity and follow the facts, wherever they lead, regardless of the consequences to the corporation, officers, or employees at issue. Moreover, an objective investigation must be independent. Any arbitrary limitations on the investigative team's scope or method will be viewed by regulators and courts with skepticism.

Accuracy

The investigative team must endeavor to get it right. Accuracy is critical. Often reputations and careers are on the line. An internal investigation can be subject to a high-level scrutiny, after the fact, by regulators, prosecutors, courts, shareholders, auditors, and even the board of trustees. Therefore, documents and electronic evidence must be carefully collected, diligently reviewed, fully preserved, and witness interviews must be expertly navigated to elicit the most information possible. The factual findings in an internal investigation must be well-supported.

Credibility

At the end of the day, the five essential hallmarks of a well-executed internal investigation all boil down to credibility — how an internal investigation was done, when it was done, who did it, and whether the findings are reliable. If an investigation is deemed to lack credibility, it is worthless.

Takeaways:

1. **Lesson from Apple: Be Ready for a Thorough, Timely and Credible Internal Investigation**
2. **Write an Investigative Plan**
3. **Act Immediately**
4. **The Investigative Team Must Be Impartial**
5. **Factual Findings Must Withstand High Levels of Scrutiny**
6. **Ensure Internal Investigation is Credible**



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