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NEWSLETTER

What Recent Enforcement Announcements and Judicial Decisions Mean for Internal Investigations

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The decision to conduct an internal investigation has never been an easy one for companies. Internal investigations are often the best way to get to the bottom of compliance concerns, protect privilege, lend credibility to government inquiry responses, and better position the company to manage risk. At the same time, they can be disruptive and expensive, and have the potential to uncover unrelated and unexpected issues. Recently, the convergence of expanded government whistleblower programs, the formation of cross-agency working groups, and the introduction of robust cooperation credit initiatives have shifted the risk calculus for companies facing potential regulatory scrutiny. Judicial decisions, such as the Sixth Circuit's recent opinion in *In re FirstEnergy Corporation*, 154 F.4th 431 (6th Cir. 2025), have also reiterated the privileged nature and additional benefits of having outside counsel conduct internal investigations.

More than ever, privileged investigations are a critical tool for companies to avoid – or efficiently resolve – costly and reputationally damaging litigation. Companies should consider these developments when deciding whether to investigate alleged wrongdoing and whether to engage outside counsel to conduct internal investigations.

White Collar Enforcement Continues

Recent federal enforcement trends have created new drivers and deterrents that significantly heighten the value of thorough internal investigations for companies subject to regulatory oversight. The U.S. Department of Justice's (DOJ) 2025 white collar enforcement plan

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confirms that, despite recalibrating enforcement in certain areas, the Criminal Division will continue to focus on combating procurement fraud, Medicare/Medicaid fraud, and investment fraud, among other priorities. The DOJ will also continue to aggressively pursue companies that harm U.S. interests in these areas. At the same time, the DOJ has allocated more resources to addressing corporate misconduct that threatens the economy and U.S. national security, such as trade and customs fraud.

DOJ also recently announced new and revitalized cross-agency task forces on trade fraud (with the Department of Homeland Security and Customs and Border Protection) and health care fraud (with the Department of Health and Human Services). These programs are designed to maximize collaboration across agencies, share subject-matter expertise, efficiently mine data, and expedite ongoing investigations. And cross-agency coordination efforts often shorten the window for self-detection and heighten the stakes for timely, comprehensive internal reviews.

Lastly, federal whistleblower initiatives, including the DOJ's Corporate Whistleblower Pilot Program, offer substantial financial rewards for those who report corporate misconduct. The Pilot Program, first announced in 2024, offers up to 30% of the first $100 million recovered to whistleblowers who provide timely information not previously known to the Department. Unsurprisingly, key focus areas of the program include trade fraud, health care, and immigration, among others. And the Trump Administration has maintained a key pressure point on companies: A company's self-disclosure of "misconduct" covered by the Pilot Program must be done within 120 days to remain eligible for a presumption of declination.

Disclosure Incentives Clarified

In conjunction with these continued enforcement efforts, the DOJ also recently revised its Corporate Enforcement Policy (CEP) to provide increased transparency to companies considering voluntary self-disclosure. Lack of certainty about the benefits of self-disclosure has long been the chief complaint from corporations and the defense bar. As revised, the CEP provides that companies meeting all voluntary self-disclosure criteria (i.e., voluntarily disclosing previously unknown misconduct to the DOJ, fully cooperating, remediating in a timely and appropriate manner, and having no aggravating circumstances) will receive a declination, not just a presumption of one. Companies that self-disclose but have aggravating circumstances can still be eligible for a declination based on a weighing of the seriousness of those circumstances against the company's cooperation and remediation efforts. And companies that voluntarily self-disclose in good faith but have not done so quickly enough, or before the DOJ became aware of the misconduct, still receive significant benefits – a non-prosecution agreement with a term of fewer than three years, a 75% reduction on the criminal fine, and no corporate monitor. Taken together, the message is clear: Early action can result in declinations or reduced penalties, and the CEP rewards transparency and prompt remediation.

Before a company can disclose, remediate, and utilize the benefits of the CEP, it must first be able to identify potential improper conduct. In other words, a company cannot address or report concerns for which it is unaware. Internal investigations, such as those prompted by whistleblower reports, audit irregularities, and other risk indicators, play a crucial role in alerting the company to potential issues and informing decisions about self-disclosure.

Privilege Protections Strengthened

Recent judicial rulings have strengthened privilege safeguards for internal investigations, enabling organizations to secure the information necessary for informed strategic decision-making under privilege.

In *In re FirstEnergy Corporation*, the Sixth Circuit recently reaffirmed the roles the attorney-client privilege and work-product doctrine play in the context of internal investigations. That case involved a securities class action stemming from a bribery case against a state lawmaker that implicated the appellant. Plaintiffs sought the fruits of internal investigations the company conducted through outside counsel when it learned of the bribery issue. The district court ordered production, ruling that the company's later use of the investigation's findings for business decisions meant that the investigation was initiated for business purposes, rather than for legal advice.

The Sixth Circuit granted the company's petition for writ of mandamus and vacated the order. In doing so, the panel clarified that the central inquiry for attorney-client privilege is whether a company seeks legal advice – not what a company does with the legal advice. The court emphasized that outside counsel's examination of "what acts occurred, whether those acts were illegal, and what criminal and civil consequences might ensue" is traditional legal advice. That the company had a concurrent "business purpose" in conducting the two internal investigations at issue was of no moment because "it will be the rare company that will not also have business purposes for seeking essential legal advice."

Similarly, documents created during internal investigations are shielded from disclosure under the work-product doctrine if the company reasonably anticipates litigation. The Sixth Circuit found that the "legal and regulatory" actions facing the company, including possible federal and state investigations, left no question that counsel conducted the internal investigations in anticipation of litigation and that the resulting documents "assembling information, sift[ing]... the relevant from the irrelevant facts" to inform legal theories and plan strategy were protected by privilege.

The court also rejected arguments that any applicable privilege was waived when the company disclosed portions of the internal investigation when negotiating its deferred prosecution agreement with the DOJ, because most of the information shared was non-privileged factual information and general investigation conclusions that did not expose the substance of outside counsel's legal advice. Nor did the company waive privilege by providing investigation materials to its independent auditor, who had a duty of confidentiality and was not an adversary.

In addition to reaffirming the fundamental privilege protections necessary to facilitate "full and frank communication between companies and their attorneys when investigating their own wrongdoings," the Sixth Circuit's decision reinforces the value of engaging outside counsel at the earliest sign of potential exposure and provides companies with important guidelines for exploring potentially advantageous resolution opportunities with the DOJ while preserving privilege protections.

Making the Most of Internal Investigations

While the decision to engage outside counsel and conduct an internal investigation must be made thoughtfully, the convergence of the above trends – recent enforcement initiatives, the availability of cooperation credit, and judicial affirmation of privilege protections – has recalibrated the decision process for corporate counsel. Should outside counsel be retained to conduct an internal investigation, company counsel should consider taking the following steps to maximize privilege and facilitate an efficient, well-scoped, and effective internal investigation:

- Clearly document the triggering event, legal purpose, and scope of the investigation to help preserve privilege and work product protections.
- Establish clear reporting channels for outside counsel and internal stakeholders.
- Take steps to help outside counsel identify and preserve key evidence.
- Determine how outside counsel will report on the investigation (e.g., weekly status calls) and how findings will be communicated (e.g., investigation report, oral presentation, etc.).
- Set deadlines for completing investigatory steps to ensure the company has time to understand outside counsel's findings and decide on appropriate remediation and/or disclosure.

In light of recent enforcement trends and judicial affirmation of privilege protections, company counsel now operate in a more favorable environment for initiating internal investigations, especially when self-disclosure and remediation can lead to more predictable resolutions. Nevertheless, the decision remains complex, and company counsel must carefully guide the process to ensure investigations are conducted efficiently while maximizing privilege protections.