

SUBJECT *to* INQUIRY



GOVERNMENT REGULATORY &
CRIMINAL INVESTIGATIONS

RESOURCE GUIDE

McGUIREWOODS
Relationships That Drive Results

ABOUT THIS GUIDE

This guide contains a condensed selection of important insights and guidance from the attorneys in our Government, Regulatory and Criminal Investigations (GRCI) Department, compiled for our clients and friends. We trust you will find it valuable.

With offices in 18 U.S. cities, and throughout the world, McGuireWoods is ready to deliver the experience our clients need to handle any GRCI matter your organization may be facing. Please feel free to call any of us regarding issues related to government, regulatory and criminal investigations, or other areas of law in which you believe McGuireWoods can be helpful. In addition, if there is anything you would like to see included in future editions of this guide, please let us know. Contact information for the contributing attorneys is inside the back cover.

Disclaimer: The McGuireWoods Government, Regulatory and Criminal Investigations Resource Guide is intended to provide information of general interest to the public, and is not intended to offer legal advice about specific situations or problems. McGuireWoods does not intend to create an attorney-client relationship by offering this information, and anyone's review of the information shall not be deemed to create such a relationship. You should consult a lawyer if you have a legal matter requiring attention. For further information, please contact a McGuireWoods lawyer.

Government, Regulatory & Criminal Investigations RESOURCE GUIDE

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Do you have a strong handle on Foreign Corrupt Practices Act issues within your international operations?

Do you have a plan for handling an Immigration and Customs Enforcement raid on a manufacturing plant?

Is your compliance organization handling red flag issues appropriately?

Do you have a plan for responding to government audits of your use of TARP and other economic recovery funds?

Are your employees up to speed on export controls?

If a government agency contacted you about these kinds of issues tomorrow, would you know how to respond?

INTRODUCTION

When your organization faces a threat to its reputation, its financial well-being, and perhaps even its existence, every decision matters. Timing is critical. McGuireWoods' Government, Regulatory and Criminal Investigations Resource Guide is designed as a user-friendly reference for in-house attorneys, compliance officials and executives across any industry – no matter the size or scope.

This guide provides overviews for key areas of law related to internal investigations, as well as suggestions for proper responses to the general risks posed in each area. It also includes at-a-glance contact information for McGuireWoods attorneys.

Although this is a concise summary of substantive law related to government, regulatory and criminal investigations, it cannot eliminate the need for consultation with an attorney. This guide will prepare you for conversations with an attorney by helping to identify potential problems and issues. However, specific questions can only be answered by professionals with experience. Importantly, the law in many of these areas is rapidly changing.

We hope you will need this guide infrequently – if ever. However, we recommend keeping it near your desk, just in case.

Our ranks include former:

- U.S. Attorney for the Eastern District of Virginia
- DOJ Section Chief
- First Assistant U.S. Attorney
- Assistant U.S. Attorneys
- U.S. House of Representatives’ Counsel to the Committee on the Judiciary
- U.S. Department of Education’s Deputy General Counsel
- Special Counsel & Acting Deputy General Counsel to the FBI
- Assistant Attorney General in charge of the DOJ’s National Security Division
- Deputy Counsel to the President
- U.S. DOJ Task Force Attorney & Virginia Commonwealth’s Attorney
- State Attorneys General
- FERC Branch Chief in the Office of Enforcement, Investigations Division
- Attorneys for the SEC’s Division of Enforcement
- First Attorney of the Division of Enforcement of the PCAOB
- Assistant Director, Enforcement Department of NASD (n/k/a FINRA)

We represent clients involved in investigations brought by the Department of Justice (DOJ), the Securities and Exchange Commission (SEC), the Department of State, Congress, the Public Company Accounting Oversight Board (PCAOB), the Financial Industry Regulatory Authority (FINRA), the Federal Energy Regulatory Commission (FERC), the Commodity Futures Trading Commission (CFTC), various state attorneys general and other federal and state civil and criminal regulators. Our GRCI lawyers regularly represent corporate and individual clients facing internal audits or investigations; corporate compliance investigations; grand jury investigations; and other regulatory, administrative and criminal investigations.

INTERNAL INVESTIGATIONS

THE PROCESS

A carefully designed and strategically deployed internal investigation is often a company's most valuable tool in assessing and remediating potential issues before they give rise to a government investigation or lawsuit. An internal investigation can also be essential to seize early control once a government investigation or lawsuit is already underway. We are skilled at rapidly designing and carrying out highly effective internal investigations in almost any business, compliance or enforcement setting in the United States or abroad.

As a first step, companies need to be cognizant of what circumstances should prompt the launch of an internal investigation. These may include any of the following:

- When there have been suspicions or credible allegations of significant wrongdoing, misconduct or ethical lapses.
- When there has been a government inquiry.
- When there have been allegations of misconduct or wrongdoing against an industry.

Factors to consider in determining whether to conduct an internal investigation include:

- Magnitude of the alleged harm.
- Number of employees potentially involved.
- Duration of the alleged wrongdoing.
- Prior disciplinary history of the company.
- Culture of the company.
- Current enforcement climate.

Reasons to conduct an internal investigation include:

- When smart businesses anticipate potential litigation or a government investigation, a prompt, well-focused and thorough investigation is critical and allows you to assess and manage risk; develop appropriate responses to actual or anticipated government initiatives; and avoid or minimize regulatory sanctions, protracted civil litigation or criminal prosecution.

WHAT CLIENTS NEED TO KNOW

The timing of an investigation is critical. As soon as a decision – based on credible evidence that an internal investigation warranted – is made, the following points should be carefully considered.

- **Personnel to Conduct Investigation**
 - o Investigations performed by an outside law firm are perceived by the government as more credible and independent.
 - o Attorney-client privilege concerns should be addressed.
 - o An outside law firm with experience conducting internal investigations will ordinarily be more efficient than an in-house team.
 - o There may be a need to retain experts or forensic investigators for assistance.
- **Client Guidelines for Investigation**
 - o Minimize disruption to everyday business.
 - o To avoid allegations of inconsistency, establish and follow guidelines.
 - o Designate a lead attorney to coordinate and supervise the investigation.
 - o Consider attorney-client privileges, and avoid confidentiality waivers.
 - o Devise a work plan with issues to be investigated and team member responsibilities.
 - o Determine who should be part of the investigatory team.
 - o Communicate frequently among team members.
 - o Once the investigation is complete, decide if a written report should be prepared.
- **Interviews**
 - o Witness interviews of employees are a key fact-gathering tool.
 - o Proper *Upjohn* warnings must be given to interviewees.
 - o Handle employees' requests to have their own attorneys at the interview.
 - o Document collection should be structured in a manner that anticipates possible production during litigation or a government investigation, and takes into account the complexities of electronic data.
 - o Relevant documents must be collected for every person who is interviewed.
 - o E-mails are a critical source of information.

HOW MCGUIREWOODS CAN HELP

We are prepared to defend clients in the largest and most complex investigations, including those involving the review and production of millions of documents. We have directed what is believed to be one of the largest productions in history by a Fortune 100 company to the DOJ and SEC.