Internal Investigations

This note gives you practical guidance on the structuring and conduct of an internal investigation. It focuses on investigations that a firm decides to carry out in relation to itself, which may or may not have been prompted by regulatory concerns. For the most part, the guidance applies equally to corporates and financial institutions. Clearly, however, the regulatory environment will differ and where appropriate, this note refers to the Financial Services and Markets Act regime.
Why Investigate? //
Aims and objectives

Investigations are conducted for a variety of reasons. These range from urgent enquiries prompted by a business crisis, to business as usual reviews of the actions of individuals and business areas. There are a range of steps that organisations can take at the outset which have a significant impact on the likely success of all investigations, large or small.
Clarify at the outset the reasons for the investigation and its objectives.

The purpose of the investigation will frame the scope of the work and dictate how the conclusions should be presented.

Terms of reference should be drawn up. These need to include details of the team (this is important in relation to any claim to privilege – see legal advice privilege). They may also cover (i) finding out what happened; (ii) how the findings will be reported; and (iii) to whom the findings will be reported, for them to determine consequences and necessary remedial action (if any).

Initial steps and timescales should be decided.

Consider whether there is an immediate issue that needs fixing (and keep this under review as the investigation also progresses).

Possible aims

One or more of:

> To inform the board about the background to and circumstances of a particular event or issue.

> In the context of a general (industry- or market-wide) or specific concern – to enable the firm to state publicly that it has investigated the matter (and taken appropriate action).

> To establish what happened in response to a complaint from a client or counterparty or to respond to shareholder concern.

> As a precursor to litigation to determine whether or not there is a claim.

> In the context of concerns about the conduct of one or more employees – as a precursor to potential disciplinary proceedings.

> To enable a firm to comply with its regulatory obligations, in particular, reporting obligations, the general principle of co-operation and openness and issues about ongoing fitness and propriety.

> To discourage one or more regulators from instituting a formal investigation.

Generally, internal investigations will concentrate on fact-finding and avoid reaching conclusions on the firm's, or individuals', legal liability.
Why Investigate? //
Who investigates?

The team should be defined at the outset, and thought given to individual roles – bearing in mind that these may develop over time. Not only will this make the investigation run more smoothly, it is important in terms of a claim to legal professional privilege.

The team may require a combination of skills.

The involvement of lawyers will assist in a claim to privilege although the entire investigation is unlikely to be privileged unless litigation is in contemplation and the dominant purpose of the work is for the litigation.

When choosing your team, consider if any conflicts issues arise from the circumstances giving rise to the need for a review. Consider also whether the investigation needs to be seen to be independent.
Management

Considerations:
> Do they have the resources? Can they commit the time?
> Are they independent and will they be seen to be independent? Is there any chance that they were involved in the underlying events?
> Will individuals’ relationships with potential interviewees be likely adversely to affect the quality of the evidence obtained? Will it make the interviewees reluctant to talk openly?
> Do they need to be authorised by resolution of the board?
> Will they need assistance in reviewing documents and/or structuring the interviews/asking the questions?
> It will not be possible to claim privilege in relation to much of their work.

Considerations:
> Are they independent and will they be seen to be independent? Is there any chance that they were involved in the underlying events? Would they, in effect, be asked to review their own work?
> Do they have the resources?
> Will they need assistance in reviewing documents and/or structuring the interviews/asking the questions?
> It will not be possible to claim privilege in relation to much of their work.

Considerations:
> Do they have the resources and are they able to commit the time?
> Is there any chance that they are being asked to review their own work?
> Is it important that the team conducting the investigation is seen to be independent of the firm?
> If in-house legal/compliance is to be the continuing link in dialogue with the regulator is it in fact helpful for someone else to be principally responsible for the investigation and to report to the in-house team?
> Do they have the resources to do the document review work?
> Enables any regulatory reporting obligations to be kept under review and action taken accordingly.
> Even though the work is carried out by lawyers, there are still limits on what it is possible to claim privilege over.

Directors

Considerations:
> Is it sensible for them to commit the time?
> Do they have the resources?
> Their relationship with the potential interviewees may be a factor – will it make the interviewees reluctant to talk openly?
> Will they need assistance in reviewing documents and/or structuring the interviews/asking the questions?
> It will not be possible to claim privilege in relation to much of their work.

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Considerations:
> Claims to privilege will be easier and clearer – see below for limits on what will be covered.
> Are there presentational advantages in that the work is seen to be objective and independent?
> Will have the forensic skills required to structure the interviews and ask the questions effectively.
> Ensures that legal advice can be given as and when issues develop – legal advice will keep pace with the facts as they are established.

Considerations:
> Are the issues such that auditors are likely to be able to assist?
> Will they be seen as independent?
> Are they being asked to review their own work?
> Will they need assistance in reviewing documents and/or structuring the interviews/asking the questions?
> It will not be possible to claim privilege in relation to much of their work.

Considerations:
> Are there asset tracing issues?
> Can they assist with technical back-up?
> May be helpful in combination with other advisers.
> It will not be possible to claim privilege in relation to much of their work.

Other experts as required

> May be helpful depending on the underlying facts which prompted the investigation.
> Usually only used in conjunction with others and instructed by external solicitors to assist them in providing legal advice (to maximise privilege protection, though note that this may be ineffective for the purpose of legal advice privilege as the expert is not the “client” and may not be giving legal advice – see further section on privilege).

Examples:
- Trading data analysts
- Experts in industry practice
- IT/trading systems experts

Considerations:
> Are there asset tracing issues?
> Can they assist with technical back-up?
> May be helpful in combination with other advisers.
> It will not be possible to claim privilege in relation to much of their work.

Private investigators

> Great care needs to be taken with the engagement letter and instructions to the private investigators to ensure that they only use methods which are legal. Usually only used in conjunction with others.
> There may be reputational risks associated with instructing private investigators. The firm should consider whether any of the proposed methods would reflect badly on the firm, even if they are within the law.
> Particular care needs to be exercised in the instruction of private investigators in relation to current employees. The Information Commissioner has issued detailed guidance under the Employment Practices Act. There is a very narrow range of circumstances in which covert monitoring of current employees will be considered lawful, and in any event, senior management need to sign off on whatever arrangements are made. This is the case both for the instruction of private investigators and for any other form of covert monitoring or investigation. Note that the involvement of private investigators will, in most cases, be a breach of the duty of trust and confidence between the employer and the employee.
**Communications** //
**Internal communications about the investigation**

The general principle should be to inform people on a “need to know” basis.

Note that any internal written communication about why the investigation is being conducted will not be privileged. It should be kept as neutral as possible and not pre-judge the issues.

The firm should work on the basis that what it says in communications to all, or a substantial number of, its employees has a high probability of becoming public.

Thought should be given at the outset to how and when issues will be escalated and reported within the firm; this will help maintain confidentiality in relation to reporting lines.

Whenever legal advice is reported, care needs to be taken to maintain privilege – see [Privilege](#).
Communications

Management, In-house legal, In-house compliance

Should be kept up to date in accordance with the firm’s usual reporting principles.

Care needs to be taken when reporting legal advice and separate reporting lines may need to be set up for this depending on how the “client” is defined for a claim to privilege – see below.

Advice should be sought where reporting lines extend outside the EEA since there may well be data protection issues under the Data Protection Act (“DPA”) / General Data Protection Regulation (“GDPR”).

Those likely to be required for interview

Employees should understand the purpose of the investigation before their interviews and in particular whether there are any consequences for failing to comply with any request to attend an interview.

All other employees

Consideration needs to be given to whether or not the fact of the investigation will become public and/or widely known within the firm. It is usually better for the firm to communicate with employees before any other source provides them with the information. Any communication should be carefully drafted and should remind employees of their duty of confidentiality and include general document control warnings.

Confidentiality

The project as a whole should have a password.

Access to documents created in the course of the investigation should be controlled by password.

Care should be taken, both within the team and externally, to be clear about who knows what and with whom matters may be discussed.

Those required to produce documents

Those required to produce documents should sufficiently understand the investigation’s purpose, scope and importance to enable them to identify relevant documents and to treat the investigation with the seriousness that it merits.

All employees likely to hear of the investigation and/or be required to produce documents and/or be required for interview

Need to be told about the fact of the investigation. What they are told about its scope depends in large part on the underlying issues.

Sufficient information should be provided so inaccurate speculation and gossip are limited. Employees must be told about not deleting or destroying relevant material.

This group should be sent the standard warning about not creating further documents/not commenting on the investigation in emails or (taped) telephone calls and maintaining confidentiality both internally and externally.

Should be kept up to date in accordance with the firm’s usual reporting principles.

Care needs to be taken when reporting legal advice and separate reporting lines may need to be set up for this depending on how the “client” is defined for a claim to privilege – see below.

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Communications //
External communications about the investigation

Consider in each case what is being communicated:
> The fact of the investigation? and/or
> The underlying facts ascertained?

Great care should be exercised in concluding that it is appropriate to communicate the firm’s view that it, or any individual, is in breach of a regulatory or legal obligation.

In any external communication about an investigation care should be taken to distinguish between the facts and the firm’s view on the facts or their consequences. In each case, the question should be: does the person to whom this information is being communicated need to know of the firm’s views and opinions on the facts as established? What use will they or might they make of that information?

Note also the need in many cases to consult with the firm’s insurers on anything which might be construed as an admission of liability.

It may be that more than one report needs to be made – so the necessity to update an initial report should be kept under review. This is particularly the case if the initial report would be rendered incomplete or misleading by information established later.

Continued
Consider privilege in relation to any external communication. If a matter is privileged, consider:

> Does it have to be communicated to a third party and why?
  Note that privilege may well be lost by doing this.

> Can the document be divided into privileged and non-privileged parts and only the non-privileged parts communicated?

> Could there be a limited waiver of privilege – as to which a formal agreement should be entered into.

In any voluntary report or report in the firm’s interest, client confidentiality should be considered. It may be that confidential details can be omitted or redacted.

If there is a duty to report a particular matter, then generally a client cannot complain that such a report contained information which would otherwise be confidential to it. Terms of business need to be considered. There will be an implied, if not an express, overriding of the duty of confidentiality to enable the firm to comply with its regulatory obligations. In a voluntary report, this question may be more difficult. The first question is whether the report is truly voluntary; Principle 11 of the FCA’s Principles for Businesses, PRA Fundamental Rule 7, Senior Manager Conduct Rule 4 and Individual Conduct Rule 3 are broadly drafted and will often lead to the conclusion that there is an obligation on the firm/individual to bring matters to the regulator’s attention.
External communications about the investigation

Reporting obligations

Advice should be taken on the scope of obligations and whether on the facts a duty to report has arisen.

Usually the working presumption is: if in doubt, report.

Timing: as soon as possible once the conclusion is reached that a reporting obligation has arisen. An initial report can always be supplemented later.

Duties will depend on which regulatory regimes the firm is subject to, but consider:

For all listed companies:
> To the market – there may be a need to involve the firm’s brokers. Even if a notification is not required immediately, consider whether a reactive statement should be prepared.
> To an overseas regulator.

For all companies and firms:
> To the National Crime Agency (NCA) – is it necessary to make a Suspicious Activity Report (SAR) in respect of money laundering, terrorist financing or dealing in the proceeds of crime? Does the firm know or suspect, or have reasonable grounds to know or suspect, that another person is engaged in such activities? Advice should be taken as to whether or not the duty applies on the facts as known or suspected.
> Any other professional regulatory authority (e.g. auditors, solicitors).

For FCA and Dual-Regulated firms:
All of these obligations apply to FCA-regulated firms. Dual-regulated firms owe similar obligations to the PRA (corresponding PRA Rulebook references are provided).
> FCA Principles for Businesses 11 (PRA Fundamental Rule 7) – “A firm must deal with its regulators in an open and co-operative way and must disclose to the [FCA/PRA] appropriately anything relating to the firm of which the [FCA/PRA] would reasonably expect notice.”
> SUP 15.3.1 (PRA Notification Rule 2.1) requires a firm to report to the FCA/PRA, among other things, any matter which could have a significant adverse impact on the firm’s reputation.
> SUP 15.3.11 (PRA Notification Rule 2.4) requires a firm to report to the FCA/PRA a breach of any requirement imposed under FSMA or the Rules in addition to various other breaches. This includes breaches of the COCON conduct rules – the Individual Conduct Rules and Senior Manager Conduct Rules.
> SUP 15.3.17 (PRA Notification Rule 2.8) requires a firm to report to the FCA/PRA immediately it becomes aware of any significant fraud and/or fraudulent or other accounting irregularities.
> SUP 15.11 (PRA Notification Rule 11) requires a firm to notify the FCA/PRA of:
  – any disciplinary action (e.g. suspension, formal written warning) for breach of the COCON conduct rules; and
  – a “significant breach” of a COCON conduct rule, as soon as the firm has information which reasonably suggests that the breach may have occurred or may occur in the foreseeable future.
> Is it necessary to make a suspicious transaction report? Article 16 of the Market Abuse Regulation requires a regulated firm to report any order or transaction it executes where it has a reasonable suspicion that an order or transaction in any financial instrument, whether placed or executed on or outside a trading venue, could constitute market abuse. Report must be made “without delay.” This is not a substitute for a SAR to the NCA if one is necessary. Advice should be sought if there is doubt about the applicability of this requirement.

Additional requirements for Dual-Regulated firms
> PRA Notification Rule 2.3 requires a firm to report to the PRA any significant failure in the firm’s systems or controls, and any proposed action which would materially alter the firm’s capital adequacy or solvency.

Requirements for persons within regulated firms
> COCON 2.1: Individual Conduct Rule 3 – “You must be open and cooperative with the FCA, the PRA and other regulators.”
> COCON 2.2: Senior Manager Conduct Rule 4 – “You must disclose appropriately any information of which the FCA or the PRA would reasonably expect notice.”
There is no general obligation to notify the police even where criminal conduct is suspected/established. Even if the conclusion is reached that reporting to the police would be appropriate and advisable, there will still be a question of timing.

Factors in favour of notifying the police:
> The firm may well conclude that it is the “right thing to do.”
> It may be a requirement of a relevant policy of insurance that the police are notified.
> There is the impact on other employees to consider if the underlying facts show that a crime may have been committed – not involving the police may send the wrong message.

Factors which may point against notifying the police:
> There is inevitably some loss of control over the investigation.
> There may be some administrative difficulties in relation to seizure/production of documents, although the police should allow the firm to keep copies.
> If it is clear that the police are involved, then all employees – not just those who may be the subject of criminal charges – are likely to be less open and co-operative in the firm’s own investigation.
> The fact that the police are involved does not prevent the firm from continuing its own investigation, questioning the employee and so on. However, if the employee seeks advice, they may well be told not to co-operate with the firm’s investigation, since it could prejudice the outcome of the criminal process.

If the police are informed and the relevant employees cease to co-operate with an internal investigation, the firm would have to consider the consequences of its investigation proceeding without the involvement of one or more employees, including whether it could terminate those employees’ employment based on what it has already established. As to that, note that the fact that an employee has been arrested for or charged with a criminal offence does not necessarily justify terminating their employment (although the employment contract may specify that this could lead to summary dismissal). Generally, the employer has come to its own view about the facts and whether the employee’s conduct is such that termination is the right response and if so on what terms.
Communications // External communications about the investigation

Notifications in the firm’s interests
What is appropriate clearly depends on the facts, but consider:
> Insurers – including directors’ and officers’ (“D&O”) insurers and employee fidelity insurers. NB check whether investigation costs are covered, either for the firm or for individuals.
> Affected clients.
> Affected counterparties.
> Creditors.
> Auditors.
> Banks as lenders – could the facts ascertained constitute an event of default?
> Banks – does the firm need to cancel one or more bank mandates?
> The public – very rarely, it may be appropriate to indicate to the public that a matter is being investigated – (where the underlying cause for concern is already public knowledge).

The timing of a report will vary depending on who is being told; but insurers should always be told without delay or cover may be jeopardised.

Public relations advice
If the matter is, or is likely to become, a matter of public knowledge, consider instructing a public relations firm and agreeing a media strategy with them.

Data protection issues
External communications will usually contain no personal information, but seek advice if necessary.
Privilege // Internal investigations – legal professional privilege

Documents which are covered by legal professional privilege remain confidential to the firm and will not have to be produced to a regulator or in litigation. The maintenance of legal professional privilege is of critical importance. English law in this area has changed, and is changing, largely in ways that make asserting privilege more challenging. It is impossible to be definitive about what line would be taken were a claim to privilege to be challenged – either in Court or by a regulator – particularly in the abstract; the factual context is all-important.
Legal advice privilege

Documents which are created for the purpose of giving or getting legal advice (which includes advice as to what should prudently be done in the particular legal context) are privileged provided that the document is a confidential communication between the lawyer and the client.

Points to note:
> “Client” is narrowly defined. Within a corporate or firm, “client” means that group of people who are responsible for obtaining the advice in question. This group should be as small as practicable. Thought should be given to its composition, and the conclusion documented.
> To remain privileged, the communications must be, and remain, confidential.
> Internal reports are not generally privileged if they are the result of a fact-finding exercise with no adversarial proceedings in contemplation. This is true even if the report is prepared by or for lawyers.

Lawyer/client communications are privileged even if they do not contain advice on matters of construction or law provided that they are directly relevant to the performance of the lawyer’s duty to the client.

Litigation privilege

Documents created for the purposes of preparing for, or conducting, adversarial proceedings are privileged if:
> this was their dominant purpose at the time the document was created;
> the document is a confidential communication between the lawyer and either the client or a third party, and
> adversarial proceedings were in the reasonable contemplation of the party at the time that the document was created.

Points to note:
> It is difficult to determine the point at which litigation privilege becomes available during an investigation by a regulator. This is a complex issue and advice should be taken.
  – Although it has never been fully tested, the better view is that litigation privilege applies to communications in the course of, or in reasonable contemplation of, regulatory enforcement proceedings (i.e. not just Court proceedings).
  – Still, there is no guarantee that an investigation into a suspected regulatory breach will result in enforcement action. The FCA in particular has been keen to reposition investigations as a purely fact-finding exercise, rather than a necessary precursor of inevitable enforcement action. This means that it may be that litigation privilege will not arise much before the issue of a draft warning notice.
  – This was illustrated, albeit in the criminal context, in (SFO v Eurasian Natural Resources Corporation) [2017] EWHC 1017 where the High Court held that a criminal investigation by the SFO is a preliminary step and should not of itself be treated as adversarial litigation (since a prosecution will not necessarily follow).
  – There remain cases, however, where the overall context and background may make it clear that regulatory enforcement action is bound to follow even before a draft warning notice is received.
> The better view is also that litigation privilege does not apply to work done in the course of statutory investigations. That said, the point has never been fully tested.
> It may be that evidence of a particular claim by an identified counterparty is required in order for litigation privilege to be claimed.
Privilege // Internal investigations – legal professional privilege

Statutory vs common law test: Under section 413 FSMA, “protected items” do not have to be produced. The test of whether an item is protected is similar to, but not identical with, the test of whether it is privileged at common law.

Differences:

> The statutory test omits the “dominant purpose” test. What is important is that the communication was made in connection with giving legal advice or in connection with legal proceedings.

> The statutory test has no confidentiality requirement.

> The statutory test only applies to communications between lawyer and client and not, for example, the lawyer’s own papers (although the practical impact of this is reduced if production is required of the firm and the papers in question are not ones over which the firm has control).

> The statutory test does not extend to common interest privilege, public interest immunity, without prejudice communications or the privilege against self-incrimination.

The practical consequence of the difference in the two tests is often not great.

It is certainly arguable that where a communication would not be protected under the statutory test but would be privileged at common law, it is not subject to production because a claim to privilege at common law can still be maintained (i.e. the statutory test does not replace it). This point seems not to have been tested in any reported decision.

Practical points

Once privilege is lost, it is lost for good.

Tips for the maintenance of privilege:

> Documents should be marked “confidential and privileged” where a claim to privilege is made in relation to them. This is not determinative but is helpful, not least as a reminder to recipients to keep the information confidential.

> A note should be sent round to all relevant staff at the start of an investigation, reminding them not to create any additional documentation – notes/emails etc. – which comments on the matters under investigation and which the firm might then have to produce.

> Even if a matter looks as if it will raise only regulatory issues, the risk of associated civil litigation should never be ruled out. Documents which are not privileged might, therefore, have to be disclosed in more than one context.

> If the matter has any international connection, advice should be taken on how privilege rules operate in the relevant jurisdictions.

> Privileged material may be relevant to an internal investigation, but it should be carefully segregated from non-privileged material and a procedure for its review determined which will preserve privilege. Care also needs to be taken not to waive privilege in such material by, for example, referring to it in a final (and non-privileged) report.
Privilege //
Legal professional privilege – potentially difficult issues

The most difficult questions usually arise if the work being undertaken is purely investigatory since the only safe assumption is that the only form of privilege available is legal advice privilege.

It is, of course, a separate question whether the documents referred to below would be relevant to later proceedings and hence subject to production – it should never be an automatic conclusion that the documents below would be disclosable. That said, it is clearly sensible to limit the potential for damaging and disclosable documents to be created.
Advice from foreign lawyers

If advice is sought from foreign lawyers for use in relation to English proceedings, privilege should be claimed by reference to the same principles which would apply were the lawyers English.

Discussions with current employees or former employees

Both are effectively treated as third parties for the purposes of determining privilege.

If litigation is contemplated, all discussions should be privileged.

If no litigation is contemplated, and the discussions are part of a fact-finding exercise, for example in the course of an investigation, then what the employee says in answer to questions is not generally privileged.

> The employee should be asked to agree to proceed with the discussions on the basis that they remain entirely confidential and covered by legal professional privilege, that the privilege is that of the firm and that the firm (and only the firm) may assert or waive it in respect of any third party (including a government agency) at its discretion (an "Upjohn warning"). There is usually no reason to go into detail with an interviewee about which parts of the interview are covered and which not.

Records of interviews with employees and former employees

> Balance the importance of keeping a record of the interview for future use (in the interests of both the firm and the interviewee) against the substantial risk that any record of the interview will not attract legal advice privilege.

> From the perspective of legal advice privilege:

  – A tape recording is clearly not a privileged document.
  – Interview notes should be made (and the interview conducted) by a lawyer, but this will not be enough to attract privilege. A record of an interview will be privileged only if it betrays the trend of legal advice. For this reason, avoid making a purely verbatim note of the interview.
  – Recording selective information may be sufficient, provided the selection betrays the trend of legal advice and is limited by its relevance to that legal advice.
  – Do not assume that the questions chosen, or isolated comments by the person compiling the note as to credibility or the strength of the evidence, will be sufficient to betray the trend of legal advice.

Lawyers can incorporate interviewee comments directly into a broader document which already analyses and records information from other interviewees, where the issues are sufficiently clear.

If the interviewee is shown drafts of the note to obtain their input (with a view to them agreeing the note), consider collecting the drafts back once the interviewee has considered them.
<table>
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<tr>
<th>Recording and reporting on investigation steps and progress</th>
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<tbody>
<tr>
<td>Consider the best way to do this in a way which preserves the strongest claim to privilege. This should include deciding how best to report to stakeholders overseeing the investigation on progress and conclusions.</td>
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<tr>
<th>Reports to the FCA, the PRA or other regulators</th>
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<td>Are not generally privileged, not least because generally the report will be of facts. If it is considered necessary or appropriate to provide the appropriate regulator with details of the firm’s legal advice – and note that the regulator has no right to its production – this should be done under an agreement recording a limited waiver of privilege and the terms on which the advice is given.</td>
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<tr>
<td>Care needs to be taken in any report to consider whether what needs to be reported are facts or conclusions as to liability/breaches.</td>
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<tr>
<td>Advice from lawyers as to what needs to be reported and how is clearly privileged.</td>
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<td>Are not privileged and care needs to be taken about making notes of such meetings. Lawyers’ notes which are not a verbatim record should be privileged under the legal advice limb.</td>
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<th>Challenges to a claim to privilege</th>
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<td>Legal advice should be sought before declining to produce documents on the basis of privilege and/or producing documents if there is a doubt as to whether they are privileged.</td>
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<td>It may be possible to show a regulator, for example, just enough of a document to confirm that it is privileged.</td>
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Identifying, retrieving and reviewing relevant documents is likely to be the most time-consuming element of any investigation. Adopting a structured and systematic approach is vital to ensuring that you make the best use of any documentary evidence.
Document the decision-making process as to what material is regarded as relevant. It may be important to be able to explain later what the firm's thinking was in that regard. Ensure that those who are involved in the work of identifying and collating documents are and will be seen to be independent and objective.

> Material should be identified by:
  - Person
  - Author

> Consider:
  - How this will have been reported upwards within the firm?
  - How will this have been reflected in documents?

> By date
> By subject matter

Consider:
> Hard copy material – documents, letters, spreadsheets, statements.
> Electronically held material – emails, documents held on databases and filed electronically.
> Documents covering a number of subjects e.g. minutes of meetings where the issue was one of many considered.
> Personnel records.
> Risk reports.

> Are the firm's systems and controls likely to be an issue?
  What documentation would be relevant to this?
> Telephone records – numbers dialled/calls received.
> Tapes of telephone calls.
> Mobile devices records – where these belong to the firm.
> Mobile devices and tablets where these belong to the firm. Check the staff handbook for the firm's rules on these as mobile devices are likely also to contain personal material.
> Laptops.
> CCTV.
> Security system log – showing employees' movements through the building – may be relevant.
> Internal audit reports.
> Internal reports the subject matter of which may be relevant to the issues being investigated.
> Diaries – where these belong to the firm – both electronic and hard copy.
> Information held by secretaries.
> Do requests need to be made for the production of documentation which belongs to the firm but is currently at an employee's home?
Collation

Consider the impact on staff of the document collation exercise:

> A heavy-handed approach will be bad for morale and may lead to unnecessary and inaccurate speculation.

> Generally, it will not be possible to ensure that all relevant material is collated without involving, for example, relevant secretarial staff.

It is important to treat all relevant employees equally. Any sign of favour/discrimination could affect the way the results of the investigation are viewed.

Does information need to be retrieved from archives or backups? Is IT advice needed to retrieve data in a usable form? This needs to be done in such a way as to preserve the integrity of the material. It may be necessary later to describe what steps were taken in this regard and a record should be kept.

Privilege

Even though with an internal investigation there may be no question of production of privileged material to third parties, it is still useful to identify and isolate privileged material at an early stage. The reasons for this include:

> It provides the opportunity for the team undertaking the investigation to consider whether privileged material should be reviewed for the purposes of the investigation. This should ordinarily only be done if it is really necessary.

> It minimises the risk that privileged material will be inadvertently referred to in the final report with consequent risks of losing privilege.

> If there are requests later for production of documents, the exercise of identifying privileged material has already been undertaken and there is less risk of inadvertent production.

> If a regulator wishes in the future to see the documents on which the report was based, it avoids discussion of whether privileged material should be produced if in fact none has been relied on.
What steps need to be taken to ensure that documents, records, trade data and other relevant information is preserved? In particular, is there a risk of destruction? If so, consider, the provisions of the staff handbook and what is known about the issues causing concern to determine if it is appropriate to:

> Change passwords/deny access to the computer system
> Remove remote log-in privileges
> Remove security passes
> Take mobile telephones (including smartphones) and laptops where these belong to the firm
> Lock individual offices

Ensure that standard document destruction policies are suspended in relation to all relevant material. Ensure that standard policies for the destruction of tapes of telephone calls are suspended in relation to all telephone calls made in the relevant period.

If there is a policy in relation to the storage/deletion of information held electronically, ensure that it does not operate so as to delete/make it harder to retrieve documents which could be relevant.

Take advice on whether files held electronically need to be backed up.

All steps taken to secure material should be documented so that they can later be explained to regulators/the police should the need arise.

Consider the best way to capture the information and secure it in the form in which it has been captured. Pay attention to preserving metadata (e.g. date of, and person effecting, access and modification).

Hard copy documents that are collated should be held in a locked room/locked cabinets as appropriate – generally in legal/compliance.

Packages of retrieved electronic data should also be held securely.

A log should be kept of any movement of material outside the secure areas in which it is now being kept. Originals should not be removed.

Is there a need for a database? Do documents need to be numbered so that they can be more easily identified? Generally, documents should be kept as they were found and files not rearranged. Records should be kept of the location from which files were taken.

Copies should be made of:

> Anything which needs to be provided to the regulator.
> All key documents and material required for interviews.

A core bundle should be compiled and kept under review.

Decide on the best way to search and review the data captured. Should an e-Discovery platform or data room be used? Consider if legal technology can help with the review (e.g. concept searching or other computer-aided review). Consider how to staff the review.
In general, difficult issues will be mitigated if care is taken at the outset to clarify what documentary evidence is being sought and why. This should help to avoid criticism that the firm has embarked on a fishing expedition. It will also help to clarify the firm's reasoning and justification for particular courses of action – e.g. searching desks.

It is important to bear in mind that the firm is entitled to consider only such information and documentation as belongs to it – it has no power to secure production of material belonging to third parties, including its own employees.

The firm will wish to consider the least intrusive methods of collating documents first – is the proposed course reasonable and proportionate? Except where there is a risk of the destruction or concealment of relevant material, an incremental approach may be the most appropriate.

In cases of doubt, steps should be taken to secure material whilst the issues are resolved – for example, locking offices and/or denying access to the computer system.

Data protection issues are often a concern and advice should be taken in cases of doubt. If gathering information across multiple jurisdictions, be aware that in some jurisdictions (for example, Germany) data protection and interception laws are stricter. In addition, under the General Data Protection Regulation...
Protection Regulation (2016/679) (the “

significant penalties can be imposed for breaches.

Generally, an employer can access personal data only if it gives sufficient notice to the employee and a gateway is available under the Data Protection Act 2018 2 or the GDPR (as applicable). It is not generally necessary to obtain consent from employees and, in any event, that consent may not be valid under the GDPR. Firms should seek advice if they propose to access personal data without notifying the employee (for example, because to do so may prejudice the investigation), or if they propose to access criminal information or special category personal data.3 Subject to this:

> If the investigation is necessary for legal proceedings (including prospective legal proceedings), legal advice or to establish, exercise or defend legal rights, data protection should not be a major concern so long as the investigation is carried out in a reasonable and proportionate manner – i.e. any interference to any individual’s privacy is justified in light of the seriousness of the matters being investigated, information generated by the investigation is kept secure and, to the extent possible, only used for the purpose of that investigation. The employees whose details are collected should also be notified in advance, to the extent reasonably practical.

> If the investigation is being carried out to comply with a mandatory UK legal or regulatory obligation, then, again, so long as the investigation is being carried out in a reasonable and proportionate manner, data protection should not cause any major difficulties.

> If the investigation is for some other purpose, the position is more difficult and the proportionality of the search would need to be considered carefully. Relatively few investigations are likely to fall into this category.

> Data protection rules also impose restrictions on the transfer of personal data outside of the EEA. Many international organisations will have data protection agreements in place (known as model clauses or IGAs) which will generally permit the free flow of personal data within that organisation.

Ensure that adequate steps are taken to quarantine (as far as possible) special category personal data unrelated to the investigation, for example, by ensuring that confidentiality obligations are in place and by engaging staff unrelated to the relevant employee (or even an independent third party) to initially review and, if possible, exclude special category personal data.

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1 Please note that the GDPR will apply from 25 May 2018.

2 Please note that at the time of writing, this Act had not been passed and was still going through Parliament. However, we anticipate it will be passed before 25 May 2018. It includes a number of additional gateways that should also be considered where a UK company is accessing employee data.

3 Information about an individual’s racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, sex life, sexual orientation, genetic data, biometric data or health data.
Can employees’ desks be searched?

Check the staff handbook for any specific provisions – it may provide consent.

However, where there are reasonable grounds to suspect that a regulatory breach or crime has been committed, ordinarily the firm can search employees’ desks.

Care still needs to be taken:

> Ordinarily, desks should be searched outside office hours. The experience should not be made more humiliating for the employee than it has to be – it should be borne in mind that the employee is entitled to be treated as innocent – and still employed – until the contrary becomes clear.

> The employee should be told that their desk has been searched – though they need not be asked for their consent if the firm is satisfied that it is properly able to conduct the search.

> Anything which is clearly an employee’s personal property – e.g. a handbag or briefcase – should be left. If necessary, these should be taken and secured on the basis that they have not been searched through but the employee can be asked later to produce anything belonging to the firm contained in them.

> No one should search a desk on their own. Someone – preferably not in the direct reporting line – should always be there to observe.

> Careful notes should be taken of how the search was conducted and a list of what was found.

Can the firm conduct a review of employees’ email accounts?

Check the staff handbook for any specific provisions. Usually there is a policy which states the firm can access email accounts. This is important when justifying that access.

The interception of communications in the UK is subject to the Investigatory Powers Act 2016. This makes the interception of communications an offence unless it is carried out with lawful authority. One source of lawful authority is the Investigatory Powers (Interception by Businesses etc. for Monitoring and Record-keeping Purposes) Regulations 2018 which permit interception on a firm’s own email system, without consent, if it is necessary to establish number of facts or issues relevant to the firm or a similar condition applies. This also requires that the firm should tell employees – generally – that interception might take place and be satisfied that monitoring or recording is relevant to the business. You should also be satisfied that the interception is in accordance with data protection law.

Intercepting communications on a public network (e.g. a review of Hotmail account) is a serious criminal offence. Intercepting communication without proper corporate authority even on a private network is also a criminal offence.

NB: the laws of other jurisdictions may be relevant, for example if emails are stored on a server in another country, or the investigation spans employees in different geographies.

Can the firm review WhatsApp chats on the employee’s personal phone?

As a practical matter, it is normally impossible to access an employee’s phone without the employee’s agreement. In addition, accessing the employee’s phone without the employee’s consent is a serious criminal offence.
An employee claims that a document belongs to them and not to the firm

Check what the staff handbook provides. Often it will give the firm a right of inspection of documents which are created on/ held on the firm’s IT systems irrespective of ownership.

Documents created in the firm’s time or on the firm’s systems should be presumed to belong to the firm unless and until the contrary is established.

It may be clear that a document really does belong to an individual (e.g. personal correspondence addressed to the employee at home but which happens to be in the office). In that case:

> If the only reason for requesting the document is its potential relevance to an internal investigation (i.e. there is no regulatory angle) the employee can be reminded of their duty to co-operate with the employer. It may be that the employee would consent to the firm reading the document and returning it. It may be that the employee would be prepared for the firm to take a copy of the relevant parts of the document.

> Ultimately, the firm has no power or authority to “seize” documents which do not belong to it.

Thought should be given to the likelihood that the document would be disclosable in civil litigation. Again, the firm’s obligations in that regard only extend to documents in its possession power or control. It may not be helpful to bring additional material within the firm’s control.

A document contains both business related and personal information – e.g. a diary

The first question is to whom the document belongs.

If the document belongs to the firm, it is entitled to its production. Even if the document belongs to an individual, it may be possible to agree with them that the firm should have a copy of the relevant business-related entries.

An employee claims to resist the production of a document to the firm based on the privilege against self-incrimination

The first question is to whom the document belongs.

If the document belongs to the firm, then there is no question of its production being refused based on the privilege against self-incrimination – the document is the firm’s property and it is entitled to it.

If the document belongs to the individual, then the firm has no right to it in any event. Strictly, the privilege against self-incrimination, where it arises at all, prevents individuals from having to make statements which might incriminate them – it is closely allied to the right to silence. However, an employer might well take the view that if an employee declines to provide their own documentation to the employer on the basis that it might incriminate them, this refusal is not a failure to co-operate with the employer’s investigation such as would amount to a disciplinary offence. Clearly the particular facts and circumstances will be all-important here. The principal task will be to work out, to the extent possible, why the employee is refusing to hand over relevant material.
If the material belongs to the firm, a request can be made for its return. If this is declined, although technically the employee may be in breach of their obligations, as a matter of practicality there is not much that can be done.

Consider the potential loss of confidentiality in the investigation in the request being made at all.

Consider whether there is any mileage for the firm in being able to show that a request was made and that it was declined.

Consider the terms of any severance agreement with the individual – does it provide for the return of documentation? Has the firm got any continued leverage over the employee e.g. through retained pay?

If the material in the hands of the former employee belongs to the employee themselves there is practically speaking nothing which can be done, and it may well be counter-productive to ask for it.

If there is an internal investigation and no associated regulatory interest – at least at this stage – consider:

> Whether the investigation can sensibly be carried out without the documentation being brought into the jurisdiction.

> If it is thought to be material, can it be reviewed overseas?

> Is there a chance of civil litigation and would bringing the documentation into the possession of the firm mean that documents would become disclosable when otherwise they would not have been?

> If there is a chance of regulatory action, bringing the documentation into the possession of the firm may well render it subject to production – but consider whether if the firm has ready access/power over the documents anyway they would not be expected to fall within the regulator’s request in any event.

Obviously stop any further destruction if it looks like there is a risk of it – the employee needs to be told to desist and any relevant documentation needs to be secured.

Try to ascertain whether the destruction was deliberate – it may not have been.

If it was deliberate, the destruction may well be a disciplinary offence and the staff handbook will provide guidance as to procedure and sanctions.

A careful note should be made of what was discovered, and when, and what action the firm took. The firm needs to be able to demonstrate that it took appropriate action once it knew the facts.

Ensure that all relevant employees are warned about the need to preserve documentation – consider whether a reporting obligation arises (see External communications).
Dealing with individuals //
Interviews: practical issues

Ultimately, most investigations within an organisation will spend a considerable amount of time considering the actions (or inactions) of individual employees. A delicate balance must be struck between the need to ascertain what may or may not have happened, and the need to ensure that an organisation complies with its obligations as an employer.
Identify relevant employees

All those directly involved in the underlying facts should generally be interviewed. Consider those in the reporting lines for the relevant employees.

It may be that more senior staff should be interviewed even if a matter has not been reported to them. The FCA is prioritising the conduct of senior managers, so consider interviewing the senior managers with responsibility for the relevant business functions. The question will be whether they have discharged their obligation to take “reasonable steps” to prevent such breaches.

Could there be a systems and controls issue? If so, consider interviewing those with oversight of the relevant systems even if they were not personally involved in the particular underlying events.

Have any relevant employees left the firm?

The list of interviewees should be kept under review: generally, it will grow as interviews progress and more is learned about the underlying facts.

Timing and order of interviews

When is the best time to conduct interviews – at an early stage or after documents have been reviewed?

Often it is a good idea to start with the most junior person and work up to the most senior. This is not least so that those conducting the interview have the most complete picture possible by the time that the senior staff are interviewed.

Who will undertake the interviews?

It is important that they are seen to be objective and fair. This may well rule out:

> Anyone who was involved in the underlying events
> Anyone who should – by virtue of their position or role – have been involved in the underlying events
> Generally – anyone in the direct reporting line of the interviewees
> Anyone who would be involved in the internal disciplinary process were it to be instituted.

Decide on an interviewer with appropriate seniority. In this context, consider also whether the interviewee is likely to feel intimidated or ill at ease with the particular interviewer. Some degree of nervousness is inevitable but – for example – a large disparity in seniority or status may mean that the interviewee is less open and confident than might be the case with another interviewer. This may impact on the quality of the information obtained or its usefulness.

Aim for consistency – the interviews should if possible be conducted by one team. It is not ideal for interviewees to be questioned by different people – it makes comparison of the information obtained more difficult. It is particularly difficult to gauge credibility if the same team is not used for every interview.
Preparing for the interview

Where will the interviews be held?

Do interviewees need separate legal representation?

Decide how much notice to give the interviewee (if any) and what they should be told in advance about the areas of questioning. It is difficult to be prescriptive, but it may be right to give interviewees a list of broad topics which the interview will focus on.

A core bundle of relevant documentation should be prepared – consider whether this bundle (or part of it) should be given to the interviewee in advance.

Prepare a list of questions.

Whilst it is not the intention to trip interviewees up, often giving them a list of questions in advance is neither necessary nor helpful. It may encourage discussion amongst interviewees. And any list of questions is certain to be changed in the course of an interview.

Again, it is difficult to be prescriptive about whether interviewees should have the core bundle in advance. Even if the decision is reached to provide some information, care needs to be taken about confidentiality. Usually it is not appropriate for interviewees to have documents which they would not already have seen.

Interviewees should be told that the interview is not a once and for all opportunity to provide information and that if they remember more detail later the interviewers would be happy to receive it.

Conduct of the interview – what should the interviewee be told?

The interviewee should be told that:

> This is part of a fact-finding exercise.

> All relevant staff are being spoken to.

> The exercise is confidential, and the firm asks them to maintain that confidentiality in the interests of everyone involved.

> Not to discuss their evidence or the questions they are asked with anyone else. This risks turning the evidence into the product of a collective memory. The interviewee will not be able to identify what they knew at the relevant time from what they have learned since, and this is in neither their interests, nor the firm’s.

> It is not a memory test and that if they do not remember something or know the answer, they should say so.

> If they remember something later, or wants, on reflection, to change something which they said, they will have the opportunity to do so. It is their final recollection in which the firm is interested.
Generally, the following points come up in answer to questions (these points may not need to be covered with the individual unless the individual asks about them):

> Use of the information. If the firm concludes that what it has learned needs to be reported to the regulator, it must do so. The interviewee should not be told that the information gained in the interview goes no further.

> The interview itself is not part of the firm’s disciplinary process but what the firm learns through the interviews will inform its decision on whether disciplinary proceedings should be instituted. If they are, they will follow the firm’s usual procedures in that regard.

> It is not the intention of those interviewing to tell other interviewees directly what their colleagues have said.

> However, clearly what is learned in one interview is used to inform the interviewers’ approach to other interviews.

> Interviewees should not discuss their recollections with anyone else.

> Do not give the employee assurances about when and how the information will be used or what the consequences may be. The interview is purely fact-finding. If pressed, you might reassure the interviewee that the information that they give will be used fairly and in accordance with the firm’s policies and obligations to its employees.

### What should the interviewees be asked?

An internal investigation is a fact-finding exercise. The aim of all the questioning should be just that – to establish the facts. This means:

> Showing the interviewee whatever documentation it is sensible for them to see to assist their recollection and allowing them time to consider it.

> Asking open and simple questions, and avoiding lengthy or aggressive cross-examination. This is not the time to try to conclusively determine people’s credibility.

> The interview is not a memory test, interviewees should be told that if they remember something later they should ask to speak to the interviewers again/correct the note of their evidence.

> It may well be sensible for interviewees to be shown a chronology or timeline to help them to anchor their recollections. This should be kept neutral and objective and should not give interviewees substantive information that they do not already possess.

The interviewers should avoid:

> Giving interviewees information that they do not already have. It is their own unaided recollection that is important. Avoid informing interviewees of others’ evidence or “case theories”.

> Telling interviewees directly what others have said on the point.

> Giving interviewees the impression that their evidence is unimportant or “wrong”. They may be interviewed in due course by the regulator and it is in the firm’s and the individual’s best interests that they approach that with as much self-confidence as possible.
> Passing on any information in the interview or showing the interviewee any document which an information barrier or duty of confidentiality should prevent that interviewee from receiving.

> Discussing “case theory” with the interviewees. Questions should be open and not leading.

> Asking interviewees for their view on whether or not particular conduct was compliant or met certain standards. This is a difficult line to draw and sometimes questions must address this – for example, why something was not reported internally. However, generally it is not part of an individual employee's role to determine whether conduct was compliant. It will also affect the quality of the evidence if the interviewee thinks that they are being asked to sit in judgment on themselves or others in relation to regulatory or other breaches.

Remember, if litigation is not contemplated, the interview is unlikely to be privileged.

### Recording the interview

See Records of interviews about balancing the need to make an accurate record against the risk that legal advice privilege will not attach to it. That section also explains the need for any note to betray the trend of legal advice if it is to attract legal advice privilege. From a practical perspective:

> Check the staff handbook for any provision relevant to this (e.g. tape recording). Some favour tape recording, but there are factors against it, including:

  - It adds an air of formality and finality which may be unhelpful.

  - It makes interviewees feel very ill at ease and may therefore impact on the quality of the information obtained.

  - What is important is people's fair recollection of events. The interview should not be designed to trip people up. So their exact language the first time they are asked a question is not determinative. What is important is their considered memory of relevant facts.

  - The tape recording is clearly not a privileged document.

> Consider if the interviewee should be asked for any comments on, and then to agree, any interview note. If the interviewee's agreement to the note is not obtained, then in using it later there can always be a debate about whether that was what the interviewee really meant (though there can of course be no debate as to whether it was what they said).
> There are advantages in having a statement that is in the form of a witness statement and signed by the interviewee even if no proceedings are in contemplation at that time. It means that if the co-operation of the interviewee is subsequently lost, the firm is in the best position to rely on the evidence in whatever context that is needed.

> Failure to sign a statement once it is accepted as accurately and completely recording the employee’s evidence is – on its face – a failure to cooperate with the employer and as such may be a disciplinary offence. The reasons for this failure should be considered before a decision is reached about disciplinary measures.

After the interview

> Remind the interviewee to keep the discussion confidential (in particular, to avoid contaminating other interviewees’ memories).

> Consider if new data needs to be captured or new interviews conducted.

> Consider any other consequences (employment or disciplinary issues, notifications to regulator etc.)
Dealing with individuals // Interviews – potentially difficult issues

The interviewee declines to be interviewed

Try to find out why.
Remind the employee that they have a duty to provide reasonable co-operation to their employer whilst still employed. This would extend to answering questions about business that the employee has been involved in on the employer’s behalf.
Ultimately, it may be a disciplinary offence to decline outright to be interviewed, though the reasons for the refusal will have to be taken into account.

The interviewee wants legal representation

Clearly an employee cannot be prevented from seeking legal advice – at their own expense – and it would be wrong for the firm to try to discourage them from doing so. But the firm does have control over its own internal investigation process and can dictate whom it will permit to attend interviews.
Individual representation should not be necessary at the stage of a first interview with the employer, but the facts already known may clearly show that there will be a divergence of interest between employer and employee.
The firm may have a policy on this and the staff handbook needs to be checked.
There may be a D&O insurance policy, which may offer cover for this kind of representation – check from what stage it would cover costs (often it is not available for the internal investigation stage). This cover does not necessarily dictate a particular answer in terms of whether representation should be allowed, but is a factor in the overall decision.
Consider overall fairness: can one employee sensibly be offered independent representation and the others not? Often, having separate legal representation at the interview stage will slow down and complicate matters.

The interviewee says they will only be interviewed if the firm pays for legal representation for them

There are two separate questions: should the employee be offered the opportunity to take legal advice; and if the answer to that is “yes”, who should pay for it?
Depending on the seniority and position of the particular employee, there may be indemnities from the company and/or insurance cover for legal costs. It is a separate question when these become available in the process – i.e. is it essential that there is a formal regulatory investigation or civil/criminal/regulatory/disciplinary proceedings?
The firm can agree to pay the costs which an individual employee incurs in relation to an internal investigation. The factors relevant to that decision include:
> Whether it is likely that the individual will only consent to participate in the investigation if legal representation is available to them and paid for by the firm (whether or not this attitude would constitute a breach of their duties under the employment contract).
> Whether the investigation can sensibly be conducted without that employee’s input.
> Fairness to all employees – if payment is made for legal representation for one, on what basis is the firm going to decline to offer it to all?
> Whether it is in the firm’s interests that the individual be represented at the investigation stage.
> NB if the individual is a director, the firm cannot pay their legal expenses if the individual is in breach of their duties to the firm, and should not pay the expenses – even on the basis that they will be recouped if the director is exonerated – if it believes that the director is in breach of their duties to the firm.
Even if the firm agrees to pay some legal expenses, the agreement to do so should be documented and:

> There should be no open-ended commitment to pay.
> The firm may want a cap on the expenses.
> It may wish to negotiate and document what the duty to co-operate with the investigation means.

Ordinarily, the firm will either recommend an independent lawyer who is known to be sensible, or offer the employee a list of three or four names to choose from. The firm has an interest in ensuring that the employee is represented by someone experienced and pragmatic.

Try to ascertain why. Are there legitimate reasons for objecting to one or more of the panel? (e.g. direct reports etc.). It may be that the composition of the panel can be revised.

If the employee is uncomfortable being interviewed by anyone other than external interviewers (e.g. the external law firm), be careful that no assurance is given about what will happen to information gathered in the course of the interview – it will all be provided to the firm in due course.

Ultimately, if this amounts to a refusal to be interviewed, this is likely to be a disciplinary offence.

Consider carefully whether to ask them for input – they have no duty to co-operate (unless a relevant agreement has been reached) and confidentiality may be a real problem.

The question is whether a conclusion can sensibly be reached without their input.

The Police and Criminal Evidence Act 1984 ("PACE") caution is as follows: “You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.”

The only point of the PACE caution language is that it affects the admissibility of the evidence in criminal proceedings if a caution is not given to someone who is believed to have committed a crime. There is no need to caution where the investigation is purely internal. Evidence can be used for the firm's own purposes whether or not the PACE caution is given even where the underlying conduct would constitute a crime.

If a police investigation is already in progress, their views should be sought on whether interviews should be conducted under caution.

It is impossible to be prescriptive, but often giving a caution is unhelpful.

Reasons why it may be better not to give a PACE caution:

> It may come across as heavy-handed and the interviewee may react badly and be less co-operative as a result.
> The interviewee may – not unreasonably – conclude that they need legal advice before they can determine what they should do.
> It gives an impression that the firm believes that a criminal prosecution may follow when this may very well not be the case.
> It is not needed for an internal interview.

Often there will be other ways of securing the evidence in any event so that even if a criminal prosecution does eventually follow it is not bound to be adversely affected by the fact that the caution was not given.
An Upjohn warning should be given, whether or not a caution is given: the employee should be asked to agree to proceed with the discussions on the basis that they remain entirely confidential and covered by legal professional privilege, that the privilege is that of the firm and that the firm (and only the firm) may assert or waive it in respect of any third party (including a government agency) at its discretion.

Ask the interviewee why they are declining to answer and record what they say. Review in the light of their answer whether the question was appropriate. Could the question be asked in a different way?

Suggest leaving the question for a later date so that both the firm and the interviewee can think about their positions further. Give the interviewee a chance to reconsider and to change their mind.

Remind the interviewee about the duty to co-operate.

Avoid getting drawn into a debate in the interview about whether failure to answer is a disciplinary offence – this confuses the two contexts. It will usually not be for those conducting the interview to determine whether or not a disciplinary offence has been committed and this point should be picked up in the appropriate way later.

Ultimately, of course, an interviewee cannot be compelled to answer.

Generally, claiming the privilege against self-incrimination is unattractive and points to one obvious conclusion.

If the interviewee has no legal representation at the interview:
   > It is usually counterproductive and may be oppressive to require an interviewee to answer a question if they believe that to do so would incriminate them – whether or not that belief is well-founded.
   > Suggest that the issue is left so that the interviewee can consider further and/or get legal advice and the firm can also consider further what it wants to do. This leaves the issue open.
   > If the interviewee does not yet have legal representation, consider whether it is in everyone’s interests that it should be offered to them/they should be encouraged to get it for themselves (see separate notes on individual representation).
The interviewee wants an “amnesty” before giving evidence. There will usually be a firm policy on this. Many factors count against giving an amnesty. They include:

> Difficulties over scope.
> If the individual is a senior manager or certified person under the Senior Managers and Certification Regime, then they must satisfy the prescribed fitness and propriety criteria to continue in their role. Conduct may be discovered that leads to the conclusion that the individual no longer meets those criteria.
> The amnesty can usually only cover the firm’s own disciplinary process. No assurances can be given that conduct will not be reported to the regulator where the firm would be obliged to do this under Principle 11 or specific Rules (for example, those in respect of Senior Management Functions).
> The firm cannot give an amnesty in relation to conduct it does not know about – so an amnesty could be considered in relation to the facts which have given rise to the particular investigation, but it would be unfortunate afterwards to discover that the employee had, in fact (also) been guilty of potentially much more serious and unrelated misconduct.
> The FCA will expect firms to take remedial action internally on the basis of any final notice, or other sanction that it issues; this may include disciplinary steps against relevant employees such as demotion or dismissal or consequences for remuneration such as salary or bonus reductions or clawbacks.
> Consider whether the firm is in possession of sufficient knowledge to enable it to judge fairly whether an amnesty should be given. Can it be sure that it has a good appreciation of what the individual has done/is likely to have done?
> Consider the effect on others if an amnesty is offered to one but not more individuals. Can there be a fair investigation and/or fair disciplinary proceedings following the investigation if an amnesty has been given to one but not all interviewees?
> Consider how even a limited amnesty would be viewed by the regulator – usually negatively.
The interviewee wants to keep a copy of the interview notes/transcript

This should ordinarily be declined. The notes are the property of the firm and not the individual. They are also confidential to the firm and having additional copies in circulation risks compromising that confidentiality. Reassure the individual that they will have an opportunity to review the notes and to sign off the resulting summary/statement if appropriate.

If there are concerns about this, the review of the notes should be done on the firm’s premises and without giving the interviewee a copy to take away.

The interviewee themselves will not be able to write and concentrate on what they are being asked at the same time and should be discouraged from trying to make their own notes.

Reassure the interviewee that what is important is their final evidence and that they will have a chance to review and correct the summary/statement which is drawn up as a result of the interview where appropriate.

If the interviewee is accompanied by someone who is not a lawyer their notes would not be privileged. The firm could permit someone to be present on condition that they do not take notes.

If the interviewee is accompanied by a lawyer acting for them and not the firm, their notes should be privileged in the hands of the interviewee (and not for the benefit of the firm). Clearly, if legal representation is permitted it is not appropriate to try to dictate what form that takes and if the appointed lawyers wish to take notes, so be it.
Prior to deciding whether and whom to suspend, thought should be given to the reasons for suspension and the risks connected with the decision to suspend.

Consider whether suspension is appropriate (are there other options such as placing the employee in another area of the business while the investigation is carried out). If considering suspending, determine if a reason for suspending the employee exists, for example:

> The employee’s continued presence in the workplace potentially jeopardises the investigation.
> There is a justifiable suspicion that the employee might destroy or conceal relevant documentation.
> There is a justifiable concern that an employee who is a senior manager or certified person under the SMCR no longer satisfies the relevant fitness and propriety criteria required to occupy their role and must be suspended pending determination.
> Would the employee agree to a suspension?
> It is predictable that the employee’s employment will be terminated.

The risks associated with the decision to suspend an employee include:

> The employee may claim constructive dismissal (see right).
> A suspended employee may be far less willing to co-operate with any investigation and/or only be willing to do so with their own legal advice.
> A suspended employee can be hard to control as they are not at their place of work.
> Suspension of an employee can unsettle other employees and make it more difficult to secure their co-operation.

**Constructive Dismissal**

An employee may bring a claim against their employer for constructive unfair dismissal if two elements are present:

> A repudiatory breach by the employer – e.g. failing to suspend the employee in accordance with a contractual right.
> An election by the employee to accept the breach by resigning, within a reasonable time frame.

If an employee can demonstrate that they were constructively unfairly dismissed the following issues arise:

> The restrictive covenants and contractual confidentiality obligations will no longer be enforceable.
> Bonus payments or incentive arrangements may be triggered.
> The employee may bring a claim in an employment tribunal and potentially the County or High Court (if bonus/incentive issues exist). Such claims can be hard to manage from a public relations perspective.

Prior to deciding whether to suspend, the employer must check:

> The employee’s employment contract.
> Any ancillary agreements or documents.
> Share incentive awards and plan rules.
> Bonus provisions.
> Whether the employee has a “custom and practice” in such situations.
If, after assessing the legal position, a decision is taken to suspend, the following should be noted:

- The employee’s contract remains in force and the employment relationship is still subject to all the statutory protection afforded to employees.
- The suspension should be limited to as short a period as is reasonably practicable.
- Review the need for suspension if the period of suspension becomes extended.
- The employee should be kept updated if the suspension is likely to be extended. Regularly communicate with the employee. Any investigation should be carried out to the extent possible without delay.
- The firm needs to consider what performance related remuneration (bonus) may be impacted by the employee’s suspension and how it will deal with this.
- Communication to other employees should be carefully considered.
- Communication to or about the suspended employee should be carefully considered.

If the employee is an Approved Person, or subject to the SMCR, the appropriate regulator will need to be told of the suspension.

Disciplinary proceedings

Disciplinary proceedings are separate from the fact-finding investigation.

There must be both a fair reason for any disciplinary sanction and the disciplinary procedure must also be fair. The contractual procedure should be followed (unless the parties agree to a variation) and there are a number of “must do’s” – for example, the right to be accompanied, notification of maximum sanctions and right to appeal, which must be complied with to ensure that the overall procedure and decision are fair.

Consideration of any “special” features should be given – for example, is the employee pregnant/suffering from an illness including a non-physical illness/a whistle-blower/working part time/a witness in another employee’s claim?

Sanctions

If a fair disciplinary process is followed and the employer reasonably decides that the employee is guilty of misconduct an appropriate sanction may be applied, which could include:

- Termination.
- Demotion.
- Remuneration decisions.
- Warning.
- Training/performance management.

Thought must be given to which sanction is the most suitable, and to the risks involved in applying the particular sanction.

Consistent treatment between employees is particularly relevant at this stage.
If it is concluded that termination is the most appropriate sanction:

> Is this termination with or without notice?
> What is the “reason” for the termination?
> Will a settlement agreement be negotiated and are there any special terms to be included?
> Is the person subject to the SMCR? If so, the appropriate notifications need to be given.
Outcomes, findings and next steps
What is the best way to record and deliver the findings of the investigation? Should a report be written, or a verbal briefing be given?

When should the findings be recorded? Has all the necessary evidence been collated and considered? Does a point need to be made about any gaps in the evidence? Is there a case for discussing conclusions orally first so as not to create a record which is not privileged?

Does the record need to be produced to any regulators or made available to an employee in any disciplinary proceedings?

The report should balance the evidence and reach factual conclusions. Anything which is written and potentially subject to production should, so far as possible, only consist of facts and views that the entire team conducting the investigation agree with. This may need discussion before drafting starts.

It may well be worthwhile asking lawyers – internal or external – to draft the report if this would render the drafts privileged.

Refer back to the terms of reference for the investigation – does the written report address these and achieve the intended aim of the investigation?

Consider having the factual element of the report – which may well not be privileged – separate from any legal advice or analysis.

For any parts of the report that are privileged:

- Ensure that they are only circulated to those who are designated “the client” for the purposes of receiving legal advice.
- Ensure that the report is marked “confidential and privileged” – although this will not change its character, it serves as a reminder.
- Consider having numbered copies of the report and keeping a record of who has which copy.
- Consider asking for the return of copies once they have been read and for those copies to be held in legal. The regulator may ask for copies of the report. There is no obligation to hand over privileged material, but it may be in the firm’s interests to do so. If this is done:
  - It should be on the basis of a limited waiver of privilege and this should be agreed and documented.
  - Consider carefully what effect a limited waiver of privilege may have in other jurisdictions – particularly the US – where it may be concluded that privilege in the advice has been completely lost.
Taking action

What immediate actions should the firm take on the basis of the investigation and/or report?

Consider whether any further notifications to regulators, authorities or police need to be made (see External communications) including in respect of disciplinary action. This includes foreign regulators: consider in particular the firm's home regulator(s), and regulators in jurisdictions where the firm operates and where any relevant harm occurred or risk of harm existed.

Consider whether any measures should be taken to hold any staff accountable. Should disciplinary proceedings be instigated? Keep in mind that a regulator may later scrutinise these measures for adequacy.

> Follow the firm's accountability, discipline and remuneration policies (subject to the need to minimise legal risks from both a regulatory and employment standpoint).

> Specific disciplinary measures may include adjustments to salary and deferred or current year variable remuneration (e.g. bonus clawbacks), demotion or alteration of role and responsibilities, suspension, and termination.

> Keep records of this process in case it is necessary to show a regulator what has been done.

> Are adjustments to remuneration at a business unit or firm level appropriate?

What lessons should the firm learn from the investigation and/or report?

This will be of critical importance – particularly in a regulatory context – if the issues were to recur. The firm needs to be able to show that it has implemented such changes as are prompted by the findings of the internal investigation.

Even if these are not issues documented in the report or associated advice, consider whether advice should be taken on what lessons the firm should take away from the exercise:

> Can what happened be described as an isolated incident, or does it highlight a defect in systems and controls which should be remedied?

> Does it highlight any deficiencies in, or confusion over, internal reporting lines?

> Does it highlight any deficiency in, or confusion over, internal procedures?

> Does it highlight the need for further training of particular staff or groups?

> Do the conclusions have consequences for other areas of the firm?

> Is there a need to address any other issues (e.g. culture, technology)?

Advice should be sought where appropriate on what changes to practices are needed as a result of the investigation.