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# CORPORATE ACCOUNTABILITY



## REPORT

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### Internal Investigations

#### **Effective Internal Investigation Plans Are Key Following Political Shifts, Gov't Activity Boom**

■ **Practice Tip:** *Public companies need to have in place effective internal investigation procedures in light of the recent political changes in Congress and increased government investigation and enforcement activity, corporate and political law attorneys told BNA in recent interviews.*

In light of the recent political changes in Congress and the currently volatile economic environment that is rife with government investigations and legal challenges, it is crucial that public company boards and managers have in place efficient and effective internal investigation procedures, corporate and political law attorneys told BNA in recent interviews.

The new Republican majority in the House of Representatives ushers in leadership changes that will likely affect the new Congress's investigative agenda, Robert K. Kelner, a partner and chair of Covington & Burling's election and political law practice group in Washington, told BNA Nov. 10.

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According to a Covington & Burling LLP Nov. 5 memo co-authored by Kelner, Republican congressional investigators in the new Congress—with its House Republican majority—may begin to consider using corporations in industries that were targeted for oversight by the former Democratic Congress to “highlight perceived failures of oversight by the Obama Administration.”

Any company that is regulated by the federal government, benefited directly or indirectly from federal stimulus or TARP funds, participated in recent legisla-

tive overhauls like health care and financial reform, received a federal contract or grant, or is regulated by the SEC could be “swept into the Republicans’ investigative agenda in 2011,” the memo said.

In light of the Securities and Exchange Commission and Department of Justice’s growing focus on criminal and civil enforcement actions, companies—upon learning they are the focus of any government investigation—must be ready to respond quickly with effective internal investigations and remedial measures, Dena Palermo, a corporate litigation partner with Andrews Kurth LLP in Houston, Texas, told BNA in a Nov. 5 e-mail.

**Committees Likely to Focus on Crisis Matters.** House Financial Services Committee and House Judiciary Committee of the new Congress are likely to be looking at, among a number of issues related to the down economy, the housing foreclosure crisis, Kelner said.

“There are a handful of large financial institutions that have publicly announced either moratoria or restrictions on their pursuits of foreclosures. Any of those institutions are likely to be targeted by the two committees, Kelner said.

House Republicans will also likely examine Troubled Assets Relief Program and stimulus spending and review the activities of recipients of funds under these programs, looking for waste, fraud, and abuse,” Kelner said. “They will look at the SEC’s enforcement activities with respect to banks and other institutions in the national spotlight,” he said.

For example, with the auto industry, bailouts for certain companies will likely be subject to review, Kelner said. “Congress may literally evaluate the list of companies that received either TARP or stimulus funding during the Obama administration, and second guess how funds were used,” he said. They will be very interested in whether taxpayers received a return on their investment, he said.

While it is difficult to predict what Sen. Charles Grassley (R-Iowa) will do in his new position in the

House Judiciary Committee, it is possible Grassley may take his current investigative staff with him, Kelner said. Grassley may chose to focus on antitrust and competition matters—which are the jurisdiction of the Judiciary Committee, he said.

Grassley may also take an interest in consumer privacy and data handling issues as well, Kelner said.

**New Congress Will Change Investigations.** Assessments regarding the effect of these changes on a company should be conducted by counsel who are familiar with the challenges of congressional investigations, such as Congress’s position that it need not recognize the attorney-client privilege, according to the Covington & Burling memo.

Congressional investigations tend to see a boost when the House of Representatives is held by a different party than the White House—the incoming chairmen of several major committees have already indicated a desire to investigate the activities of the Obama administration, the memo said.

“Given the ongoing fallout from the financial crisis, including the recent foreclosure controversies, the House Financial Services Committee and the House Judiciary Committee are likely to have active investigations in the new Congress,” the memo said. However, with the continued Democratic majority in the Senate, committee leadership will change very little, it said.

The Permanent Subcommittee on Investigations of the Senate Homeland Security and Governmental Affairs has recently been conducting a multiyear investigation of Wall Street and the financial crisis, the memo said. The actions of the Republican investigators in the House may have a significant effect on the subcommittee leaders, it said. “For example, chairman Sen. Carl Levin (D-Mich.) may find it beneficial to elevate the activities and profile of the subcommittee’s corporate investigations as a counterweight to the investigations undertaken by Republicans in the House,” it said.

**Board Education Is Key Part of Plan.** The DOJ has an opinion release procedure that can be used in advance of the company engaging in conduct that may subject it to Foreign Corrupt Practices Act liability, Palermo told BNA in the Nov. 5 e-mail. “Otherwise, the only appropriate communication with U.S. government officials would be to self-report that the audit committee or the company is investigating a potential concern,” she said.

Also, “[t]here are definitely times when it is appropriate to use in-house counsel to conduct an investigation and other times when outside counsel should oversee the investigation,” Palermo said. “In-house counsel can conduct a prompt, effective investigation and is in a strong position to obtain quickly facts and findings because of their familiarity with the business model, personnel, information and other systems and prior issues,” she said.

“Once a decision is made to engage independent counsel, the audit committee should plan on an early discussion with its own counsel regarding the parameters of applicable privileges and the possibility that some privileges may ultimately be waived in the course of the investigation,” Palermo said.

However, on the other hand, it is essential to obtain outside counsel when the matter is under investigation by regulators or is made public, Palermo said. Depending upon the nature and seriousness of the matter, consideration should be given to retaining independent

#### **Key Internal Investigation Considerations.**

Dena Palermo, a corporate litigation partner with Andrews Kurth LLP in Houston, Texas, told BNA in a Nov. 4 e-mail that some of the most important issues a company must consider when faced with a government or internal investigation are:

- who should conduct the investigation, and how in-house and outside counsels can be effectively involved in the process;
- whether early self-reporting can be performed;
- what the scope of the internal investigation should be to satisfy the government and discharge the board’s and management’s duty of care;
- how documents and other forms of information can best be gathered and preserved; and
- what remediation measures need to be undertaken during the investigation to correct any problems detected.

counsel with no prior ties to the company to increase credibility during the investigation, she said.

“It is appropriate for the board or audit committee to engage their own outside counsel if the facts surrounding the investigation reach senior management. This allows the directors to keep an appropriate distance from company management implicated in the investigation,” Palermo said.

**Proactive Measures Will Benefit Company.** According to Palermo, author of an Andrews Kurth Sept. 1 memo on the top five lessons learned from government investigations, members of the audit committee, the board, and management should all be familiar with the appropriate steps to take when faced with a government investigation. “There are many resources that provide this information for companies, including articles written by attorneys as well as seminars,” she said.

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ANDREWS KURTH LLP MEMO

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Companies need to be proactive about prepping audit committees, gathering and preserving documents, and maintaining relationships or seeking outside counsel when there are no pending government investigations, Palermo said. “In fact, failing to do so will unquestionably leave the wrong impression. Companies are under an obligation to know the law, ensure com-

pliance with the laws, and to preserve documents when legally required to do so,” she said.

Among several other important items to prepare, “it is important for companies to have ready a short list of attorneys to call immediately in the event the company is served with a subpoena or receives notice that it is the subject of an investigation,” Palermo said.

**Fastidious Response Is Key for Companies.** In the government investigation context, it is important for the government to have confidence that the company is doing a thorough and probing investigation, Palermo said.

By having the audit committee oversee the investigation, companies will lend an air of independence that instills confidence in the government that the investigation is proceeding appropriately, Palermo said. “The audit committee of the board is made up of outside directors—they are more objective and they have a charge to act independently of the board and management,” she said.

According to the Andrews Kurth memo, all indications are that the government’s heightened focus on foreign bribery, enforcement actions, investigations, and other related activities will continue into the next decade.

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General counsels and chief compliance officers should have a written checklist of action items conforming to what the government currently considers to be best practices that need to be immediately acted upon when a potential violation is found, the memo said.

BY TINA CHI

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*The Covington & Burling memo is available at <http://www.cov.com/publications/?pubtype=7&archiveyear=2010>.*

*The Andrews Kurth memo is available at [http://www.andrewskurth.com/assets/pdf/article\\_739.pdf](http://www.andrewskurth.com/assets/pdf/article_739.pdf).*