

November 10, 2026

Board Oversight During Government Investigations

GIBSON DUNN

MCLE Certificate Information

Continuing legal education

- Approved for 1.5 hours of NY PP and 1.75 hours CA General credits
- CLE credit form must be submitted by ***Tuesday, November 17th***
- Form link: https://gibsondunn.qualtrics.com/jfe/form/SV_8dFdu69OL8uk4vk
- Most participants should anticipate receiving their certificate of attendance in in four to eight weeks following the webcast

Please direct all questions regarding MCLE to CLE@gibsondunn.com

Presenters



F. Joseph Warin
(Moderator)
Partner
Co-Chair, White Collar Defense and Investigations Practice Group
Washington, D.C.
fwarin@gibsondunn.com



William Savitt
Partner
Co-Chair, Litigation Practice Group
New York
wsavitt@gibsondunn.com



John W.F. Chesley
Partner
Washington, D.C.
jchesley@gibsondunn.com



Monica K. Loseman
Partner
Co-Chair, Securities Litigation Practice Group
Denver and New York
mloseman@gibsondunn.com

AGENDA

01 Why This Is a Board Issue

02 What Delaware Expects of the Board

03 The 2026 Enforcement Landscape

04 When an Investigation Begins

05 Interacting with Enforcement Authorities

06 Overseeing the Compliance Program

07 Follow-On Litigation: How the Board Is Judged

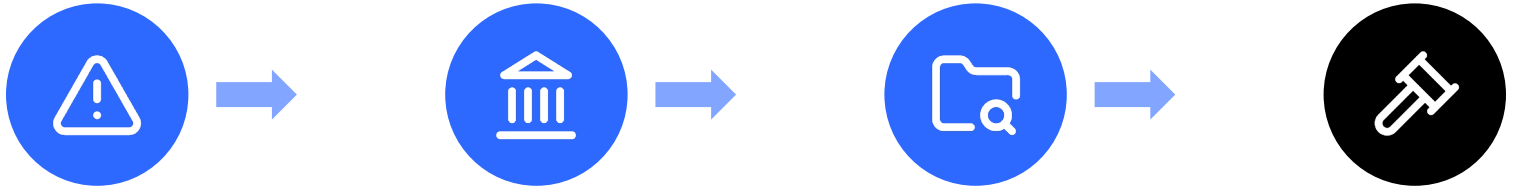
A Appendix: Questions Directors Should Ask Counsel

Why This Is a Board Issue

01

Why This Is a Board Issue, Not Just a Management Issue

The same allegations travel from the source to the investigation to the courtroom



The board's response to the surfaced misconduct and investigation becomes evidence in that later suit

Prosecutors and regulators
evaluate the company's compliance program

Court of Chancery
evaluates the board's oversight of the investigation and compliance environment

Both ask the same questions:

1 What was the board told about the risk?

2 How and when?

3 What did it do in response?

The 2026 Enforcement Environment

Washington: a reorganized DOJ with shifting priorities

Department-wide CEP (Mar. 2026): one corporate enforcement policy to govern all DOJ criminal investigations (except antitrust)

New National Fraud Enforcement Division leads all cases involving fraud against government programs

Record False Claims Act recoveries: more than $6.8B in FY2025

More whistleblower programs, though award totals are down

Delaware: a high bar to derivative liability, if the board is engaged

Claims dismissed

Boeing II (Aug. 2026)

The board had standing safety reporting at every meeting

Claims sustained

Teligent (Sept. 2025)

Reporting on the central compliance risk was left to management's discretion

The Board's Job: Understand the Risks, Ask the Right Questions and Build the Record

A director's duty is to make a good-faith effort to understand, and respond to, the company's central compliance risks.

1. Understand the central compliance risks
2. Establish a reliable system of reporting tailored to high-risk areas
3. If misconduct surfaces that is likely to lead to corporate trauma, become informed and oversee management's response
4. Make sure the board's oversight is documented, including what it was told

Create a record that shows informed, good-faith oversight

This program focuses on the types of questions directors should ask the GC, the CCO and outside counsel at each stage. ***See* Appendix.**

The Legal Foundation:
What Delaware Expects

02

Caremark's Two Prongs and the Bad-Faith Requirement

PRONG 1

No system

Directors "utterly failed to implement any reporting or information system or controls"

PRONG 2

Ignored the system

Having a system, directors "consciously failed to monitor or oversee its operations"

Both prongs require bad faith: directors who "knew that they were not discharging their fiduciary obligations" (*Stone v. Ritter*, Del. 2006, restating *Caremark*)

A loyalty breach

Section 102(b)(7) cannot exculpate it, so directors face personal exposure for bad faith

> *"possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment"*
>
> *Caremark* (Del. Ch. 1996)

Marchand and "Mission-Critical" Risk

Marchand v. Barnhill
Delaware Supreme Court, 2019

Blue Bell made one product, so food safety was "essential and mission critical." No board committee or regular report covered it: **claims survived.**

THE RULE

The board must make a good-faith effort to put in place "a reasonable board-level system of monitoring and reporting"

"Business risks are shades of gray; legal compliance risks are black and white."

Boeing II (Del. Ch. 2026), quoting *ProAssurance* (Del. Ch. 2023)



Business risk
board judgment



Legal compliance risk
needs a board-level reporting system

Mission critical depends on the business. Delaware courts have found, e.g.:

- Airplane safety for an aircraft manufacturer (*Boeing*)
- FDA compliance for a drug manufacturer (*Teligent*)
- Clinical-trial compliance for a one-drug biopharma (*Clovis*)
- Cybersecurity for online service providers (*SolarWinds*)

Oversight Duties Extend to Officers

In re McDonald's (Del. Ch. 2023): officers owe a duty of oversight, generally within their own areas of responsibility

A particularly egregious red flag may require an officer to speak up even outside that area

Teligent **(Del. Ch. 2025) applied the duty to three officers**

CEO

Claims survived

Allegedly knew of FDA red flags and did not tell the board

Chief Scientific Officer

Claims survived

Allegedly knew of FDA red flags and did not tell the board

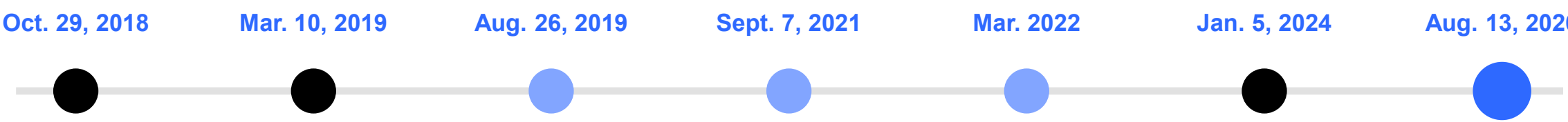
CFO

Claims dismissed

"FDA compliance is not typically conceived of as a financial risk"

Still a bad-faith standard: officers "cannot face *Caremark* liability for gross negligence"

Boeing II: Robust Reporting Defeats a Red-Flags Claim



Lion Air Flight 610 crashes off Indonesia

Ethiopian Airlines Flight 302 crashes in Ethiopia

Board forms Aerospace Safety Committee, nearly 10 months after the first crash

***Boeing I:* oversight claims survive**

Court approves settlement with governance reforms

Door-plug blowout on an Alaska Airlines 737 MAX 9

***Boeing II:* claims dismissed**

WHAT PLAINTIFFS ALLEGED

"Dozens of red flags": supplier defects, workforce issues, rework, foreign object debris

WHAT THE COURT SAW

"Ninety-five pages of allegations reciting routine board and committee reports": a functioning system

THE TAKEAWAY

"If everything is a red flag, then nothing is."

Boeing II (Del. Ch. 2026), quoting defendants

Boeing I to *Boeing II*: What Changed

Boeing I (Sept. 2021): claims survive

Before: as alleged for 2018–19

- No board committee charged with airplane safety; the Audit Committee focused on financial risk
- Safety was not a regular agenda item; the board relied on management's ad hoc reports
- After the first crash, the board treated it as an "anomaly" and, in Feb. 2019, resolved to delay any internal investigation

Aerospace Safety Committee formed (Aug. 2019)

Boeing II (Aug. 2026): claims dismissed

After: as alleged for 2019–24

- An Aerospace Safety Committee of independent directors with aerospace and safety expertise, meeting at least 23 times from Jan. 2022 to July 2024
- Safety discussed at every board meeting, plus twice-yearly reports from the Chief Aerospace Safety Officer
- Settlement reforms: a safety organization reporting to the committee, directors with aerospace or safety expertise, separate CEO and chair

Same company, same judge. What changed was a board-level safety reporting system, and a record showing the board used it.

Teligent: The Foil

	Boeing II (2026)	*Teligent* (2025)
Board reporting on the central risk	Safety a standing item at every board meeting	FDA compliance left to management's discretion
Committee focus	Dedicated Aerospace Safety Committee	Audit committee focused only on SEC compliance: 30 meetings, no mention of FDA
Warning signs	Routine reports, not red flags	Repeated FDA Form 483 observations and a 2019 warning letter
Result	**Claims dismissed**	**Prong-one claim sustained**

"A board's reporting practice that allows management to elect to report (or not) on central compliance risks fails Caremark's baseline requirement."

What This Means for the Board: Questions to Ask



Which of our compliance risks are mission critical, and does each have a standing board or committee report that does not depend on management's discretion?



If a prosecutor or a Chancery judge read our minutes and board materials, would they show what we were told, when, and what we did about it?

"*Caremark* does not demand omniscience."

Boeing II (Del. Ch. 2026), quoting *Clovis* (Del. Ch. 2019)

Delaware rewards structure. The prosecutor's view of the program and the court's view of oversight are converging, so **one record serves both audiences.**

The 2026 Enforcement Landscape

03

The Department-Wide CEP: Three Paths to Resolution

March 10, 2026: one policy for all DOJ corporate criminal matters (except antitrust)

Corporate criminal matter

Declination	Requires voluntary self-disclosure, full cooperation, timely remediation, disgorgement and no aggravating circumstances
"Near miss"	Non-prosecution agreement (presumption under 3 years, no monitor) and a 50–75% fine reduction off the low end of the Guidelines range
All other cases	Fine reduction capped at 50%; any form of resolution, including a guilty plea, is available

Disclosure must be "reasonably prompt." **The board cannot always wait for the internal investigation to finish before deciding to notify the government.**

Remediation Drives Outcomes; Monitors Are Now the Exception

What remediation means

- Root-cause analysis
- An effective compliance program
- Discipline, including for oversight failures
- Retention controls for personal devices and messaging apps

Eligibility does not require waiving privilege

DOJ's current view on monitorships

The exception, not the rule
Crim. Div. Monitor Memo, May 2025

- Imposed only when needed
- Defined scope and budget
- Tailored to the risk of recurrence

The Criminal Division imposed no new monitorships in its 2025 or 2026 corporate resolutions
DOJ has also ended numerous monitorships early

Fewer monitors means more weight on the company's own post-resolution reporting and certifications

The New National Fraud Enforcement Division

~500

attorneys and staff by the Aug. 24, 2026 launch

AAG McDonald memo, Aug. 13, 2026

National Fraud Enforcement Division

Created by Acting AG memo, Apr. 7, 2026; codified Aug. 2026 (91 Fed. Reg. 53,357)

Leadership: Assistant Attorney General Colin M. McDonald (confirmed Mar. 2026)

Staffing: took over the Criminal Division's Health Care Fraud Unit, Market, Government, and Consumer Fraud Unit and Tax Section; each U.S. Attorney's Office details a prosecutor

The Division also hires directly and uses state prosecutors as Special AUSAs.





Office of the Attorney General
Washington, D. C. 20530

April 7, 2026

MEMORANDUM FOR THE DEPARTMENT OF JUSTICE

FROM: THE ACTING ATTORNEY GENERAL

SUBJECT: CREATION OF THE NATIONAL FRAUD ENFORCEMENT DIVISION

The American people deserve a government that stewards their money wisely and protects it from wrongdoers. They rightly expect that taxpayer-funded programs will be administered lawfully and protected from theft. Fraudsters who target taxpayer dollars do not just steal from taxpayers; they also prevent critical benefits from reaching those in need and

Directive 26-12 (Oct. 2026): the Division's four corporate priorities

Health care fraud	Public trust and financial integrity	Revenue evasion	Trade and forced labor
Including controlled substances and FDCA violations	Procurement and government-contract fraud	"Significant evasion of internal or external revenue"	"Tariff evasion, importation of goods or services, or forced labor"

"The core mission of the National Fraud Enforcement Division is to zealously investigate and prosecute those who steal or fraudulently misuse taxpayer dollars." Acting AG memo creating the Division, Apr. 7, 2026

The Trade Fraud Task Force

>$1B

recovered or charged in less than a year

DOJ announcement, July 2026

Trade Fraud Task Force

DOJ and DHS, launched Aug. 2025

Criminal: the new Fraud Division's Global Trade & Commerce Enforcement Section

Civil: customs FCA cases stay in the Civil Division

Mandate: duty and tariff evasion (transshipment, origin fraud, undervaluation), smuggling of prohibited goods, forced labor, unsafe imports and sanctions evasion

Recent resolutions focus on tariff evasion (e.g.)

$549.5M
May 2026

Perfectus Aluminum

Customs-duty FCA settlement (Chinese aluminum extrusions allegedly imported as "pallets")

$54.4M
Dec. 2025

Ceratizit

FCA settlement over alleged country-of-origin misstatements (Chinese tungsten carbide transshipped through Taiwan)

Declination
With $3.9M disgorgement, Dec. 2025

MGI

Resin distributor self-disclosed Chinese resin routed through Canada; a former executive agreed to plead guilty

"For too long, fraud actors have viewed customs violations as a mere surcharge or cost of doing business." AAG Colin M. McDonald, July 14, 2026

The False Claims Act: The Front Line in the War on Fraud

$6.8B+
FY2025 settlements and judgments*
All-time record

1,297
qui tam suits filed in FY2025
A record

$5.3B+
recovered in *qui tam* cases
nearly 80% of the FY2025 total

Priorities reach well beyond the historical focus on health care fraud

Health care: Medicare Advantage, drugs, unnecessary care (e.g., Kaiser Permanente affiliates, $556M, Jan. 2026)

Customs duties and tariff evasion (e.g., Perfectus Aluminum, $549.5M, May 2026)

Contractor cybersecurity obligations (e.g., Illumina, $9.8M, July 2025)

Civil rights certifications and "illegal DEI" at contractors and universities

Zafirov (11th Cir. Sept. 2026)
Vacated a district court ruling (M.D. Fla. 2024) that the FCA's *qui tam* provision violates the Appointments Clause; Take Care and Vesting Clause challenges continue on remand

FCA matters become *Caremark* predicates
Clem v. Skinner (Del. Ch. 2024) followed a *qui tam* suit and a DOJ civil investigative demand (claims dismissed)

**FY2026 figures have not been released.*

Spotlight on FCPA: Even if the Government Is Pulling Back, Boards Should Not

The FCPA pullback?

Feb. 2025
Executive order pauses FCPA enforcement

June 2025
DOJ guidelines prioritize cases tied to cartels, harm to U.S. competitors, national security and serious misconduct

2025–2026 (to date)
DOJ has continued to bring cases on a more measured pace; SEC brings no FCPA cases, though Enforcement Director David Woodcock has said the SEC is not done enforcing the FCPA (Sept. 2026)

Why vigilance still matters

- **The statute has not changed:** DOJ FCPA Unit Chief David Fuhr calls it the "law of the land" (Mar. 2026)
- **Cases continue:** e.g., TIGO Guatemala ($118M, Nov. 2025); Scoular ($10M+, July 2026)
- **Long tail:** limitations periods run five years or longer, into the next administration
- **Foreign enforcers** have become more active as U.S. enforcement pulled back (e.g., the SFO's £10M Ultra Electronics DPA, May 2026)

Government priorities change faster than corporate culture.

A compliance program allowed to atrophy will be hard to rebuild when enforcement returns.

And the board's calculus on investigations holds: whistleblowers, state and foreign enforcers and the Court of Chancery have not pulled back.

Beyond DOJ & the SEC: State Attorneys General and Private Plaintiffs



Qui tam relators

Can pursue False Claims Act cases on their own even when DOJ declines to intervene

State attorneys general

California and Texas are active on data security, privacy and AI

Private plaintiffs

Securities class actions and derivative suits (Section 07)

Resolving with DOJ or the SEC does not end exposure to the states, relators or private plaintiffs

What This Means for the Board: Ask for Enforcement-Trend Briefings

Make enforcement-trend briefings a periodic (e.g., annual) agenda item

1. Brief

The CCO, GC or outside counsel present enforcement trends to the board or audit committee

2. Map

Tie government enforcement trends to your "mission critical" risks: e.g., trade and customs, immigration, FCA exposure, etc.

3. Record

Minutes reflect the briefing and that the board asked questions and discussed it

The record prosecutors look for: "What types of information have the board of directors and senior management examined . . . ?" (DOJ, *Evaluation of Corporate Compliance Programs*)

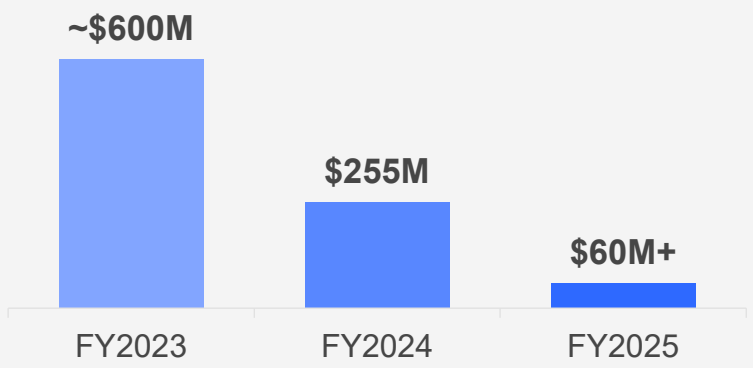
Run periodic risk assessments. The ECCP asks whether the company's risk assessment is "current and subject to periodic review" and whether its criteria are "periodically updated." Trend briefings feed that review.

When an Investigation Begins

04

Whistleblower Rewards: Expect the Government to Hear It Too

More programs, smaller awards: the tips keep coming even as award totals fall



Tips still rose, to about 27,000 in FY2025

Meanwhile, the programs multiply

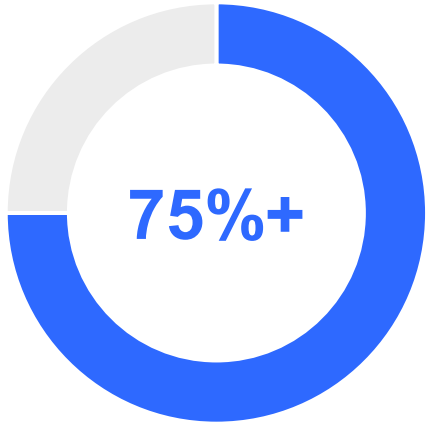
- **DOJ Criminal Division pilot (since Aug. 2024):** 1,800+ tips; up to 30% of the first $100M forfeited
- **DOJ Antitrust Division:** first award, $1M (Jan. 2026)
- **DOJ Fraud Division WHIP** (Oct. 20, 2026): $10K–$30K up front for tips leading to charges
- **False Claims Act:** relators can receive up to 30% of the government's recovery, under a law dating to 1863

"Enlist the public"

"This groundbreaking program will enlist the public as part of the fraud-fighting apparatus and reward them quickly for helping the country in the war on fraud." AAG Colin M. McDonald, announcing the up-front tip rewards from DOJ's whistleblower incentive program (Oct. 20, 2026)

Retaliation is misconduct in its own right: both agencies treat retaliation, or agreements that impede reporting (so-called "muzzle clauses"), as serious misconduct (SEC Rule 21F-17; e.g., Foot Locker, $148,000, May 2026, over separation agreements that waived SEC awards)

The Internal Hotline Is the Board's Early-Warning System



of SEC award recipients who were insiders **raised concerns internally first** or knew compliance was aware (FY2021; about 80% in 2016)

84% of employees who went outside the company did so only after reporting internally (2011 national ethics survey)

Ask for periodic hotline reports on:

- Volume and trends
- Triage and time to close
- Retaliation complaints
- Escalations
- Whether employees trust the channel (too few reports can itself be a red flag)

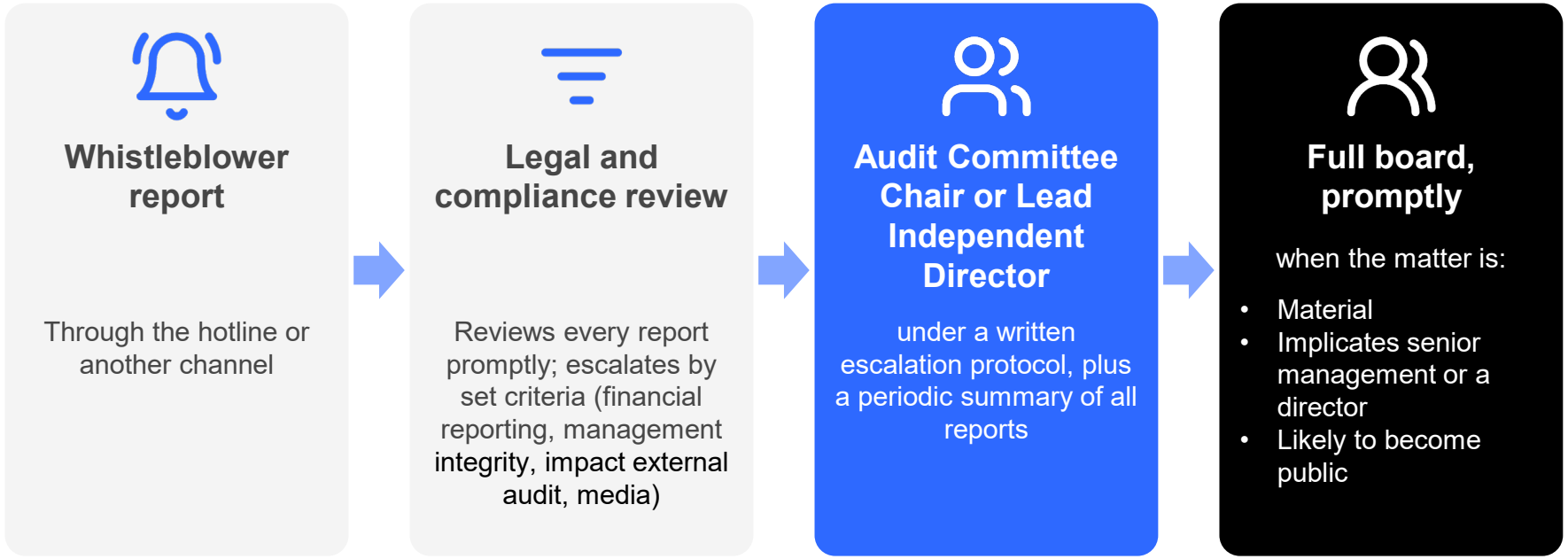
A report to the audit committee, CLO, CCO or a supervisor starts two 120-day clocks

Day 0 — Day 120

Company: self-report as soon as reasonably practicable, and within 120 days, to stay eligible for CEP self-disclosure credit

Officers, directors and compliance or audit staff: after 120 days, may seek DOJ awards themselves

Triage: Who on the Board Needs to Know, and When



Build a direct line. The GC and CCO should be able to go straight to the committee or board if the CEO or CFO is implicated.

SOX § 307 points the same way: lawyers must report "up the ladder" and, if the CLO or CEO does not respond appropriately, to the audit committee.

Does the Board Need Its Own Counsel?

Ask three questions

Is senior management implicated?

Is a director conflicted?
Small board with no independent directors? Consider adding one to lead the review.

Is there a reason DOJ, the SEC, the auditor or a court might later question the investigation's credibility and independence?

Sometimes

In the minority of cases where an answer is yes, an audit or special committee of independent directors directs the investigation, with counsel who does not regularly represent management, and walls implicated executives off from it

The audit committee has statutory authority to hire independent counsel at company expense

The SEC asks who performed the review and whether outside counsel had "done other work for the company" (Seaboard Report, 2001)

Write it down: set scope in a written mandate and document the committee's reasoning

Expect testing: by the government, the auditor and the Court of Chancery

Retaining counsel starts the board's response; it does not complete it.

Engaging With the Auditor

Most of the time: keep the auditor's trust

Share enough about investigations to support the audit, in a way that preserves privilege.

The extreme case, Section 10A: when the auditor detects a possible illegal act

Expect a parallel "10A" review with forensic specialists. Steps 4 and 5 apply only if the act is material and management and the board have not taken timely remedial action.

1. Determine whether an illegal act likely occurred
2. Assess the effect on the financial statements
3. Make sure the audit committee is adequately informed
4. If material and not remediated, report to the board
5. **Rarely reached: the board has one business day to notify the SEC**

What an unresolved investigation can cause

- **Delayed reviews and audit opinion**
- **Late-filing notices**
- **Material-weakness findings**
- **Auditor resignation**

Super Micro (Oct. 2024): after flagging governance and internal-control concerns, and amid short-seller allegations of accounting and export-control violations, the auditor resigned, saying it could no longer rely on management's and the audit committee's representations

Keeping the Auditor Satisfied Without Waiving Privilege

ATTORNEY-CLIENT PRIVILEGE

Generally waived

when privileged material is shared with the auditor

e.g., *First Fed. Sav. Bank of Hegewisch* (Fed. Cl. 2003); *SEC v. RPM* (D.D.C. 2020)

WORK PRODUCT

Courts are divided

No waiver (most courts)

The auditor is not an adversary: D.C. Cir. (*Deloitte*, 2010); 6th Cir. (*FirstEnergy*, 2025)

Waiver

Medinol (S.D.N.Y. 2002); *SEC v. RPM* (D.D.C. 2020): an investigation done at the auditor's request to support the audit, not for litigation, produced no work product, and any protection was waived

How to brief the auditor

Do

- Brief orally: facts and conclusions
- Track what was shared, and with whom

Avoid

- Handing over written work product
- Overstating conclusions: share them with caveats; officers and directors may not mislead the auditor

The Self-Disclosure Decision as to Law Enforcement

To count, a disclosure must:

go to a DOJ criminal component "within a reasonably prompt time after becoming aware of the misconduct," before DOJ otherwise knows of it, and before public disclosure or an investigation is imminent (CEP, Mar. 2026, App. B; *see* slide 18).

Government contractors: FAR 52.203-13 separately requires timely written disclosure to the agency inspector general of credible evidence of certain federal crimes or civil False Claims Act violations.

Potential benefits

- Declination path
- Near miss: non-prosecution agreement under three years, no monitor
- First "near-miss" NPA (Extreme Networks, Oct. 2026): self-reported Russia-related sanctions and export violations before DOJ investigation but only after a reporter asked for comment



Costs to weigh

- Declinations are public and invite follow-on suits
- Disclosure must be coordinated with the SEC, the auditor and the market
- Full cooperation means identifying everyone involved, "regardless of their position, status, or seniority"



Either way, the audit committee owns the process. It must make sure the company has the facts, counsel and process for an informed choice that will withstand scrutiny, whether it discloses voluntarily or is responding to a whistleblower.

Must the Company Disclose the Investigation or the Subpoena to Investors?

Silence

No freestanding duty to disclose an investigation

Pure omissions are not actionable under Rule 10b-5(b) (*Macquarie*, U.S. 2024)
But materiality still matters: Item 103 (proceedings "known to be contemplated by governmental authorities") and Item 303 (known trends and uncertainties) can require disclosing a material investigation in SEC filings

Half-truths

What you do say must be complete. Disclosure can be triggered by:

- Risk factors that call an already-materialized risk hypothetical (*Facebook*, 9th Cir. 2023)
- Remediation claims while an SEC investigation is pending (*Noto*, 2d Cir. 2022)

Reg FD: a subpoena, Wells notice or settlement talks may be material nonpublic information; script investor communications

Cyber: a material incident still requires a Form 8-K within four business days of the materiality determination

Ask at each quarter-end and before earnings calls or offerings: Do our statements need updating? Who decides? How is the decision recorded?

Questions the Board Should Ask at the Outset

- Who is directing the investigation, and is that counsel independent of the people involved?
- How has the investigation been scoped?
- Has the record been secured, including personal devices and messaging apps?
- When will we know enough to decide on self-disclosure?
- Has anyone already reported this to the government?
- Has the auditor been told, and how will we brief it without waiving privilege?
- Do we have disclosure obligations now?
- What do our hotline data and prior complaints show?
- Does this touch a “mission critical” risk? If so, expect prosecutors and the Court of Chancery to focus on what the board knew and how it responded (*Marchand*; *Boeing II*)

The answers, and when the committee received them, will be reconstructed later by prosecutors and plaintiffs alike.

Interacting with Enforcement Authorities

05

The Board's Role: Strategic Guidance; Not Day-to-Day Operations

The board or special committee weighs in on or decides

- Investigation scope
- Disclosure
- Cooperation strategy
- Privilege assertions
- Resolution strategy

Counsel executes

Handles day-to-day contact with the government

Should directors meet with the government?

Appropriate in certain cases

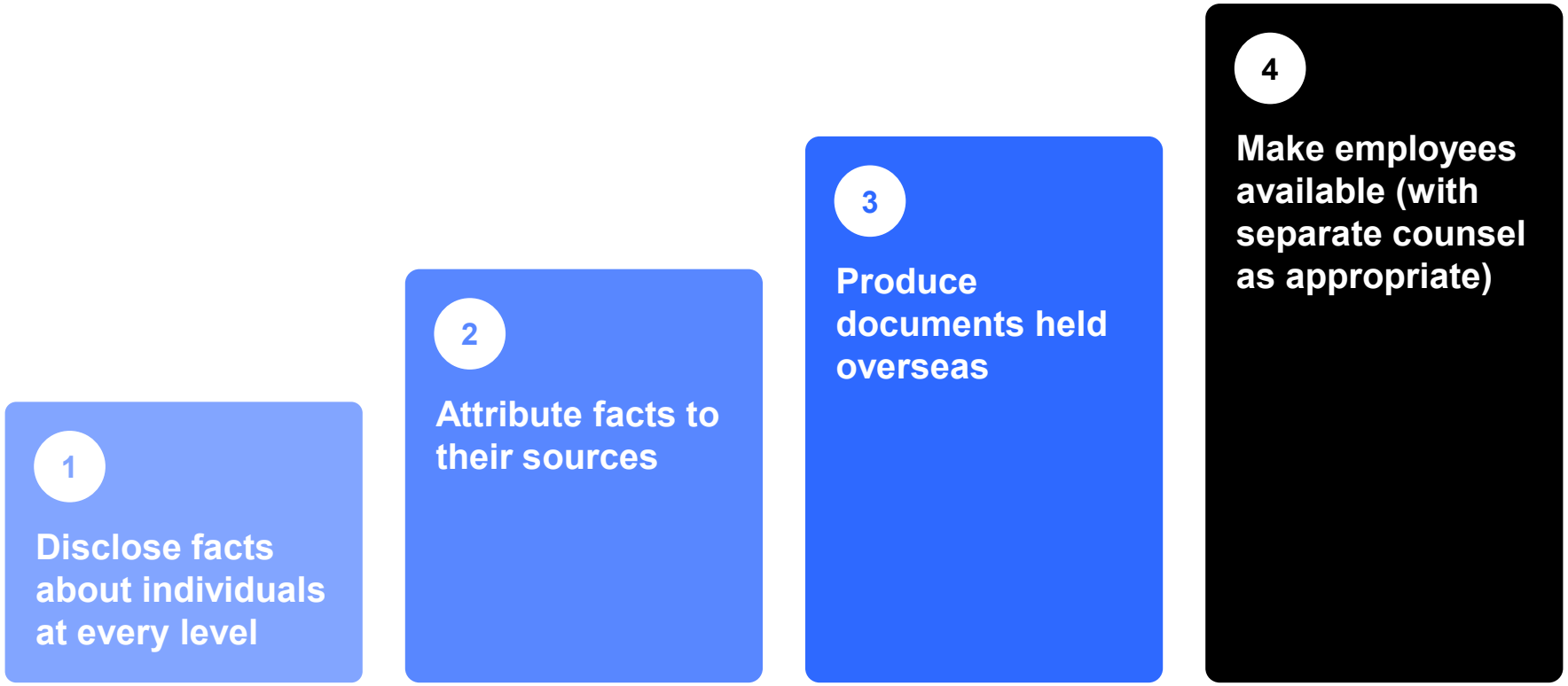
- At the resolution stage, to present remediation and board engagement
- At the government's request

Avoid

- Routine contacts: heavy director involvement can signal a more serious matter; keep directors in reserve
- Meetings where the director is a fact witness or has personal exposure

What "Full Cooperation" Requires in Practice

Cooperation credit starts at zero and is earned through specific actions



The SEC too: its 2026 Enforcement Manual gives no credit "based merely on compliance with subpoenas" and credits steps like sharing investigation findings, identifying key documents and witnesses, and making witnesses available (§ 6.1.2)

Cooperation Decisions: The Board Sets the Tone

Mostly management's calls with board guidance; disclosure is the exception



Discipline vs. deconfliction

Balancing employee discipline against DOJ requests to hold off



Advancement and indemnification

For executives under investigation



Disclosure about senior management

What the company discloses about its leaders



The record should show the board's guidance on these decisions, and its own call on disclosure

Managing Privilege: Assume Plaintiffs Will Read It

Four documents plaintiffs may eventually read

Investigation presentations

Assume written materials shown to the government will reach private plaintiffs, and draft them that way; oral briefings can also waive privilege

Board minutes

Show engagement without reciting privileged advice

Wells submissions

Generally discoverable: draft them with follow-on litigation in mind

Section 220 productions

Inspection can reach potentially privileged communications and work product in board materials. Under *Garner*, stockholders who show good cause can overcome privilege (*Wal-Mart*, Del. 2014)

Assume what is written down and shared will be read later. Build the investigation record for the derivative suit that follows

Delivering on Resolution Terms and the Board's Certification Exposure

1 Know the terms	2 Plan	3 Deliver	4 Certify
Resolutions now rely on standard compliance undertakings (typically Attachment C), not monitors, with little room to negotiate	Turn each undertaking into a work plan with owners and deadlines (Section 06)	Track and test progress, and report to DOJ as the agreement requires	CEO and CCO certifications at the end of the term are now standard, but an unsupported certification risks breach and personal exposure

Design the certification process at the start of the term, not at the end

What This Means for the Board

The board sets the tone and makes the disclosure call; management and counsel run the day-to-day, and the record should show the board's oversight

Assume written materials shown to the government will reach plaintiffs, and draft them that way

Plan from the start to deliver, and certify, the resolution's compliance undertakings

Overseeing the Compliance Program

06

The ECCP as the Yardstick

Prosecutors ask three questions about the compliance program

1



Is it well designed?

2



Is it adequately resourced and empowered?

3



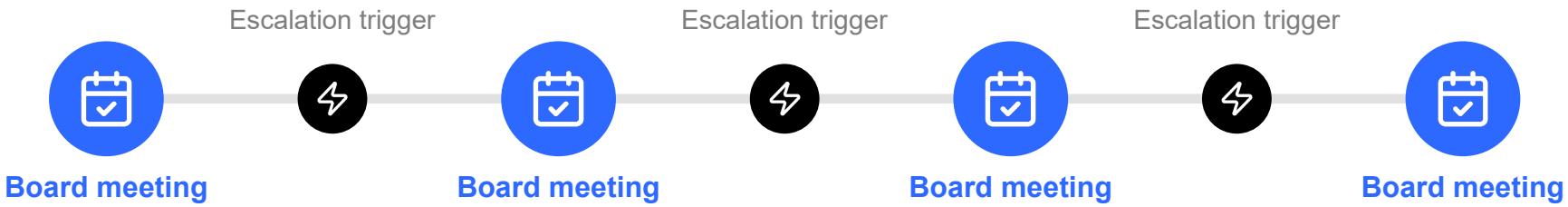
Does it work in practice?

DOJ's Evaluation of Corporate Compliance Programs (ECCP) guides how prosecutors assess the CEP remediation element of "an effective compliance and ethics program"

M&A too: the ECCP asks what diligence found and how fast the target was integrated into the acquirer's compliance program.

Board Reporting Cadence and Direct Access to the CCO

A reporting rhythm the board can document



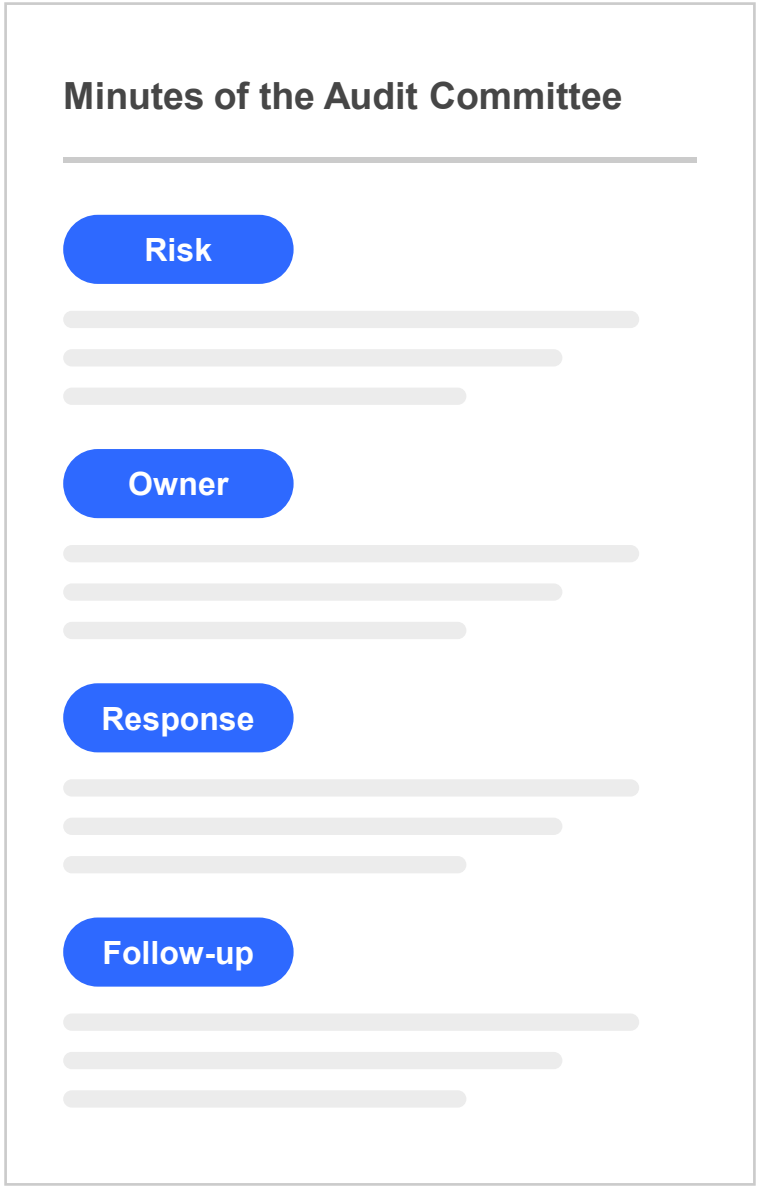
Standing agenda items for each mission-critical risk

Regular executive sessions with the CCO or General Counsel

Clear escalation triggers between meetings

DOJ asks whether compliance has “direct reporting lines to anyone on the board of directors and/or audit committee”

What the Minutes Should Show: Lessons from *Boeing II*



LESSON FROM *BOEING II*

Boeing's post-crash safety reporting (a dedicated committee, safety as a standing agenda item) was documented and in regular use, and that record defeated the oversight claims over the 2024 door-plug blowout (dismissed in 2026)

SB 21 RAISES THE STAKES

SB 21 (Mar. 2025) amended Delaware's Section 220 to focus on formal board records, so the minutes and board materials are the record

Record the risk, its owner, the response and the follow-up

Emerging Mission-Critical Risks for All: AI Governance & Cybersecurity

AI governance

- 2026 derivative suits test the companies' own AI statements:
- Adobe (two suits, N.D. Cal.): a model allegedly trained on pirated books while Firefly was sold as "commercially safe"
- Microsoft (W.D. Wash.): AI allegedly trained on unlicensed works despite proxy statements on data use
- Nvidia (N.D. Ill.): models allegedly trained on pirated books
- In federal court on Exchange Act claims; Delaware law governs the fiduciary claims for Adobe and Nvidia, Washington law for Microsoft

Cybersecurity

- SEC rules require prompt disclosure of material incidents and annual disclosure of board oversight (rules in effect but under SEC review)
- State AGs are active on data security
- **Litigation:** *SolarWinds* (Del. Ch. 2022, aff'd 2023): cyber is "mission critical" for online service providers, but claims failed because committees oversaw it and no red flags reached the board

Board oversight of these risks is now disclosed, and tested. Make sure public governance statements match actual practice.

Following Through: The Record Becomes the Shield

Track every remediation commitment

Undertaking	Owner	Deadline	Status
			✓
			✓
			🕒

Under a DOJ resolution, the same record supports certification and early termination

The *Boeing* arc

- **2021:** *Boeing I* oversight claims survive
- **Then:** governance reforms, reinforced by the 2022 settlement
- **2026:** *Boeing II* oversight claims dismissed

The same record earns DOJ credit and supports a good-faith defense in Chancery

What This Means for the Board



Directors should:

1. **Identify the company's mission-critical risks**
2. **Confirm each has an owner and standing board reporting**
3. **Make sure public governance statements match actual practice**

Follow-On Litigation

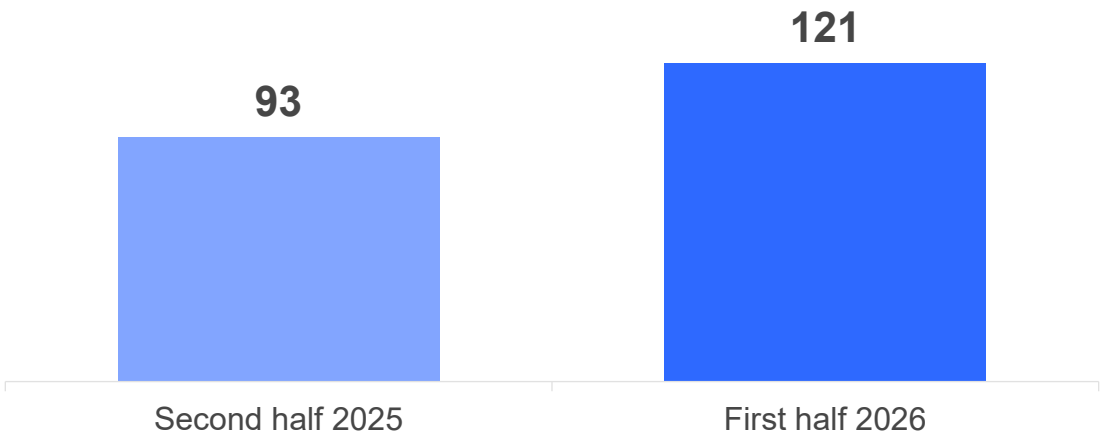
07

A Common Path from Investigation Disclosure to Derivative Complaint

Investigation disclosed → Stock drop → Securities class action → Section 220 demand → Derivative complaint

Derivative suits are frequently stayed until the regulatory action or securities case is resolved, so **the board's investigation-era record is often tested years later**

Securities class action filings



Enforcement actions are frequently followed by shareholder derivative litigation

49%

of 2025 securities class action settlements involved an accompanying derivative action

Source for both figures: Cornerstone Research

Section 220 After SB 21

Available: defined "books and records"

- Board and committee minutes
- Materials provided to the board in connection with board action
- Director and officer independence questionnaires
- Three years of annual financial statements

Anything else needs a "compelling need"

- Emails, texts and other informal records require "clear and convincing evidence" that they are "necessary and essential"
- Companies may impose confidentiality and incorporation-by-reference conditions

What it means for the board

- Plaintiffs still build *Caremark* complaints from Section 220 records (the *Boeing II* complaint recited three years of board reporting)
- Keep board business in formal records and off personal channels: a board that keeps formal records limits access to informal ones (*Scarantino*, Dec. 2025, applying pre-SB 21 law)
- Board materials can be the record that shows the absence of bad faith on a motion to dismiss

Beyond Delaware

- Texas excludes nearly all emails and texts from inspection and lets listed companies set a derivative-suit ownership threshold of up to 3%, as more companies reincorporate in Texas and Nevada
- Other states impose similar or even more stringent requirements (e.g., Nevada limits inspection of accounting records to 15% holders and exempts SEC-reporting companies)

The Board's Response to an Incident Should Reflect Good Faith

NOT A RED FLAG BY ITSELF

"The receipt of a lone subpoena or launch of a regulatory investigation does not necessarily show that directors knew the company was breaking the law."

Walgreens: the audit committee was kept apprised of a DOJ civil investigative demand and a *qui tam* suit, and the billing problem was fixed within months. **Claims dismissed.**

Clem v. Skinner (Del. Ch. 2024)

Boeing II: FAA letters of investigation in compliance reports did not count; the board was not shown to know their "exact subject"

WHAT GETS JUDGED: A PROPORTIONATE RESPONSE

"Merely hiring an attorney in response to a red flag … does not provide the absolution Defendants seek."

The board's main response to a former deputy general counsel's draft whistleblower complaint was hiring outside counsel while the challenged overdraft practice continued (as alleged). **Claims survived.**

Brewer v. Turner (Del. Ch. Sept. 2025)

***eXp World* (Jan. 2026):** claims survived where the board allegedly "effectively did nothing" about company-wide sexual-assault allegations

Perfection and hindsight are not the standard: plaintiffs cannot "equate a bad outcome with bad faith" (*Stone v. Ritter*, Del. 2006)

Demand Futility Under *Zuckerberg*

Director by director, demand is excused only if at least half the board:

1



Received a material personal benefit, or lacks independence from someone who did

2



Faces a substantial likelihood of liability, or lacks independence from someone who does

The key question for directors who oversaw the investigation: it turns on the record of what they were told and how they responded (*Boeing II*)

Exculpated claims don't count: *Caremark* plaintiffs must plead particularized facts showing a breach of the duty of loyalty, i.e., bad faith

SB 21: heightened presumption that directors meeting exchange independence standards are disinterested (*Ayers v. Foley*, Del. Ch. June 2026)

Independence Scrutiny for Directors Who Oversaw the Investigation



Committee service alone does not disable a director

Plaintiffs must plead particularized facts about:

- **What each director knew**
- **How each director responded**
- **Ties to implicated executives**

Special litigation committees

- The committee bears the burden of proving its own independence
- *Coinbase* (Del. Ch. Jan. 2026): after the court denied a motion to dismiss for demand futility (2024), the committee moved to terminate; one of its two members had co-invested alongside defendant Marc Andreessen's firm at least 50 times and referred deals to it during the investigation; the motion to terminate was denied
- Directors who led the investigation may seem natural picks, but their roles and relationships will be examined closely

D&O Coverage: Check It Before You Need It

During the investigation

- The company's own investigation costs are usually not covered without an entity investigation extension
- Coverage for individuals turns on how the policy defines a "Claim" (subpoena, target letter, Wells notice)
- Give notice early, before the first derivative demand, and check related-claims terms: later claims can be pulled into an earlier policy (*Alexion*, Del. 2025; *Under Armour*, 4th Cir. 2026)

When derivative suits arrive

- Delaware bars indemnifying derivative settlements (§ 145(b)), so Side A and Side A DIC coverage protect directors
- Key terms: priority of payments, final-adjudication conduct exclusions, disgorgement coverage (*Clear Channel*, Del. Super. Ct. 2026)

$237.5M Boeing derivative settlement (2021), funded by D&O insurers, plus governance reforms

$190M Meta derivative settlement (approved Apr. 2026), insurance-funded, plus governance reforms

Questions & Answers

Appendix
Questions Directors Should Ask Counsel

Questions for Counsel: Before Any Inquiry

Before any inquiry | At first notice | During the investigation | At resolution and after



Which compliance risks are mission critical for us, who owns each one, and when did the board last receive a report on it?



What are DOJ, the SEC and the states focused on this year, how does that map to our business, and what are we still doing in deprioritized areas?



What does our hotline show, do employees trust it, and do any of our agreements discourage reporting to the government?



Do we have a written escalation protocol and a self-disclosure process, and are our messaging, retention and D&O arrangements adequate?

Questions for Counsel: At First Notice

Before any inquiry | **At first notice** | During the investigation | At resolution and after



Who needs to know, and should the audit committee or a special committee take over with its own counsel and a written mandate?



Has the record been secured, including personal devices and messaging apps, and have the D&O insurers been notified?



Which clocks are running (self-disclosure, the 120-day whistleblower windows, periodic reports), and must we disclose anything now?



When and how will the auditor be briefed, and how will we protect privilege in doing so?

Questions for Counsel: During the Investigation

Before any inquiry | At first notice | **During the investigation** | At resolution and after



What have we learned since the last report, what must we decide, and do the minutes show what we were told and why we decided?



Are remediation and discipline proceeding as the facts develop, rather than waiting for a final report?



Is the auditor satisfied with the scope and independence of the work, and are our statements to the auditor, regulators and the market consistent?



Should we revisit the self-disclosure, cooperation or privilege decisions in light of new facts?

Questions for Counsel: At Resolution and After

Before any inquiry | At first notice | During the investigation | **At resolution and after**



Can we deliver and certify every term we are being asked to accept, and who will own each undertaking?



What will we tell the market, the auditor and employees, and how will the board track remediation through the term?



Are we prepared for follow-on litigation: Section 220 demands, derivative claims, special litigation committee options and D&O coverage?



What did we learn, and how will the compliance program, board reporting and governance disclosures change as a result?

Upcoming Programs

2026/2027 White Collar Webcast Series

Date and Time	Program	Registration Link
Thursday, November 12, 2026 **7:00 AM – 8:00 AM PT** **10:00 AM – 11:00 AM ET**	**Congressional Investigations** Speakers: Barry Berke, Michael Bopp, Stuart Delery, Matthew Owen, Susan Pelletier	Event Details
Tuesday, December 1, 2026 **9:00 AM – 11:00 AM PT** **12:00 PM – 2:00 PM ET**	**FCPA and Anti-Corruption Enforcement Trends in Global Markets** Speakers: Michael Diamant, Katharina Humphrey, Ning Ning, Benno Schwarz, Patrick Stokes, Oliver Welch	Event Details
Thursday, December 10, 2026 **9:00 AM – 10:00 AM PT** **12:00 PM – 1:00 PM ET**	**Corporate DEI Enforcement** Speakers: Stephanie Brooker; Mylan Denerstein; Karin Portlock; Jake Shields	Event Details



Attorney Advertising: These materials were prepared for general informational purposes only based on information available at the time of publication and are not intended as, do not constitute, and should not be relied upon as, legal advice or a legal opinion on any specific facts or circumstances. Gibson Dunn (and its affiliates, attorneys, and employees) shall not have any liability in connection with any use of these materials. The sharing of these materials does not establish an attorney-client relationship with the recipient and should not be relied upon as an alternative for advice from qualified counsel. Please note that facts and circumstances may vary, and prior results do not guarantee a similar outcome. © 2026 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at gibsondunn.com.