

Internal Investigations: Retaining and Working with Forensic Accountants

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This practice note addresses identifying the need for forensic accountants, how to retain them, and best practices for working with them throughout an internal investigation. Forensic accountants are accounting specialists who analyze data to detect anomalies, questionable activity, and fraud.

An allegation of misconduct can catapult an organization into a challenging time of scrutinizing protocols and employees. When investigating such matters, an independent legal team must be well-equipped to understand relevant financial and internal controls issues and such teams commonly turn to forensic accountants for assistance. To be reliable, internal investigations should be independent and thorough. Forensic accountant participation is one of myriad means that may be necessary to achieve this. Routine matters, such as small-scale company code-of-conduct matters, can often be handled by in-house counsel and investigations staff. For matters implicating corporate liability, however, it is often critical to hire independent, reputable outside counsel and, where appropriate, appoint a special committee of the board of directors. This practice note focuses on investigations conducted by legal counsel and may refer to "forensic accountants" as simply "accountants."

In the context of an internal investigation, legal counsel should consider all of the following:

- Whether the nature of the investigation calls for retention of forensic accountants
- The appropriate scope of forensic accountants' work to support and advance the investigation
- Key factors to determine the optimal forensic accountants
- Privilege, conflicts, and insurance issues
- Effective collaboration with and direction of the forensic accounting team
- Work product, client recommendations, and presentation issues

Forensic accountants should generally be retained at the outset of the investigation as soon as counsel, with the buy-in of the client, determines the investigation's goal and strategy. Early retention helps keep the investigation process clear, efficient, and well-informed, as well as enhancing its ability to identify issues. Where the client is an audit/special committee or other committee of a board of directors, the committee has the power to direct the investigation team on the scope of the investigation. Scope and strategy buy-in from any such committee or, where appropriate, the board is crucial.

For information relating to liability, see [Materiality in Securities Fraud Actions](#), [Liability of Compliance Personnel at Financial Institutions](#), [Liability under the Federal Securities Laws for Securities Offerings](#), and [Corporations, Directors, and Officers: Potential Criminal and Civil Liability](#).

Step 1 – Determine Whether the Investigation Warrants Forensic Accountants' Assistance

Forensic accountants should generally be retained for investigations involving one or more of the following:

- Allegations of bribery, kickbacks, or corruption (e.g., FCPA-related issues)
- Embezzlement, theft, or asset misappropriation
- Accounting improprieties including fraudulent financial reporting (e.g., improper revenue recognition)
- Complex financial transactions and funds tracing (e.g., money laundering allegations within financial services companies)
- Audit failure cases

The aforementioned categories may involve convoluted factual scenarios requiring specialized knowledge, beyond that of counsel, in order to comprehensively navigate and untangle them. Essentially, forensic accountants can be critical to effectively analyze financial and transactional data in sophisticated and large-scale investigations. Forensic accountants are instrumental in these types of cases as they typically have expertise identifying, acquiring, and analyzing large volumes of data located with corporate data systems including enterprise resource planning (ERP) systems, which typically include various data elements such as general accounting ledgers, subledger data, accounts payable and accounts receivable, data related to third parties, inventory, procurement, and others. Forensic accountants have expertise and technology tools to analyze large volumes of such data and quickly home in on potential red flags or fraud or corruption. For more information on the FCPA, see [Foreign Corrupt Practices Act](#) and [Foreign Corrupt Practices Act Compliance Programs Checklist](#).

Step 2 – Determine the Appropriate Scope of the Forensic Accountants' Work to Advance the Investigation

When you have identified the need for forensic accounting assistance, you must then determine the initial scope of the accountants' work. This is dictated by the investigation's

scope, which should be clear and agreed to by the client and counsel prior to engaging accountants. For example, an investigation may involve an employee's report of pressure to alter financial statements. An appropriate scope of the accountants' work therefore would include analyzing relevant current and historical financial statements and underlying accounting entries to identify and assess potential accounting inaccuracies and non-GAAP compliant disclosures.

An important consideration at this stage is to determine whether the role of the forensic accountant will be that of a privileged consultant or of a potential expert witness. In the case of a privileged consultant, the role of the accountant is typically to support and take direction from counsel throughout the investigation. In these instances, the accounting team is essentially an extension of the legal investigative team. In cases where accountants are engaged to act as expert witnesses, their role must be much more arm's length and independent.

For more information on GAAP compliance and financial statements, see [SEC Regulation of Non-GAAP Financial Measures](#) and the [Financial Statements and Reporting Resource Kit](#).

As an investigation unfolds, accountants' work scope may evolve. See Step 5 below for more discussion of the evolution of the work scope. After determining the need for forensic accountants and the initial scope of their work, counsel is well-positioned to identify and retain them.

Step 3 – Identify the Appropriate Forensic Accountants

The appropriate type of forensic accountants depends upon the investigation's nature and scope. Accountants can be broadly categorized according to the following criteria:

- Size and geographic reach
- Licensing
- Subject matter expertise
- Experience as expert or summary witnesses
- Experience with regulators or enforcement agencies

Accounting firms range from smaller firms that have few employees, to midsized firms with approximately 2,000 employees which may tout talented professionals with "Big Four" firm experience, to the "Big Four" accounting firms themselves, which each employ hundreds of thousands of employees. Each size has strengths.

For example, a large global investigation involving terabytes (or warehouses full) of documents may warrant a large, Big Four accounting firm with international reach, while a smaller, more nimble, and economically efficient firm may be appropriate for smaller-scale issues.

Generally, an accounting firm with relevant experience and capabilities will be the best fit. The size, nature, and complexity of the investigation will largely dictate the appropriate forensic accounting candidate. One important axis of evaluation of such candidates is the types of licenses, certifications, and abilities held by the proposed accounting team. In many circumstances, a Certified Public Accountant (CPA) may be essential to the investigation, and most reputable firms have an abundance of CPAs to offer. CPAs generally provide a higher level of expertise, ability to handle complexity, and knowledge of particular accounting issues, compared to a comparable non-CPA accountant. Many forensic accounting practitioners in both small and large firms (including the Big Four) also have a Certified Fraud Examiner (CFE) accreditation. CFEs may be able to provide counsel and corporate clients with additional expertise in the areas of fraud detection, criminology, interviewing techniques, and in the design of fraud prevention programs and trainings. Additionally, investigations involving jurisdictions outside the United States may require the services of accountants having the relevant credentials in those countries or regions.

In addition to credentials, accountants may have particular experience in a given subject matter area, such as experience performing services for clients in the oil and gas industry, financial services firms, or biotechnology companies. The accountants' experience may also be related to a specific accounting topic, including, for example, revenue recognition, reserve issues, or executive compensation. Choose a firm that will have the subject matter knowledge to work efficiently on your client's investigation.

Accountant candidates' experience handling the issues and dealing with the involved government entity(ies) is also important. Accountants with relevant investigative experience, such as government employment at the Securities and Exchange Commission or Department of Justice, may have additional insights into what certain government investigators and prosecutors will focus on during presentations and analysis of the investigation findings. When identifying accountant candidates to consider, consider soliciting recommendations from professional networks.

Additionally, you may consider accountants who are experienced with testifying as a summary witness before

regulators and/or as an expert in court. This skillset can play a critical role in investigations, which can advance beyond the initial scope into detailed meetings with government agencies or even complex litigation. Early, thoughtful staffing can save both counsel and the client valuable time and resources.

When serving as summary witnesses, accountants can trace transactions through bank accounts and show the movement of funds, as well as efforts to conceal the funds. For example, an accountant may effectively serve as a summary witness in criminal proceedings or to regulators in a situation involving alleged investor-fraud schemes and misuses of investor moneys. Tracing from the money source to the ultimate disposition can be informative to factfinder, including if the factfinder is a regulator. Accountant summary witness testimony can involve the analytics surrounding factual situations and the ultimate payment to a third party. The key challenge when accountants testify as summary witnesses is ensuring that the quality of the underlying data is sufficiently reliable, detailed, and complete to support the summary testimony. For example, there must be sufficient information to support testimony that funds can be traced a certain way and that certain conduct was consistent and pervasive. If the underlying data shows only one transaction to support the conclusion that company employees generally behaved lawfully, it is important to understand if there are other transactions—which experienced counsel or regulators would ask about on cross-examination—that would indicate that the lawful conduct with respect to funds was not, in fact, pervasive. Thus, the accountant summary witness should analyze all the available relevant information, and not an incomplete subset. The accountant must know of and be prepared to address the limits of the data. In sum, where the underlying data is sufficient, an accountant summary witness can be very effective to summarize voluminous information into a compelling story. Of course, one generally cannot persuasively demonstrate an entire narrative or case through one witness, and industry experts are often necessary in addition to an accountant summary witness.

Furthermore, constant, regular communication between the legal team and the summary witness is vital to ensure that the work of the accountant expert is aligned with the client's evolving needs, including the appropriate deliverable to the ultimate recipient (e.g., regulators, a court, the company). To this end, a phased approach may be ideal. When employing a phased approach, the legal team and the accountant expert participate in periodic check-in meetings or teleconferences, as well as thorough, comprehensive status meetings as each phase of the work is concluded.

There are key criteria of which to be cognizant when selecting a forensic accountant witness. In addition to the other factors discussed herein that are applicable to selecting a strong accounting firm for your matter, when considering an accounting firm for purposes of providing summary witness testimony, you should scrutinize the following aspects of the candidate firm's capabilities:

- **Leverage.** Summary witness preparation and work can be extremely document-intensive and can take a tremendous amount of time. This can be especially true if there are voluminous bank statements and/or a great deal of suspect transactions involved in the subject investigation. As you can imagine, if a senior accountant performs all of the preparation and work, then it can quickly become quite expensive. A strong accounting firm candidate should have both senior practitioners with expertise and more junior personnel to whom certain tasks and functions (e.g., document organization, conversion of hard copy documents to electronic schedules) can be appropriately delegated.
- **Availability of "second partner" reviewers.** Auditing firms generally assign a second partner to ensure that the primary partner has someone with whom to discuss key issues with before the audit is completed. This process is known as "second partner" or "concurring partner" review. Such a review facilitates the evaluation of, and acts as a sort of quality control for, the primary accounting team's judgments and conclusions. "Second partner" reviews are similarly helpful in a consulting/expert witness matter. Typically, strong accounting firm candidates have the personnel and protocol to support and facilitate second partner reviews. You should ensure this is a standard practice—and will in fact be performed during your matter—when deciding among accounting firms to retain.

Essentially, it is critical to select reputable independent accountants, generally an accounting firm, that can fully meet the needs of the investigation from both timing and substantive perspectives.

Step 4 – Retaining Forensic Accountants: Privilege, Conflicts, and Insurance Issues

After identifying excellent accounting candidates, you should reach out to appropriate contacts at the accounting firms to obtain information for a conflicts analysis. Before proceeding with an interview process, counsel must confirm

that no conflicts exist between the forensic accountant candidates and the client(s) or parties that may be related to the investigation, such as parent companies, subsidiaries, and affiliates. Additionally, counsel should ensure that there would be no appearance of a potential conflict of interest, as that can render an entire investigation unreliable and eviscerate its efficacy. Independence is critical.

After conflicts are cleared, the interview process can begin. Multiple candidate firms can be interviewed. As basic reminders, during interviews you should not disclose privileged or confidential information. The process should be used to glean, at a high level, relevant expertise, competency, experience, and availability. Each candidate should confirm that they can operate on an acceptable timeline and have sufficiently efficient and up-to-date technology. For international investigations, accounting firm capabilities on the ground in the subject locations should be considered. This may involve local offices and multilingual staff in key locations to work in conjunction with the accountants' domestic offices.

Prior to selecting an accounting firm, counsel should work with the client to determine whether there is applicable insurance coverage. If so, counsel may consider the coverage requirements when contemplating accounting firm candidates. For example, if the insurance carrier requires policyholders to use an accounting firm from a preapproved list, then counsel can discuss with the client the pros and cons of using certain preapproved firms. For high-profile and complex matters, it may be appropriate for the client to select an accounting firm that is not on the carrier's list if that firm would be best suited to meet the needs of the investigation. In such a case, the client may request from the carrier permission to deviate from the preapproved list and, if that request is denied, the client may determine that it is in its best interests to fund the selected forensic accountants and forego coverage (or retain coverage counsel and pursue coverage if a viable basis exists to do so).

After promptly concluding the interview process, you can recommend a firm to the client, obtain client approval, and move forward with retention.

Next, you will prepare an engagement letter that formalizes the scope of the accountants' work, the accountants' role, and the retainer/payment agreement. Additionally, in order to preserve privilege protections, you should retain the forensic accountant to work at your direction. Most jurisdictions do not recognize a privilege applying to communications between the accountant and the client. However, if counsel retains the accountant and the accountant works as an agent of the client's counsel, and

not directly for the client, the attorney-client privilege may apply. This consideration makes retention of the accountant by counsel very important. Any decisions regarding privilege waiver should be deferred until the investigation has concluded and a strategy is in place, so counsel and retained accountants must be diligent in protecting privilege protections throughout the entirety of the investigation. During the investigation, both counsel and the accountant should be mindful to have the accountant team communicate with counsel, rather than directly with the client.

Step 5 – Collaborate with and Direct Forensic Accountants Effectively

After retaining the accountants, you should work closely with the forensic accounting team, including frequent communication to effectively direct their work, meet deadlines, glean any strategy insights, and identify as early as possible any issues uncovered through the accountants' work. Timing, expectations, and overall strategy should be communicated clearly and regularly. The interview process should have confirmed that the retained accounting firm is well-equipped from an expertise, staffing, and technology perspective to meet expected deadlines with high-quality work product, even in time-sensitive and complex investigations.

With respect to the data, you must also work with the accountants to ensure that they have access to all documents and information relevant to their analyses. For instance, an FCPA investigation may involve documents relating to success fees and third-party intermediary invoices. Access to all such documents should be provided to the accountants. As mentioned above, information relevant to the accountants' analysis will often be located in ERP systems. Forensic accountants can also harmonize data outside ERP systems, such as due diligence information, with ERP system data to create a more comprehensive overview of a situation or potential compliance issues.

Prior to the outset of the investigation, you should ensure a comprehensive document retention program is in place and issue appropriate hold notices. In situations where the relevant information is located in a foreign jurisdiction, it may be appropriate for the accountants to review such data in the jurisdiction where it is located to ensure compliance with applicable laws and potentially avoid the reach of the U.S. government's subpoena power.

You should integrate the forensic accountants into the witness interview process where appropriate to gain additional insight from the testimony. For example,

accountants may suggest accounting-focused questions for a CFO or other employees regarding financial occurrences or potential conflicts of interest. Thus, you should keep accountants abreast on timing and substance concerning witnesses who may have information relevant to the accountants' analyses.

Forensic accountants should work closely with counsel throughout the investigation to sync up financial/accounting data points with evidence by the legal team from other sources including document reviews, email traffic, and evidence gathered through interviews. Working closely with counsel will help ensure that key facts and issues considered by the accountants can be comprehensively validated or refuted with other contemporaneous evidence.

At all times during the investigation, forensic accountants retained to act in an expert witness capacity must remain independent and objective. Their work cannot, and should not, be influenced by the client, counsel, or other outside factors. You should be mindful when working with the retained professionals and refrain from suggesting a certain view of materials or otherwise influencing the forensic accountants to reach a certain conclusion.

Modifications to, or Expansions of, Scope

During the course of the investigation, accountants may identify the following:

- Additional issues or red flags that warrant exploration
- Information to obtain from the client and potentially other sources
- Witnesses to consider interviewing
- Possible financial analyses and theories to incorporate into the ongoing investigation strategy
- Determinations or conclusions that may warrant additional or different investigation strategy or scope

Any, or a combination, of these may cause you, the accountants, and/or the client to suggest a change in the scope of the investigation. Generally, such investigation-scope changes do not affect the accountants' scope of work as set forth in their engagement agreement.

Step 6 – Culminating the Forensic Accountants' Work: Work Product, Recommendations, and Presentation Considerations

At the conclusion of the accountants' work or of the investigation, the forensic accountants will typically present

their findings to you. The findings can be presented orally, or in writing, or a combination of the two while being mindful of attorney-client privilege and the possibility of creating discoverable materials. When reporting their findings, forensic accountants should describe all of the following:

- The initiating event / scope of work
- The process and procedures followed/undertaken
- The documents and data reviewed
- Their findings relating to any financial/accounting issues
- Any recommendations or next steps the client should consider based upon their findings

Although sophisticated forensic accountants are generally well-versed in privilege issues, counsel should nonetheless remind them of privilege and work product protections. Forensic accountants should mark work product as "confidential" and "attorney-client privileged" as appropriate.

With respect to accountants' recommendations, typically fraud or corruption occurs when either corporate controls are missing or established controls are circumvented. Forensic accountants can typically make recommendations covering a broad range of topics depending on the nature of the investigation at hand and the fraud schemes identified. The types of possible recommendations are too numerous to list but could include things like:

- Establishing/strengthening controls around onboarding and monitoring of third parties
- Establishing/strengthening controls around cash disbursements including the detection of manual payment, duplicate payments, offshore payments, round dollar payments, etc.

- Establishing/strengthening controls around the preparation and review of manual journal entries
- Ensuring/strengthening adequate controls over pricing, rebates, and discounts
- Ensuring adequate segregation of duties across key functions
- Establishing/strengthening controls and monitoring around disclosures of conflicts of interest
- Putting in place mechanisms to monitor corporate transactions for the identification of red flags and suspicious transactions

You can incorporate the accountants' findings into reports to the client and, if the investigation remains ongoing, into the investigation inquiries. It is generally best to provide interim reports orally. As for whether there should be a written report at the conclusion of the investigation, counsel and the client should thoroughly assess the purpose, findings, recommendations, and necessity of a written report prior to its preparation. When preparing the final report, you should be mindful that different U.S. jurisdictions may take a different approach to its discoverability.

If the forensic accountants conclude their work prior to the investigation's conclusion, it may be advantageous to keep them retained for any potential new accounting issues that may arise. After the investigation has concluded and all reports are finalized, the forensic accountants' engagement can be terminated. Their work product created throughout the course of the investigation should be sent to counsel to be handled with other work product in connection with the investigation.

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Elissa McClure is a partner in Holland & Knight's Dallas and Orange County offices who focuses her practice on complex commercial litigation, white collar criminal investigations and internal investigations. She advises clients, including Fortune 500 companies and individual executives, in all stages of disputes, from pre-litigation strategy through trial and appeal. Ms. McClure has extensive experience advising clients in connection with the False Claims Act (FCA), the Anti-Kickback Statute and the Stark Law, as well as government and corporate investigations involving the Foreign Corrupt Practices Act (FCPA), consumer protection, healthcare enforcement, trade secret misappropriation, discrimination, whistleblower, regulatory, accounting and securities fraud matters.

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