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# BOARD OVERSIGHT IN SPECIAL COMMITTEE INVESTIGATIONS

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EXPERT FORUM

# BOARD OVERSIGHT IN SPECIAL COMMITTEE INVESTIGATIONS



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## **R&C: What developments are most significantly changing how boards of directors oversee special committee investigations today?**

**Canova:** Boards today are overseeing special committee investigations in a more complex environment – shaped by expanding whistleblower activity, increased civil litigation, an evolving regulatory agenda, frequent and complex cyber and data privacy incidents, as well as heightened expectations associated with independence, documentation and disclosures. Specifically, recent Securities and Exchange Commission (SEC) enforcement trends, Department of Justice (DOJ) guidance and case law have all prompted boards to respond with greater urgency, document oversight more carefully and demonstrate independence in appearance and in fact. Boards are also under growing investor and stakeholder expectations to demonstrate that investigations are not simply reactive exercises, but rather critical to broader corporate governance and prospective risk management. Consequently, oversight is becoming more structured, with clearer protocols for escalation, counsel and adviser selection, reporting lines and remediation.

**Eichenberger:** The SEC's recent policy reforms have greatly impacted board-led investigations.

Under Gary Gensler, former chairman of the SEC, the agency was focused on ensuring that 'gatekeepers' protected market participants from corporate fraud. This created an adversarial dynamic where board members who did not adequately investigate potential red flags faced SEC enforcement. What we are seeing under the lead of Paul Atkins, current chairman of the SEC, is different. Independent, board-level investigations are still tremendously important, but the incentives, and the mandate, are different. The SEC has made clear that companies are more likely to receive lenient treatment if they conduct credible inquiries and promptly report any misconduct. Because staff are placing a premium on independent investigations, boards overseeing special committee investigations are laser-focused on structuring independent, fact-driven processes that will withstand SEC scrutiny.

**Farrar:** Special committees have become much rarer in recent decades – thus, the biggest change has not been how boards oversee such investigations, but whether they do so. Under the Sarbanes-Oxley and Dodd-Frank Acts, whistleblower infrastructure became more sophisticated and standardised. As a result, special committees became reserved only for seismic, C-suite-level crises – and these have been easier to identify in today's more sophisticated internal allegation and investigation management environments.

Additionally, DOJ corporate whistleblower pilot programmes incentivised accelerated self-disclosure, meaning that initial triage decisions happen more quickly at the chief compliance officer (CCO) or general counsel level. Finally, on the accounting front, financial statement quality has improved dramatically. According to recent studies from the Center for Audit Quality and Ideagen Audit Analytics, SEC-reporting companies are filing record-low numbers of restatements. This is one indicator that financial reporting quality has improved, thereby decreasing the need for special committees.

### **R&C: How are boards formalising early investigation triggers from whistleblowers and disclosure controls without overreacting?**

**Eichenberger:** Boards need to ensure that companies have mechanisms to identify 'mission-critical' risks without reflexively converting every internal complaint into a costly inquiry. One way to do this is by instituting written procedures to categorise incoming whistleblower reports by risk profile. The goal is to create a company-specific process that distinguishes between operational issues that can be handled through ordinary compliance processes and matters that may warrant board attention. For example, complaints involving concerns about revenue recognition or misconduct by senior officers

might trigger heightened scrutiny, whereas more ordinary-course personnel disputes would be routed through compliance. Before higher risk complaints make their way to the board, though, they are often reviewed by disclosure committees – typically led by in-house counsel – that are tested by making rapid credibility and materiality assessments. Ultimately, the goal is to create a disciplined triage process that will satisfy SEC expectations without overreacting to ordinary course issues that can be resolved without board involvement.

**Farrar:** Today's board systems and controls exhibit a healthy maturity that help companies methodically handle reports and, importantly, prevent panic. Historically, a whistleblower letter would trigger alarm and hasten calls for the creation of a special committee. But now, publicly traded companies have internal structures in place to help evaluate and address these allegations in a routinised, structured way. Often, the complaint might be routed to a general counsel or CCO for initial triage, and that person will issue legal holds, evaluate whether the matter requires escalation to the board, decide whether there should be further investigation and sometimes determine whether outside legal help will be required. Following the steps of this regularised protocol provides the company a more predictable, composed process than one might have seen in the past.

**Canova:** Boards are increasingly formalising a process that links early investigation triggers – including whistleblower reports, internal audit findings, compliance anomalies and subpoenas – to documented escalation protocols. The objective is not to investigate every red flag, or even allegation, as a full-blown crisis. Accordingly, leading boards apply a defensible triage framework based on factors including, for example, the seniority of implicated parties, financial statement implications, legal exposure, extent of recurring nature and reputational risk. Well-designed protocols help boards distinguish between matters subject to management review or internal compliance follow-up versus independent committee involvement. This approach promotes a balanced, risk-based response, while illustrating for regulators that the company has a disciplined reporting and escalation process.

### **R&C: What does ‘true independence’ now mean for special committee members and advisers in the eyes of regulators and courts?**

**Canova:** ‘True independence’ means more than satisfying technical director independence rules. Regulators and courts increasingly focus on whether committee members and advisers are free from relationships or incentives that could reasonably call their judgment into question. For special committee

members and their advisers, that includes business, personal, financial, shared community affiliations, or professional ties to the company and its vendors or customers, implicated executives or other interested parties. It means examining prior relationships and representations, fee dependence and any role that could compromise objectivity or even make them a witness. Some courts have emphasised process credibility and the importance of an unbiased decision maker in conflicted situations. At the same time, regulators look closely at whether the investigation team was independent not only in fact but appearance, especially where the company is seeking reduced penalties for cooperation or self-reporting. In practice, experienced boards are performing more robust independence vetting and documenting those assessments at the outset.

**Farrar:** At minimum, ‘true independence’ means that special committee members or advisers have no stake – financial or otherwise – in the matter over which they have oversight authority. The analysis is case specific – even if a person’s job title does not make obvious a conflict, they may exhibit a personal conflict that requires consideration. Typically, if a board member was involved in the company’s earlier decision now under scrutiny, or has personal ties to an investigation’s subject, that board member would not serve on the special committee. On the other side of the ledger, there is a substantive

component that concerns the investigation's scope. 'True independence' requires that the committee have access to all materials that might be needed to conduct thorough inquiries. The relevant question is whether the committee has sufficient factual understanding of the analytical materials to make a thorough and knowing recommendation on the issues the committee is considering.

**Eichenberger:** 'True independence' for special committee members means more than just absence of formal conflicts. At a minimum, special committee members need to be free of any relationships that could be seen as impairing their individual judgment. These can include business relationships, social and professional connections, and income sources. The independence assessment does not stop once the special committee is empanelled. To maintain 'true independence' throughout an investigation, a special committee needs to execute an independent process. The hallmarks of a truly independent process include the retention of independent counsel, the ability to control the scope of the investigation, and unfettered access to the documents and witnesses. Advisers, particularly lawyers assisting special committee investigations, play an equally important role in ensuring true

independence and must, at a minimum, undertake their own detailed conflict checks, and ensure that neither their process nor their findings were curated by management.

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*Sarah Eichenberger,  
Katten Muchin Rosenman LLP*

### **R&C: Why are boards increasingly favouring independent external counsel over in-house teams for sensitive investigations?**

**Farrar:** At the outset, in-house teams are extraordinarily skilled and sophisticated, but they have day jobs that are very demanding. Accordingly, inside counsel does not have the bandwidth to take on a fast moving, complex, drop-everything investigation. Outside counsel also gives an

investigation credibility in a few specific ways. First, the lawyers are external to the company and are able to assess issues working on a blank slate. This provides the investigation independence and impartiality, both perceived and actual. Second, outside counsel lacks the resource constraints that smaller organisations might have – law firms can conduct investigations that are as wide and deep in scope as necessary to fully complete the job. Third, lawyers in private practice routinely handle complicated, difficult and sensitive investigations. They therefore possess a depth of experience that provides legitimacy to both the investigative process and its outcomes.

**Eichenberger:** Sensitive board-level investigations are inherently more likely to attract scrutiny from regulators and stockholders. Designing a process that can withstand such scrutiny means ensuring that it is credible. Independence, of course, is one aspect of credibility, and outside counsel are often perceived by courts and regulators as having more independence than in-house legal teams who may have disabling relationships with the person or persons under investigation. A second, equally compelling reason for involving external legal counsel relates to legal privilege and work product protection. Regulatory matters often segue into civil actions, where private

litigants frequently seek a special committee's work product. Because in-house counsel wear both business and legal hats, having an investigation

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*Melissa Farrar,  
Gibson Dunn*

managed by external legal counsel more clearly establishes the legal purpose of the inquiry, and can strengthen privilege or work product protections down the road.

**Canova:** Depending on the nature of the matter, boards may favour independent external counsel and advisers because of the objectivity and credibility they bring to the process. For such matters, the composition of the investigation team, and the independent nature of its process, can mean as much as the underlying findings. Independent external counsel can provide greater separation

from management, mitigate concerns or perceptions that internal counsel may be conflicted or too close to the issues, and strengthen confidence among stakeholders – whether regulators, auditors, investors or courts. This is particularly important when allegations involve board members, senior management, financial reporting, bribery or sanctions. For example. Independent counsel and advisers typically bring deeper investigative expertise and technology, specialised capabilities, and a track record of defending privilege and work-product considerations. While in-house teams no doubt remain essential partners, many boards often conclude that an externally led investigation better supports credibility, defensibility and stakeholder trust in higher-risk matters.

### **R&C: How can boards effectively narrow investigation scope without undermining credibility or regulatory trust?**

**Eichenberger:** There are many benefits to having a focused investigation. Even putting aside the issue of resources, having a streamlined prerogative helps special committees and their advisers to dig deeper on the relevant issues. Enforcement staff under the Mr Atkins-led SEC understand this, and have shown a willingness to defer to the results of investigations as long as there is principled basis for their scope. One way to focus the investigation is to define the

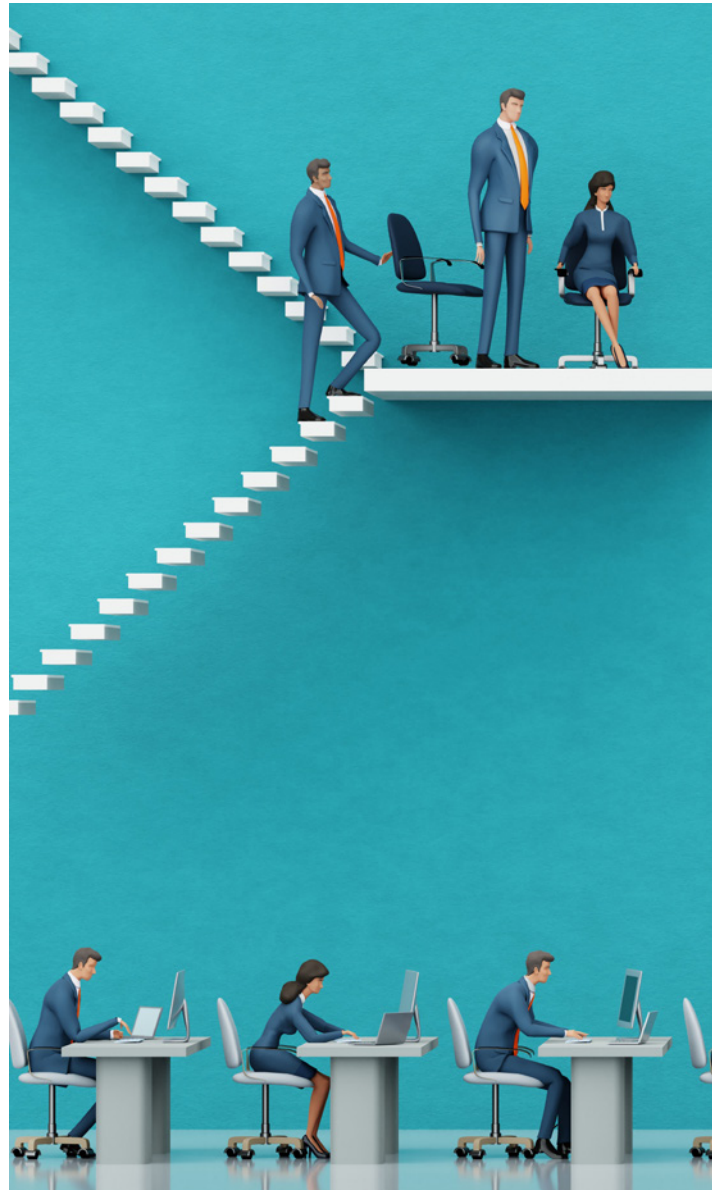
core issues from the outset. Because investigations frequently involve subjective questions, anchoring the work plan in objective, data-driven thresholds – such as specific financial materiality limits, geographic boundaries or discrete timeframes – can help articulate clear boundaries. Memorialising this scope in writing ensures that all stakeholders understand the goals, and the limits, from the outset. A word of caution, though: because investigations are inherently dynamic, boards and special committees should be prepared to revisit the scope of the investigation if doing so is warranted by the facts.

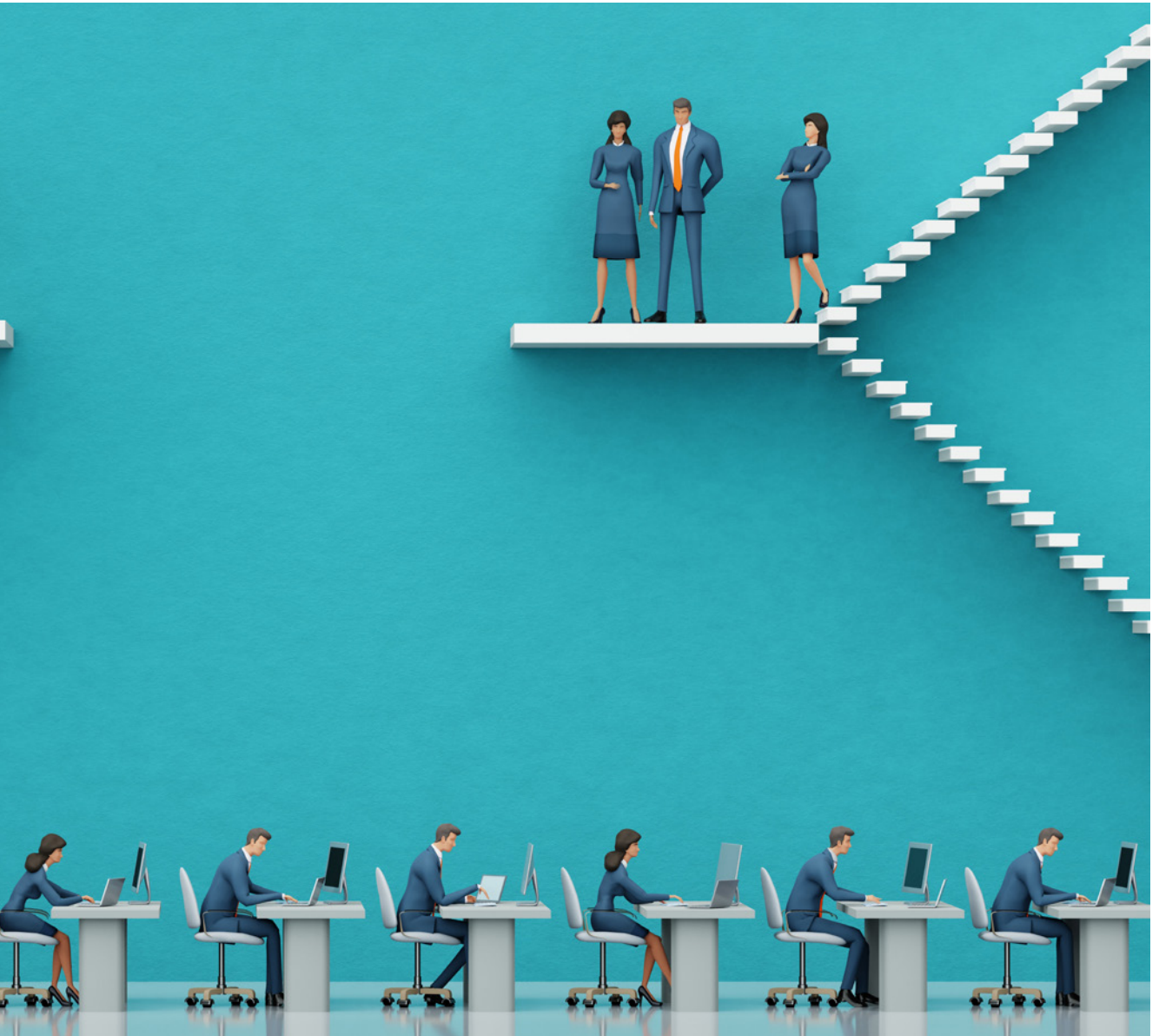
**Canova:** Protocols that link investigation triggers to escalation thresholds – and the corresponding nature and extent of the scope – do matter. Importantly, boards do not ‘narrow’ but right-size an investigation’s scope based on the nature of the matter and according to its formalised process – which, critically, includes an initial risk assessment. A credible scope should reflect and consider the nature of the core allegation, affected business units and geographies, relevant time period, associated personnel – both target and witnesses – and any indicators of control issues. Boards often preserve credibility by setting an initial scope while revisiting it as evidence emerges, with the special committee and counsel documenting why and how the scope has changed. This iterative approach shows regulators and auditors that the inquiry is targeted

yet adaptable. Transparency and consistency in process, and the willingness to expand scope when warranted, is often what sustains trust. The strongest investigations align scope with the issues, risks and objectives most material to the company and its stakeholders.

**Farrar:** Boards can narrow investigations effectively by delineating the key issues at play in a clear scoping memo, and with the aid of outside counsel when and where it makes sense. That exercise allows the board to focus on material issues without losing sight of its obligation to uncover bad facts where they may exist. Properly done, narrowing an investigation can strengthen the credibility of the findings, because it directs attention and resources to the areas likely to unearth wrongdoing and lead to compliance enhancements, rather than boiling the ocean to address every concern without first appreciating whether those concerns carry meaningful risk to the company. To preserve trust with regulators, the board should be clear about what it is – and is not – reviewing and document where those lines were drawn. But it should also remain willing to revisit lower-priority investigative areas if and when the facts warrant it.

**R&C: What are the biggest privilege risks when sharing investigation insights**





## with auditors and regulators, and how are boards managing them?

**Farrar:** The biggest privilege risks include possible waiver when sharing information with regulators and certain waiver when sharing with auditors, even though internal investigation work product and communications may otherwise be protected by attorney-client privilege and work product doctrine. Disclosing key facts to regulators may demonstrate cooperation, but detailed interview readouts or reports can create waiver risk, and risk of compelled disclosure in later proceedings. Boards manage that risk by separating privileged analysis from underlying facts, considering confidentiality agreements, and, where available, seeking rule 502(d) orders, which can limit waiver consequences. Waiver rules remain highly fact-dependent and jurisdiction-specific. Disclosures to auditors will waive privilege, though not necessarily work product protections. Courts increasingly scrutinise whether materials were prepared in anticipation of litigation to qualify as work product, particularly where the investigation was driven by third party auditor requests. Boards therefore should define counsel's role carefully and review information to be shared with auditors.

**Canova:** Privilege risks are greatest when boards share investigation findings too broadly, especially with external auditors, regulators, lenders or business

personnel who do not have a need for privileged information. Formal deliverables, written summaries and even verbal updates can all create waiver arguments. Auditors present a particularly sensitive scenario because companies often need to share sufficient facts for audit purposes without disclosing privileged information. Boards are managing this by separating factual findings from legal advice, tightly controlling who receives information, using counsel-led communications and carefully documenting confidentiality expectations where appropriate. In some cases, special committees provide high-level factual briefings instead of full reports. Because privilege rules vary by jurisdiction and context, boards are taking a more deliberate, tailored approach to information sharing and, of course, conferring with their legal counsel.

**Eichenberger:** Special committees that share information with regulators and auditors risk a potential subject matter waiver in related litigation. Most circuits hold that sharing attorney-client communications with regulators or auditors generally waives the attorney-client privilege. While there is some precedent for using confidentiality agreements to minimise risk of waiver, a number of courts have made clear that those have limited utility. Work product, though, is treated differently, and some courts, most recently the Sixth Circuit, have held that sharing investigative conclusions does not

waive work product protection as long as doing so does not reveal attorney opinions. The practical takeaway for boards is, first and foremost, to refrain from sharing privileged communications. Maximising work product protection is somewhat easier. First, it requires that the investigation has a documented litigation-related purpose. Second, it requires that lawyers restrict their communications to factual issues.

**R&C: How is board-level oversight evolving to ensure investigations deliver visible remediation rather than just factual conclusions?**

**Eichenberger:** Being able to point to tangible remediation is extremely important. In fact, the SEC's updated Enforcement Manual makes clear that one of the factors weighed in connection with cooperation credit is the extent to which the identified harm was remediated. As a result, boards are becoming more involved in tracking remediation, especially the remediation of 'mission-critical' risks. Many audit and special committees now work closely with compliance, internal audit, cyber security and human resources functions to ensure investigative findings translate into revised policies, enhanced disclosure controls, executive accountability

measures or targeted training initiatives. Ensuring visible remediation often requires that boards work with these professionals to develop written

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BDO*

plans, set timelines and receive periodic reports on implementation progress. Follow-up is equally important and boards often look to the internal audit function to review process improvements at specified intervals to ensure that the remediation strategy is working.

**Canova:** Board-level oversight is increasingly focused on whether an investigation drives timely, visible remediation rather than simply producing a factual record. Regulators assess not only whether misconduct was investigated and substantiated, but whether root causes were identified, control gaps were addressed, responsible individuals were

disciplined and how the compliance programme, including risk assessment, evolves. In response, boards are demanding clearer remediation plans, management accountability, timelines, and reporting and monitoring subsequent to the investigation. Special committees are also more likely to track whether policy revisions, control enhancements, training, incentive changes and monitoring improvements were actually implemented and tested. This reflects a broader shift in governance. The response is no longer seen as complete when facts are gathered, but when the organisation can demonstrate a credible response that reduces the risk of recurrence.

**Farrar:** Board-level oversight is evolving to focus not only on what an investigation found, but on how the company addressed identified gaps and

misconduct. The completion of an investigation should not necessarily end board oversight of the matter. Boards can and should ensure that the requisite compliance uplifts are being identified, implemented and tested, particularly where the investigation revealed gaps in controls or pathways of proper escalation. To do that, boards often keep investigation-related remediation on their agendas and set callback intervals – such as three or six months – for management to report on compliance improvements to date. Those updates should address what has changed based on gaps identified in investigations, whether those changes have been effective, and whether any additional controls are needed. A board's role is to ensure that investigative findings lead to visible corrective action and that the company is taking meaningful steps to reduce the risk of recurrence. **RC**

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