

Miller & Chevalier

Avoiding Investigation Pitfalls: A Boots on the Ground Perspective

October 24, 2018

David Ikenna Adams, Compliance Counsel, Eaze

Ann Sultan, Counsel, Miller & Chevalier

Introduction

- **David Ikenna Adams, Compliance Counsel, Eaze**
 - Former Life: Latham & Watkins LLP – White Collar & Investigations Group
 - Now: Regulatory Compliance, Product Compliance, Litigation
- **Ann Sultan, Counsel Miller & Chevalier**
 - Focus: Internal investigations, international corporate compliance, white collar defense and FCPA issues.

Agenda

- Expectations for Investigation Procedures
- Benefits & Risks of Properly-Conducted Investigations
- Preliminary Considerations
- Planning the Investigation
- Information Gathering
 - Data Preservation, Collection & Review
 - Interviews
- Concluding the Investigation
- Remediation & Corrective Actions
- Communications Strategies

Expectations for Investigation Procedures

- To be effective, corporate compliance programs must have procedures designed to detect, investigate and remediate potential violations of company policy or applicable law
- Investigation procedures should:
 - establish “an efficient, reliable and properly funded process for investigating [allegations] and documenting the company’s response, including any disciplinary or remediation steps taken” (*DOJ/SEC FCPA Guide*)
 - require that “reasonable steps [be taken] to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization’s compliance and ethics program” (*U.S. Sentencing Guidelines*)

Benefits of Properly-Conducted Investigations

- Opportunity to remove or sanction wrongdoers
- Demonstrate commitment to compliance and Code of Conduct
- Management review of existing corporate policies for effectiveness
- Government leniency and future credibility for corporations with good compliance programs and that disclose issues
- Early and accurate assessment of exposure and potential avoidance of formal legal proceedings and expenses
- Protection for Board of Directors and/or senior management

Risks of Properly-Conducted Investigations*

- Involves commitment to conclusion (and expense), which may take longer and be more involved than anticipated
- Can alarm auditors, making it difficult to get them to sign off on financials
- May expose evidence to discovery that outside party may seek through subpoena
- Possibly reveal need for remedial measures company does not want or that may entail substantial expense
- Reveal evidence that exposes corporation to criminal or civil liability

* Of course, there are also significant risks and pitfalls if not done properly

Preliminary Consideration: To Investigate or Not?

- Determining the credibility of an allegation
- Determining whether an investigation is needed
 - Code of Conduct violation?
 - Listing or other obligations to investigate evidence of material violations of law (E.g., SOX Section 307)
- Dealing with possible whistleblowers
- Documenting the handling of an initial allegation (especially if you do not launch full investigation)
 - Standard investigation protocol as part of compliance program
 - Use of staged inquiries
- Key Takeaway: Don't ignore any allegation

Preliminary Consideration: Stopping Questionable Conduct

- Based on initial assessment, have a protocol for stopping questionable conduct if needed, including:
 - Communications with relevant business units and exercise of accounting controls
 - Transaction-specific prophylactics
 - Considering “fast-track” review if more information needed to determine nature of conduct or if transaction timing matters
- Risk of later charges of management/company participation or acquiescence

Planning the Investigation

- Key questions:
 - Who is (and isn't) the client?
 - Reporting lines for investigators
 - Scope of potential issue – country, business line, third party, etc.
 - Scale of investigation team
 - Securing and preserving relevant information
 - Identifying relevant witnesses
 - Initial identification of key legal and factual issues
 - End goal and documentation of results
 - Might results be disclosed to government agencies?

Planning the Investigation Cont'd

- Choosing the investigation team
 - In-house vs. outside counsel – privilege and independence considerations
 - Using other resources (auditors, tech support, etc.) – documenting direction by counsel via engagement letters and communication protocols
- Consider Pitfalls in Advance
 - Protect whistleblowers
 - Prevent data tampering
 - Account for potential media inquiries

Planning the Investigation Cont'd

- **Know Your Client**
 - Are investigations common, or this is a first-go?
 - Will employees pay attention to a Litigation Hold?
 - What resources do they have for document collection?
 - What tools do employees use to communicate? Different teams talk differently.
- **Special Considerations**
 - Are any employees personally at risk? Do they need special attention?
 - Do you need to ask for personal devices?
 - Company deletion policies.

Planning the Investigation Cont'd: Implications of Multi-Jurisdictional Investigations

- **Preserving the Attorney-Client Privilege in Multi-Jurisdictional Investigations**
 - Consult with local counsel In some jurisdictions, use of in-house counsel may weaken privilege
 - When document production involves authorities in multiple jurisdictions, may need to adjust how the company defines the scope of the privilege
- **Data Privacy Laws**
 - Make no assumptions about data privacy laws in foreign jurisdictions; consult local counsel
 - If available, may be helpful to consult in-house data privacy specialists

Information Gathering: Data Preservation Considerations

- Data tampering concerns
 - Risks of sending document hold notices without taking immediate physical preservation steps
- Assess and address data privacy issues under relevant laws
- Document preservation efforts
 - Preservation steps are often a focus of enforcement agency attention
 - Possible obstruction of justice issues if evidence destroyed or tampered with by employees

Information Gathering: Data Preservation Steps

- Instruct employees, in writing, to preserve relevant documents and cooperate with investigation (the Preservation Order)
 - Provide a description of documents to be preserved
 - Inform employees that documents created after the Preservation Order are to be preserved unless told otherwise
 - Provide versions of Preservation Order in foreign languages, if international investigation
- With IT Dept. support, suspend automatic destruction of e-data

Information Gathering: Data Review

- Identify key materials by source, type, location, and custodian
- Preserve and access large set of recovered materials before running search terms, sorting, and reviewing
- Mirror hard drives and servers; search hard copy files; back up hand-held devices and cell phones when appropriate; consider need for telephone records, calendars and other documents
- Consider software or other types of analytics (e.g., predictive coding), which are increasingly being accepted by some government authorities
- As noted, underlying facts and data cannot be privileged, but analysis by counsel in appropriate conditions can be

Conducting Effective Interviews

- Preparation
 - Research and know applicable laws (and related issues such as accounting guidance, as well as internal compliance code requirements)
 - Prepare outline and documents to be presented
 - Face-to face vs. telephone vs. videoconference
 - Minimizing disruption to the business
 - Native-language resources and keeping local cultural context in mind
- Interview tips
 - Ask open-ended questions and keep an open mind
 - Focus on facts and follow up on contradictions
 - Use as tool for finding additional evidence and witnesses
- The importance of documenting interviews
- Avoiding any conduct or messaging suggesting retaliation

Instructing Interviewees on Rights and Obligations*

- Admonitions to interviewees:
 - Represent company, not the interviewee
 - Retained to investigate facts and give legal advice
 - Interview is protected by attorney-client privilege, but that privilege belongs to company, not employee, and interview contents can be disclosed to third parties, including government agencies (*Upjohn*)
 - Employee should keep interview confidential
 - It is vital that employee tell the truth
- Employee duty to cooperate and produce relevant company records
- Possible employee rights, depending on local laws
- Interviewing departed employees, third parties?

*Subject to change based on jurisdiction

Concluding the Investigation

- How much is enough?
 - Focusing on regions/key employees/similar business models
 - Considering jurisdictional and statute of limitations issues
 - Balancing what is necessary vs. what is achievable
 - What does DOJ/SEC expect?
 - FCPA Guide: “efficient, reliable, and properly funded process” + “documenting” company response
 - Standard question: “How can you assure us that the conduct/issue is limited to Country X or transaction Y?”
 - But, agencies do not want broad response at expense of focus on investigating/remediating main issues under review
- Written report or not?
 - Level of detail and management/Board preferences
 - Roadmap for government investigators? Cooperation obligations/credit?
 - Legal obligations to report and document
- Pros/cons of communicating with outside parties (auditors, insurance)

Remediation & Corrective Actions

- Response and remedial action should be **prompt and appropriate**
- Employee discipline
 - Local employment law issues and possible whistleblower considerations
 - Compliance program messaging
- Remedial internal action – programs and procedures
 - Revised policies, procedures, or internal controls
 - Correcting books and records
 - Revised compliance oversight, plus added auditing
 - Training on new procedures or substantive issues
- Remedial external action
 - Revision/enhanced examination of relationships with third parties
 - Restatements of financials or disclosure in public filings
 - Compensating injured parties

Communication Strategies: Voluntary Disclosure to Authorities

- Likelihood facts will come out independently
 - Posture of whistleblower
 - If authorities from more than one jurisdiction are involved, it may impact a company's decision to voluntarily disclose its misconduct due to increase in global cooperation.
- Severity of findings
- Impact of disclosure on privilege (third party litigants)
- U.S. authorities encourage self-disclosure
 - FCPA Corporate Enforcement Policy Creates a “presumption” of declination for organizations that voluntarily disclose FCPA violations to the DOJ, which may be overcome only if there are “aggravating circumstances”
- Various jurisdictions encourage disclosure and cooperation following introduction of DPAs (e.g., UK, France)

Communication Strategies: Voluntary Disclosure to Authorities

- Potential Benefits
 - Gives company the opportunity to frame the issue
 - May lead to a reduction in penalty or a dismissal of charge
 - Better negotiating position
 - Avoid harsher consequences of being prosecuted after failing to disclose
- Potential Risks
 - In U.S., if you voluntarily disclose, guarantees that investigation will follow, which is expensive, time-consuming, and could lead to liability.
- **Key Takeaway:** Calculus on whether or not to voluntarily disclose has shifted, as greater chance your misconduct will be discovered:
 - More authorities in different countries are now investigating these types of cases
 - Greater media focus; rise of social media and whistleblowers

Communication Strategies: Internal & External Communication

- Investigation must remain confidential until definitive findings determined
- Considered when defining communications strategies:
 - Posture of the investigation (publicly-disclosed, government facing?)
 - Determinant of rumors to organization v. reputational damage of disclosure
- Level of detail disclosed matters (retaliation concerns, privacy concerns, defamation suits, etc.)
- Can create a “teachable moment” to prevent future occurrences; any communication should emphasize steps taken by company to remediate and mitigate future risks

Surviving the Pitfalls

- Investigation plans rarely survive “the fog of war”
- Effective and timely communications among the investigation team and regular updates to management are critical
- Careful planning and using experienced in-house resources can manage costs, but external events sometimes can create significant, unexpected impacts
- Government inquiries from multiple jurisdictions are becoming the norm, and can greatly increase complexity
- Whistleblowers and the press remain as wild cards – have a plan for responses
- “Document, document, document” – be ready to look at what has been done years after the fact

QUESTIONS?



David Ikenna Adams
Compliance Counsel,
Eaze
dadams@eaze.com
(510) 334-1136



Ann Sultan
Counsel, Miller & Chevalier
asultan@milchev.com
(202) 626-1474