Avoiding Investigation Pitfalls: A Boots on the Ground Perspective

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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.

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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

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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

* 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
    - DOJ/SEC: “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. reputation 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?

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