Compliance Investigations
Lessons from the Trenches

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An Improperly Performed Investigation Creates More Risk Than it Mitigates

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Today's Agenda

1. Initial phases of an investigation
   - Scoping and risk assessment
   - Key steps in commencing an investigation
2. Use of third parties to assist with investigations
   - Under what circumstances
   - How to manage
3. Collection and use of data and other digital evidence
   - Types of digital evidence
   - Methods and tools used for collection
   - Use of forensic analytics

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PART 1

The Initial Stages of an Investigation

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What Triggered the Investigation?

- Allegation/tip
  - Anonymous v. known
  - Internal v. third party
  - Level of specificity
- Internal audit
- Other auditing/monitoring activity
- External process (government auditors, etc)
- How serious is the alleged or possible act?
  - Escalation issues?

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Allegations

- Perform preliminary assessment to determine whether an investigation is warranted
- Consider whether it is necessary to perform without subject's knowledge Covert v Overt
- Data analytics
  - Consider this – If the allegation is true, what impact would the act have on electronic data? How would the digital trail of the act differ from that of a valid transaction or act?
  - Data analytics is often the most practical method of establishing credibility of an allegation
- Document analysis
  - Look for red flags, characteristics that support or refute the allegation

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What Next?

- What type of compliance issue?
  - Bribery, conflict of interest, employee theft, fraud, privacy, data breach, environmental, financial reporting fraud, etc
- What level within the organization is implicated?
- Possible next steps:
  - If there is an allegation, assess credibility
  - Notify/engage legal counsel
  - Assemble team; Determine who investigates
  - Is subject currently employed with us?
    - Consider whether it is necessary to investigate without subject's knowledge

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Scope Considerations

- How specific/vague is the allegation or concern/red flag?
- Could additional individuals be involved?
  - Internal
  - Third parties (individuals or organizations)
- What other acts could the subject(s) have perpetrated?
  - Very common that if someone is engaged in wrongdoing, there are multiple schemes/acts
  - Perform role-based risk assessment
- How far back might the activity have been occurring?
- Are violations/losses potentially still occurring?
- How likely is it that other individuals may have witnessed the alleged wrongdoing?

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What are the Goals of the Investigation?

- Terminate employee?
- Stop the bleeding?
- Civil litigation to recover damages?
- Refer for criminal prosecution?
- Keep it quiet?

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Goals as Compliance Professionals

- Investigate processes, not people
- Ultimate goal is to find and fix the problem

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Identifying Records & Data Needed

- Develop process map of the transaction/activity cycle(s) involved in the target of the investigation
  - MUST understand how the transaction cycle operates in order to identify relevant records/people needed
- Based on this process map, identify:
  - People involved in each step
  - Internal controls
    - Preventive
    - Detective
  - Documents and forms
    - Received
    - Created
  - Electronic records
  - Systems and databases affected

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Identifying Records & Data Needed

- **Example** – For corruption in the purchasing cycle:
  - Identification and documentation of need
  - Development of specifications, if necessary
  - Solicitation of bids or negotiation with alternative vendors
  - Selection of vendor
  - Contract, statement(s) of work, etc
  - Purchase orders
  - Change orders, subcontracts, etc
  - Receipt of goods or services
  - Submission, review and approval of invoice
  - Payment
- In addition, what other internal records would we expect along the way? E-mails, electronic approvals, etc.

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PART 2

Use of Third Parties to Assist with Investigations

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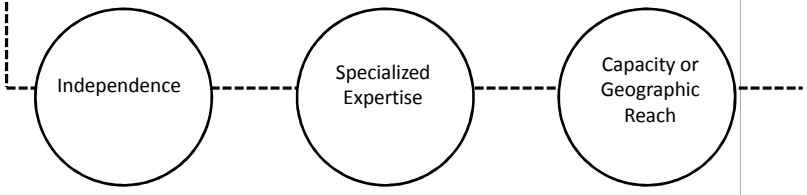
Why Use Third Party Assistance?



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When/Why Use Third Parties?

- **Independence**
  - For example, certain investigations of C-level execs, board members, etc
  - Relationships – family, financial, etc
  - Past history with subject/department
- Appearance/reputation also matters, not just independence in fact
  - Certain critical/public investigations
- However, make sure the third party is independent
  - In larger organizations and larger third party firms, this isn't always obvious
  - Independence checks should be performed

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When/Why Use Third Parties?

- **Specialized expertise**
  - eDiscovery
  - Data extraction and analytics
  - Case management
  - Interviewing
  - Subject matter expertise (e.g. accounting fraud,)

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When/Why Use Third Parties?

- **Capacity or geographic reach**
  - We have talented people, but not enough time
  - Remote location, impractical for us to investigate

Policy Consideration

- Among the policies that should be in place pertaining to investigations, the issue of when to use third parties should be included
  - Authority to hire third parties
  - Under which circumstances

Understanding the Goals

- What are the goals of the investigation?
  - Determine who did it?
  - Determine how they did it?
  - Determine damages?
  - Terminate guilty employees?
  - Take legal action to recover?
  - Criminal charges?
  - Minimize organizational liability?
- This may drive some of the decisions surrounding the use of outside experts

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Outside Experts – Two Types

- Consulting experts
- Testifying experts
  - Subject to U.S. Federal Rule of Evidence 702 and Daubert challenge - A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
    a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
    b) The testimony is based on sufficient facts or data;
    c) The testimony is the product of reliable principles and methods; and
    d) The expert has reliably applied the principles and methods to the facts of the case

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Using Third Parties – Engagement Phase

- Key issues before engaging:
  - Background check
    - Firm
    - Individuals working on your engagement
  - Clarification of scope
  - Fee structure (fixed price, hourly, etc)
  - Engagement letter, proposal, professional standards

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Third Parties & Privilege

- Use of third party consultants, retained by legal counsel, reinforces privileged status of investigation
  - Underscores that investigation not a routine business function
  - Facilitates legal counsel control of third parties' work product
  - Controls distribution of third parties' work product to protect privileged information

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Privilege Issues with Third Parties

- Keeping legal counsel "in the loop" with third party consultants
- Risk of waiving privileges when third party consultants communicate exclusively with non-lawyers
- Third party consultants using subcontractors

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Using Third Parties – Work Phase

- How should you deal with each of the following key issues?
  - Introduction, integrating into the "team"
  - Supervision of third party contractors
  - Responsibility for their work product
  - Third parties communicating with third parties
  - Managing the investigation
  - Scope creep
  - Reports from outside experts
  - Closeout of engagement

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PART 3

Use of Digital Evidence
And Data Analytics

Preserving/Collecting Electronic Evidence

- Issue a document/record hold notice based on process map explained earlier
  - Identify relevant records
  - Identify relevant record custodians (may include third parties, cloud storage, etc)
- Negative implications of information being lost/altered
- ESI (electronically stored information):
  - What ESI is relevant?
  - What format is it in?
  - Where is relevant ESI stored?
  - How do we ensure we collect it all?
  - Proper collection (use forensically recognized technologies)

Tools

- Forensic imaging
- Hand-held devices
- eDiscovery
- Link analysis
- Data analytics
- Graphic depiction of data

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Uses of Data Analytics & Forensic Tools

- To assess credibility of an allegation or concern
- To determine which documents and records should be inspected
- To identify additional individuals who may have been involved
- To prioritize or identify suspect transactions
- To determine where internal controls broke down or were intentionally violated
- To assess whether noncompliance was intentional or accidental
- To estimate the full extent of the problem

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Data Analytics to Assess the Allegation

- Data analytics can be used to assess the credibility of an allegation, helping to determine whether to launch an investigation
- If the allegation is true:
  - What data would be created or touched in the processes involved
  - How would characteristics of the data associated with noncompliant activities differ from data involved with compliant activities
  - Perform data analytics to se if these characteristics are present, consistent with noncompliant activity
  - Data analytics does not prove fraud, corruption, noncompliance, etc; But it can provide evidence of characteristics that are consistent with such improper activity

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Framework for Using Data Analytics

- Which data is affected, and how, in each stage of a compliance issue:
  - Preventive control that should have prevented the act
  - Perpetration/violation - the act itself
  - Concealment – is often separate from the act itself
  - Detective control that should have detected the act
  - Effects of the act (if any)
- How would data associated with an improper transaction/activity differ from that of a legitimate one?

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QUESTIONS ??

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