

# INTO THE WOODS

Plotting a Course for a Successful Internal Investigation

December 2022 Association of Corporate Counsel – South/Central Texas Chapter

# Today's Agenda

Regulation and Enforcement in 2022



Into the Woods: The Life Cycle of an Investigation



Case Studies



Key Takeaways



Questions and Answers



# Up next...

Regulation and Enforcement in 2022



# Regulation and Enforcement 2022



- Biden administration focused on antitrust, cybercrime, environmental, corporate fraud, and pandemic fraud.



- Recent update to Corporate Criminal Enforcement Policies



- New “aggressive” posture, no admit / deny DPAs, focus on auditors as fraud detectors

Up next...



**Into the Woods: The Life Cycle of an Investigation**



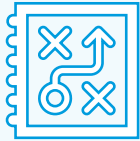
# Into the Woods: The Life Cycle of an Investigation

Identify



- Understand potential sources of investigation allegations and tips, whether internal or external, and their implications.

Plan



- Sketch out objectives of the investigation, the appropriate scope, the right team, and leadership/communication protocol.

Investigate



- Conduct the investigation with a focus on documents and data, information-gathering interviews, ordering of tasks, development of summary and demonstrative information, and the impacts of COVID-19.

Remediate



- Align investigation results with objectives, including an understanding of stakeholders and regulators, as well as any duties to disclose or self-report.

Report



- Present the narrative to management, the board, regulators, or the media appropriately to meet objectives (and comply with best practices).

# Into the Woods: Identifying the Problem

Identify



– Understand potential sources of investigation allegations and tips, whether internal or external, and their implications.

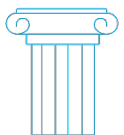
## In-House



Internal Audit



Whistleblower/Ethics Hotline



Legal and Compliance

## External



Subpoena/Request



Regulatory Sweeps



Media

# Into the Woods: Planning the Investigation

## Plan



- Sketch out objectives of the investigation, the appropriate scope, the right team, and leadership/communication protocol.

### Goals of the Internal Investigation

- Process improvement?
- Quantify loss?
- Assess compliance?
- Root out bad actors?
- Meet regulatory requirements?
- Avoid penalties/bad press?

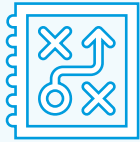
### Scope of the Internal Investigation

- Data and Documents
- Time Period
- Geographies
- Business Segments/Corporate
- Questions to Be Answered
- How to Meet Goals



# Into the Woods: Planning the Investigation

Plan

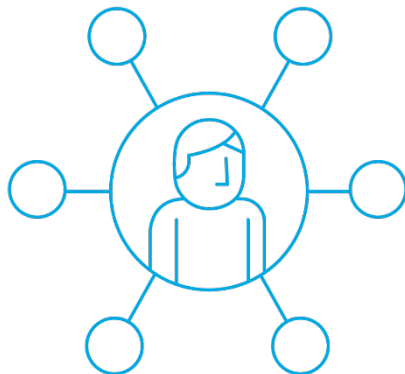


- Sketch out objectives of the investigation, the appropriate scope, the right team, and leadership/communication protocol.



## Assembling the Right Team

What departments, skills, geographies, and experiences are needed *to form the right team* to conduct the investigation?



## Assuming Leadership Responsibilities

Who is leading the investigation, and why? What is the appropriate flow of information and communication throughout the investigation?

# Into the Woods: Conducting the Investigation

Investigate

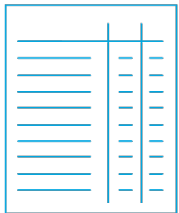


– Conduct the investigation with a focus on documents and data, information-gathering interviews, ordering of tasks, development of summary and demonstrative information, and the impacts of COVID-19.



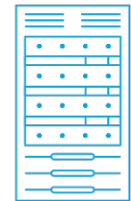
## Company Contacts

Identify personnel at company to support investigation, including legal, IT, operations, finance, and other leaders.



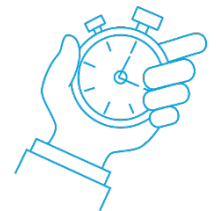
## Documents and Data Analysis

Design and implement data collection, document review, and case management systems to process information for investigation.



## Interviews and Counsel Participation

Conduct interviews with key company personnel based on review of documents and data; consider privilege requirements.

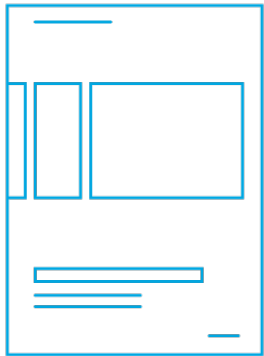


# Into the Woods: Conducting the Investigation

Investigate



- Conduct the investigation with a focus on documents and data, information-gathering interviews, ordering of tasks, development of summary and demonstrative information, and the impacts of COVID-19.



## Deliverables and Investigation Conclusion

- Verbal briefing
- Written report
- Workpapers and native files

*What is required to communicate the results of the investigation to meet its objectives, while limiting the risk to the company, counsel, and investigators?*

## Considerations of Use

- Supporting arbitration/mediation
- Providing expert testimony
- Shared directly or repackaged

*How will the output of the investigation be used, and by whom?*

# Into the Woods: Remediation

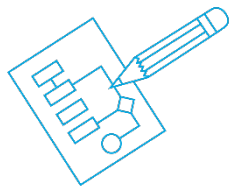
Remediate



- Align investigation results with objectives, including an understanding of stakeholders and regulators, as well as any duties to disclose or self-report.



Identify appropriate stakeholders and the associated information for each, including the board, regulatory agencies, company auditors, and investors at large.



Develop a remediation plan to *fix* any identified issues as well as *stop* other issues from arising in the future.



Consider whether self-reporting to regulators is beneficial to the company and when to notify agencies.

# Into the Woods: Reporting

Report



- Present the narrative to management, the board, regulators, or the media appropriately to meet objectives (and comply with best practices).

## Cooperation and Sentencing Considerations



### Seaboard Report

*Cooperation credit in enforcement actions*



### Yates Memorandum

*Regulatory focus on individual accountability*



### Corporate Penalties

*Factors that impact the outcome*

# Up next...



**Case Studies**



# Case Study - HeadSpin

- Provides data around testing, performance monitoring, and quality of experience (QoE) management for mobile apps
- SaaS-type business, valuation based on changes to annual recurring revenue or ARR

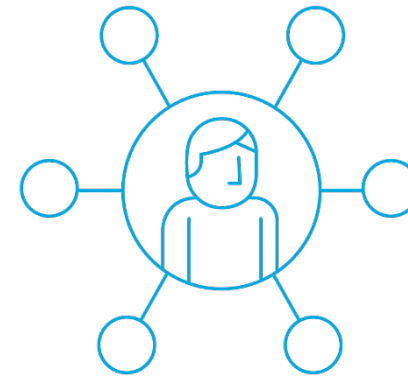


# Case Study - HeadSpin

- Provided services *directly to corporate customers*



- Worked with *third-party resellers* to market and sell



- Sales agreements were known and binding

- Sales agreements could be binding or *letters of intent*



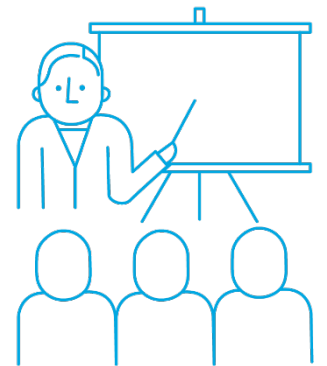
# Case Study – HeadSpin



- CEO Manish Lachwani
- Maintained ARR calculation / presentation in an Excel spreadsheet
- Garnered valuations in Series B and C of \$500 million and \$1.1 billion, respectively

# Case Study - HeadSpin

- ARR was inflated by Lachwani to make the company appear more valuable
- Lachwani used the ARR spreadsheet to entice investment into HeadSpin
- Company valued at \$1.1 billion during Series C funding round



# Case Study - HeadSpin



- Mar 2020 – Board made aware of ARR issues; investigation conducted



- ARR of \$80 million written down to \$10 million
- Valuation falls from \$1.1 billion to \$300 million



- May 2020 – CEO forced to resign
- Board hires new CEO, COO, GC, Controller

# Case Study - HeadSpin

## Press Release

### Remediation Helps Tech Company Avoid Penalties

SEC's fraud case against Silicon Valley-based HeadSpin,  
Inc.'s former CEO is ongoing

**FOR IMMEDIATE RELEASE**

**2022-14**

Washington D.C., Jan. 28, 2022 — The Securities and Exchange Commission today announced settled fraud charges without a penalty against HeadSpin, Inc., a private technology company that made significant remedial efforts in the wake of an internal investigation into misconduct by its now former CEO.

*"HeadSpin's remediation and cooperation included not just its internal investigation and revised valuation, but also repaying harmed investors and improving its governance—all of which were factors that counseled against the imposition of a penalty in this case."*

# Case Study – Ericsson

- Settled 16 year FCPA allegations in 2019
- Almost \$1 billion in fines and penalties
- Required to hire independent monitor for three-year period
- Plead guilty to inappropriate activity in Djibouti, China, Vietnam, Indonesia, and Kuwait



# Case Study – Ericsson

## Kitchen Sink of ABAC / FCPA Violations:



Djibouti: setup sham consulting firm to pay spouse of government official



China: payments to third party providers for services not performed; slush-fund travel expense account for government officials



Vietnam: payments to consulting firm associated with customers to then pay providers who would not pass company due diligence procedures



Kuwait: paid off government insider for information about changes in telecommunications needs of Kuwaiti infrastructure



Indonesia: off-the-books slush fund payments

# Case Study - Ericsson



Three Year Monitor appointed to review Ericsson response to DOJ-identified issues

- The main responsibilities of the monitors include the review of:
  - compliance with the terms of the regulations
  - the assessment of the company's progress in the implementation and operation of its improved compliance program and the accompanying controls
  - the formulation of recommendations for improvement.

**POHLMANN & COMPANY**

# Case Study - Ericsson

- DOJ informs Ericsson that it breached DPA terms based on previously undisclosed conduct in Iraq
- Ericsson argues that this conduct was covered in prior investigation
- Time will tell...

## Update on Deferred Prosecution Agreement

Available in English [Svenska](#)

PRESS RELEASE | MAR 02, 2022 04:45 (GMT +00:00)

[About Ericsson](#)

On December 6, 2019, Ericsson entered into a Deferred Prosecution Agreement (DPA) with the United States Department of Justice (DOJ). On March 1, 2022, the DOJ informed Ericsson that the disclosure made by the company prior to the DPA about its internal investigation into conduct in Iraq in the period 2011 until 2019 was insufficient. Furthermore, it determined that the company breached the DPA by failing to make subsequent disclosure related to the investigation post-DPA. The company is in communication with the DOJ regarding the facts and circumstances of the breach determination and is committed to co-operating with the DOJ to resolve the matter.

At this stage it is premature to predict the outcome of this matter.



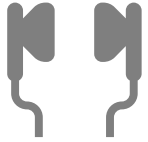
# Up next...



## Key Takeaways



# Key Takeaways



**Follow emerging trends and regulatory priorities.**



**Be prepared to investigate credible tips and take action.**



**Enforcement actions reveal best practices—and cautionary tales.**

# And finally...



## Questions and Answers

THANK YOU