

Corporations Under Fire: Navigating Investigations in the New Era of Enforcement

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Speakers



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Overview of Today's Presentation

- With increased scrutiny in the federal enforcement landscape, swift yet informed decision making will help minimize risk.
- Discussion of when an investigation may make sense.
- Investigations can be expensive and time consuming. It is critical to develop a plan that, from the outset, (i) sets objectives, (ii) defines scope, (iii) employs the appropriate resources, and (iv) respects privilege and confidentiality.
- Discussion on interfacing with the Government and what do post-investigation.

Potential Sources of Allegations

- Whistleblower complaints or anonymous hotline reports;
- Employee complaints;
- Third-party complaints (former employee, potential employee, etc.);
- Social media;
- News media or other reports; or
- Receipt of subpoena or other threat of imminent lawsuit.

When the Government is Making the Allegation

- Initial Internal Conversation
 - Litigation hold
 - Custodians, Document Identification, ESI, and IMs/Chats
- Initial Conversation with the Government
 - Witness/Subject/Target?
 - Adjust litigation hold
 - Establish production timeline
- Production
 - Working with vendors / the use of AI
 - Creating documents to convey data to the Government
 - Privileges
 - FOIA



" THE MARKET WAS UP TODAY ON MASSIVE STOCK FRAUD . "

Threshold Considerations

Depending on nature of the allegation, consult with in-house counsel right away to conduct an initial assessment of:

- Whether an investigation is necessary;
- Who will conduct the investigation;
- How factual information will be developed;
- The initial goals and scope of the investigation (likely will evolve over time);
- How the investigation will ultimately be resolved and reported;
- Consult your employee handbook, if any; and
- Be consistent.

Who Should Investigate?

At the outset need to determine:

- Who will lead the investigation – *i.e.*, In-House Legal, HR and/or Outside Counsel.
- Who will supervise the investigation – *i.e.*, General Counsel or Senior Management, Board of Directors, and/or Special Board Committee.
- Should the investigative team retain subject matter experts or other resources – *i.e.*, PR/crisis management, or other experts.
 - Considerations of attorney-client privilege.
- Industry-specific knowledge.
- Ensuring investigative team is diverse.

Who Should Investigate? (cont.)

Factors to Consider:

- Who or what is being investigated?
- History
- Nature and severity of allegation
- Optics of the investigation
- Likelihood of press or media coverage, governmental involvement, and/or third-party litigation

Goals of the Investigation

- Developing facts and evidence to determine the extent of any alleged violation, including potential civil and criminal liability.
- Inspiring confidence that the investigation will be completed fairly, consistently, confidentially, and with a firm commitment of no retaliation for reports made in good faith.
- Where wrongdoing is identified:
 - Remedying past misconduct.
- Even where wrongdoing is not confirmed or results are inconclusive—identifying opportunities for enhanced policies, procedures, training, and other internal controls.

Scope/Timing of the Investigation

- Determining the appropriate scope of the investigation—need to balance efficiency with quality and thoroughness.
- Developing a strategy and timeline for the investigation.
- Identifying key documents, employees, and other information to be evaluated during the investigation.
- Potential external factors that could impact timing or scope (upcoming disclosures, anticipated employment actions, news or media reports, etc.).

Conducting the Investigation

At the start of the procedures, investigators must consider:

- Document and data preservation and collection.
- Temporary measures.
- Initial communications with person(s) making allegations and with the “target” of the allegations, and a plan for “process” updates to these and other relevant stakeholders.
- When to engage PR or media consultants.

Preserve attorney-client and attorney work product privilege whenever possible:

- Legal “supervision” of potentially sensitive or high-profile internal investigations.
- Navigating potential waiver issues.

Witness Interviews

- Who should be interviewed?
- Sequence and location of interviews—complainant first?
Accused first and last?
- Who should conduct the interviews, and should anyone else be present?
- Communicating point of contact and ways to report (hotline, emails, etc.)

Confidentiality and Privilege Concerns

- Preservation of attorney-client and work product privileges.
 - *Upjohn* warnings.
- Stress need for confidentiality and no retaliation.
 - But cannot instruct witnesses that they are prohibited from speaking with or reporting suspected violations of law to the government.
- Consider separate counsel for accused executives.
- How to safely engage in fact-gathering from former employees.

Concluding the Investigation

- At the outset of the investigative process, consideration should be given to how the results of the investigation will ultimately be disclosed, and to whom.
- Oral versus written report.
- Potential remedial measures.
- Opportunities for enhancements to training and/or policies.
- Communications with complainant and accused.

The Investigation is done ... now what?

- Grounding
 - Intent vs. Action
- Operationalization
 - Policies and Procedures
- Setting Expectations
 - Inclusion
 - Who, what, where, when, and why



"I'm not going to lie to you. We've been having our share of legal problems."

What if the Government is Seeking Testimony

- **Initial Conversation with the Government**

- Witness/Subject/Target?
- Immunity?

- **Proffer Interview?**

- Considerations

- **Testimony**

- Preparing a witness
- The “Post-Testimony Download”
- Follow-up with the Government

The Knock at the Door

- Debrief client following approach/interview
- Outreach to Government
- Getting your arms around the facts and potential exposure
- Different considerations for individual clients vs. entity clients
- Crisis management/media relations

Search Warrant

- Initial instructions to client
- Manage the situation
 - Avoid the appearance of hindering/obstructing the search
 - Documents to get before the agents leave
- Cardinal Rules

To Proffer or Not to Proffer ...

- The client provides information with the promise the Government will not later use the information against the client in court.
 - Individual clients
- What are the benefits/risks?
 - Consider the “status” of the client
 - What will a Proffer Agreement actually protect?
 - Additional forms of immunity

To Present or Not to Present ...

- Corporate/Entity Clients
- Benefits/risks?
- Prepare a persuasive presentation
- Confidentiality considerations
 - FRE 408 & 410
- Making the presentation



Thank You