

Effective Internal Investigations: Adapting to a Changing World

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Speaker & Introduction

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Agenda

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- **Part 2:** Privilege Challenges
- **Part 3:** Risks of Attorney Proffers
- **Part 4:** Risks of Using AI and Evolving Technologies
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Part 1: Shifting Regulatory Landscape

- The Department of Justice (DOJ) continuously updates its guidance, notably the "Evaluation of Corporate Compliance Programs" (ECCP).
- These updates are a roadmap for how prosecutors assess compliance programs and determine penalties.
- Key themes: pro-business shift, national security, expanded voluntary disclosures, Cartels

Pro-Business Shift in Regulation

- **Focus, Fairness, and Efficiency:** The Department of Justice (DOJ) has announced a new white-collar enforcement strategy with a "business-friendly" emphasis, aiming for targeted enforcement and quicker, more favorable resolutions for companies.
- **Narrowed Monitorships:** The DOJ will impose fewer independent compliance monitors and will more narrowly tailor the scope of those that are imposed, focusing on cost and avoiding undue interference with business operations.
- **Cost-Benefit Analysis:** Prosecutors are now explicitly instructed to consider the impact of investigations on businesses, seeking to ensure that the benefits of a monitorship outweigh the costs to the company.
- **Deregulation:** DOJ created a deregulatory task force focused on identifying current regulations that adversely effect competition and innovation.
- **Takeaway:** "Business-friendly" environment may result in less regulation, but underlying risks may not go away.

National Security

- **New "High-Impact" Priorities:** The DOJ's Criminal Division is now prioritizing "high-impact" areas that pose threats to U.S. national security and the economy.
- **Specific Focus Areas:** This includes sanctions and export control violations, customs and trade fraud, and crimes involving Chinese-affiliated companies (VIEs) that present risks to U.S. investors.
- **FCPA Enforcement:** The Foreign Corrupt Practices Act (FCPA) enforcement has a renewed focus on cases that impact the United States or the American people and competitiveness.

Expanded Voluntary Disclosures

- **Declination, Not Just Presumption:** The DOJ's revised Corporate Enforcement and Voluntary Self-Disclosure Policy provides a clear path to a declination for companies that voluntarily self-disclose misconduct, fully cooperate, and remediate in a timely manner, provided there are no egregious aggravating circumstances.
- **New Whistleblower Program:** A new pilot program has been expanded to incentivize individuals to report corporate wrongdoing in key priority areas like customs fraud and violations related to cartels and sanctions.
- **Leniency for "Near Misses":** Companies that miss the window for voluntary self-disclosure but cooperate in good faith may still receive significant benefits, such as a 75% fine reduction and no compliance monitor.

Cartels and Transnational Criminal Organizations (TCOs)

- Focus of enforcement efforts is on identifying and disrupting the financial networks that support their illegal activities.
- This includes targeting complex international money laundering operations.
- Companies should be aware of the potential risks if their financial systems or personnel are involved, even unknowingly, in facilitating transactions for these organizations.
- Incentives are also in place to encourage individuals to report corporate wrongdoing related to cartels and TCOs.

Part 2: Privilege Challenges

- Internal investigations are essential but create a target for civil litigants and regulators.
- The tension: the need for candid, confidential legal advice vs. demands for transparency and evidence.
- The "dual-purpose" problem: when an investigation serves both legal and business needs, the "predominant purpose" test can be a battleground.
- Waiver through Disclosure to Third Parties (Auditors, Government, etc.) may result in a waiver of privilege in future litigation.

The "Predominant Purpose" Test

- To claim attorney-client privilege, the primary purpose of the communication must be to seek or render legal advice.
- For work product protection, materials must be prepared "because of" the prospect of litigation, not for ordinary business purposes.
- The challenge is proving this intent, especially when legal advice informs business decisions.

Hallmarks for Maintaining Privilege

- Led by counsel (whether in-house or external);
- Clearly documented purpose of the investigation;
- Interviews and record reviews are done in connection with serving as counsel and clearly marked;
- As the investigation unfolds, counsel provide "legal updates" on their investigative findings and those records are kept segregated; and
- Any third parties hired to assist with the investigation are retained and overseen by counsel.

Case Study: *In re First Energy*

- **Background:** FirstEnergy faced civil lawsuits and government investigations related to a bribery scandal. A lower court ordered the production of their internal investigation documents.
- **The Sixth Circuit's Mandamus Ruling (2025):** The Court vacated the lower court's order, strongly reaffirming robust privilege protections.
- **Significance:** This decision provides powerful precedent that attorney-led internal investigations are privileged and protected work product.

Part 3: Risks of Attorney Proffers

- **Obstructions Charges:** The most severe risk is that a factually inaccurate proffer could lead to charges of obstruction of justice or making false statements.
- **Waiver of Privilege:** While proffers are usually protected by a "proffer agreement," this case highlights the potential for the information to be used for impeachment or, as here, as direct evidence of a crime.
- **Locking in a Story:** A premature proffer can lock the defense into a specific version of events before full fact-checking, making later discrepancies fodder for cross-examination.

Proffer Best Practices

- **Rigorous Verification:** Do not proffer facts unless they have been thoroughly vetted and independently corroborated.
- **Use Explicit Disclaimers:** State clearly that the information is counsel's current understanding, based on client representations, and subject to change.
- **Weigh Benefits vs. Risks:** The potential for leniency or a declination must be carefully balanced against the severe downside of an obstruction charge.
- **Consider "Innocence Proffers" Carefully:** Proffers intended to dissuade prosecution carry unique risks if the government has contrary evidence.

Case Study: *U.S. v. Menendez*

- **Background:** Senator Menendez was convicted of bribery and obstruction of justice. A key piece of evidence for the obstruction charge was his lawyer's statements during a pre-indictment "proffer" session with prosecutors.
- **The Problem:** Prosecutors argued the statements were false and used them as evidence of the client's criminal intent to obstruct the investigation.
- **Significance:** This case serves as a warning shot: attorney statements made during proffers can be used as substantive evidence against the client.

Part 4: Risks of Using AI and Evolving Technologies

- DOJ now expects companies to proactively manage risks associated with new technologies like Artificial Intelligence (AI).
- **Prosecutor's Questions:**
 - Has the company conducted a risk assessment regarding AI use?
 - What governance and controls are in place to ensure AI is used reliably and legally?
 - Are policies updated to address AI-enabled risks (e.g., false documentation)?
- **Takeaway:** "Black box" AI systems are not an excuse for failing to meet legal standards; human review is expected where necessary.

Recent Enforcement Actions Involving AI

- "AI Washing" and Deceptive Claims
 - Delphia (USA) Inc. and Global Predictions Inc.: SEC fines two investment firms a combined \$400,000 for falsely claiming to use AI and machine learning in their investment strategies.
- Discrimination and Bias
 - FTC banned Rite Aid from using facial recognition technologies that the Commission alleged wrongly accused innocent people—including children and mostly people of color—of shoplifting.
- Misuse of Data and Consumer Harm
 - FTC banned NGL Labs and its founders from offering anonymous messaging apps to kids under 18 for its allegedly false claims that its AI content moderation program filtered out cyberbullying.



Data Analytics and Compliance

- DOJ expects companies to leverage data analytics to identify risks and measure program effectiveness.
- **Key Expectations:**
 - Compliance personnel must have timely access to relevant data sources.
 - Resources and technology for compliance should be comparable to those used for commercial purposes.
 - Companies should manage data quality and measure the accuracy of their analytics models.
- **Takeaway:** Data-driven compliance is now an expectation, not just a best practice.

Part 5: Key Takeaways

- Be mindful of current administration priorities and focus.
- Whether to self-report versus simply just implementing corrective measures.
- Take all precautionary measures to safeguard results of internal investigations and carefully consider disclosures to third-parties.
- Proffers can be a double-edged sword.
- AI regulations and enforcement are evolving and to care and be up to date on proposed regulations.

Q&A

Questions & Discussion

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