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Conducting Effective Investigations

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COMPLIANCE WEEK

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Refresher: Discipline of Good Investigations

By Karen Kroll

The damage wrought by inept internal investigations can go well beyond wasted time and money; they can cause civil litigation, enforcement risk and, of course, bad publicity.

Consider an internal investigation at IBM. In 2014, James Castelluccio, a former vice president, was awarded millions for wrongful termination. In its decision, the court stated, “There was reason to suspect that the investigation was designed more to exonerate IBM than to determine if Castelluccio was treated fairly.”

Deliberately ineffective investigations can influence the penalties levied on the organization. In a May 2015 speech, Assistant Attorney General Leslie Caldwell discussed the \$8.9 billion fee levied on BNP Paribas for violations of U.S. sanctions against Sudan, Iran, and Cuba. The financial institution “affirmatively hindered the investigation by dragging its feet ... BNP’s lack of cooperation was a key factor in the decision to seek a parent company guilty plea.”

Given the prevalence of internal investigations, handling them properly is critical. “They’re beyond pervasive. They’re almost a fact of life,” says Kevin Michels, associate professor and director of the School of Business Center for Innovation and Ethics at the College of New Jersey.

Effective internal investigations require investigators who have full access to information and individuals. The investigators must be independent and shouldn’t report to the individuals under investigation. Transparency is also crucial; readers of any report produced should be able to make an informed decision as to the investigation’s thoroughness and integrity.

Ensuring all this happens isn’t easy. Internal investigations contain inherent limitations, Michels says. In contrast to many modern legal systems (where two adversaries present often divergent versions of the facts, law, and their interpretation to a neutral third party), in an internal investigation one person or team is charged with uncovering the facts and assessing their legal significance. While this can boost efficiency, it means one avenue for seeking the truth is lost, Michels notes. On top of that, the company subject to an investigation usually is the one paying for it.

When allegations against an employee important to an organization—perhaps he or she has skills that are particularly needed, or holds a high position—are found to be credible, internal politics sometimes override the findings. “Things can go sideways once the political machine is in action,” says Natalie Ivey, a human resource consultant with Results Performance Consulting in Boca Raton, Fla.

For example, an investigation at one of Ivey’s clients determined that a senior executive had been selling company assets and pocketing the funds. Although the transgressions should have been grounds for dismissal, the board of directors issued a warning that the individual no longer could liquidate the organization’s assets without board approval. “They didn’t want to deal with the evidence,” Ivey

says.

Even when companies don’t go that far, some try to hinder investigations by dragging their feet instead of cooperating. One tactic: claiming data privacy laws prohibit them from providing the information requested by investigators, says Ruti Smithline, a partner with Morrison Foerster. “Companies are trying to use the laws as a shield.”

Caldwell mentioned that in her May 2015 speech, too: “Your first instinct when providing cooperation should be, ‘How can I get this information to the government?’ It should not be a kneejerk invocation of foreign data privacy laws designed to shield critical information from our investigation.”

“You need clear communication at the outset on the scope of the investigation.”

Neal Stephens, Partner, Jones Day

None of those limitations are reasons to skip internal investigations. Organizations and investigators, however, need to be aware of and take steps to mitigate the concerns, Michels says.

Like Hitting a Golf Ball

Much of the success of an internal investigation starts with the initial discussion between the organization and the investigators, says Christopher Madel, a partner with Robins Kaplan. He compares the preparation needed before an internal investigation to that which should occur before hitting a golf ball. “Ninety percent of problems are solved if you think about everything before you hit the ball,” Madel says. That is, the initial discussions between an organization and the investigation team are key to laying the ground rules that largely determine the effectiveness of the investigation.

“You need clear communication at the outset on the scope of the investigation,” says Neal Stephens, a partner at law firm Jones Day. Without that conversation, the time, cost, and access to people and information the investigator needs to conduct a thorough investigation can catch companies off guard, he adds. Among the items to discuss: how the investigation team will handle access to documents, document preservation, and witness interviews.

For instance, at the start of an investigation, Madel usually creates a mirror image of the servers and hard drives within the organization and runs his own searches through those data centers rather than ask someone from within the company to handle the task. “When it’s all done, I want to know if anything was missed, I did it”—rather than error or wrongdoing by employees with the organization under investigation.

It’s also critical to “be very explicit at the outset that the investigator is not charged with being an advocate for the company,” Michels says. “The goal is to arrive at an accurate account based on a good faith, independent inquiry.”

While these principles sound fundamental, they're easy to overlook, especially when an allegation has become news and triggered intense media coverage, Stephens says. "There's a rush to get going."

Once an investigation is underway, organizations need to be willing to accept the evidence, no matter the implications. It's not unusual for investigators to come across individuals who say they have nothing to hide at the outset, but then balk at providing information, especially as the questions become more targeted.

"A lot of folks don't have a handle on what their culpability is," says Tim Purdon, also a partner with Robins Kaplan. Some don't understand the law or its application; others are in denial. While that's natural, organizations whose goal is an effective investigation can't blindly adhere to their initial assumptions as to guilt or innocence.

Instead, investigators—and by extension, the organizations that engage them—need to elicit information respectfully while also challenging it.

One common obstacle: By their nature, investigations begin with a lack of information. That can give rise to initial assumptions that are inaccurate or incomplete. The investigating team has to be driven by evidence—not any preconceived theories of guilt or innocence.

At the investigations' conclusion, the organizations should expect a thorough, transparent report of the findings that provides a detailed accounting of the facts and legal analysis, and discloses any limitations on the investigation, such as material witnesses who couldn't (or wouldn't) participate. "It's not enough to say "we investigated, and

"Ninety percent of problems are solved if you think about everything before you hit the ball."

Christopher Madel, Partner, Robins Kaplan

here's the conclusion," Michels says.

Initiating and overseeing a credible, effective internal organization ultimately requires leadership, Purdon says. "It's not easy to make the decision to conduct an investigation, but real leadership requires getting ahead of" allegations of wrongdoing.

Moreover, executives who find themselves thinking "maybe we need an investigation" most likely do need an investigation, Purdon adds. While investigations are expensive, time-consuming and distracting, the potential alternative—a squad of government agents at the company's door—is worse.

"Most companies want to get it right and do it in a responsible way," Stephens says.

Accomplishing that requires an understanding and appreciation of the costs and challenges of unilaterally developing an accurate narrative of the facts and identifying and applying the appropriate legal standards, Michels says. "It's not inherently undoable, but it has to be done mindfully." ■

COOPERATING WITH GOVERNMENT INVESTIGATIONS

The following is an excerpt from a speech by Leslie Caldwell, assistant attorney general in the Justice Department's Criminal Division, regarding cooperating with the government during investigations.

The department has long made clear the benefits of cooperation, should a company choose to cooperate. Most companies have no obligation to cooperate with the Department of Justice. And it's a decision for the company whether or not to cooperate, but if a company decides to cooperate, then we expect that cooperation to be candid, complete and timely. Our recent case filings have set forth both the advantages of cooperation as well as the real and sometimes severe consequences for non-cooperation and foot-dragging. Still, I recognize that questions remain about both the value of cooperation and the department's expectations.

As you all know, the basic parameters we consider in deciding what to do about corporate wrongdoing are in the Principles of Federal Prosecution of Business Organizations, also known as the Filip Factors. Cooperation obviously is a key factor. And the Filip factors do give guidance about what we expect corporate cooperation should include.

We expect that when a company learns about potential criminal wrongdoing, it will investigate. What that investigation should look like will depend on the nature of the misconduct. Whether to engage internal or outside counsel, how narrow or broad, those are the company's decisions in conjunction with outside advisors.

We will not tell you how to, or how much to investigate. You decide. But from our point of view, a good investigation should focus on the problem at issue, determine the scope of that problem and investigate accordingly, and also focus on what compliance or cultural shortcomings allowed that problem to exist.

While every internal investigation will be unique and depend on the scope of misconduct and the size and nature of the corporation, there are a few aspects that are universal:

- » We expect you to learn the relevant facts, assuming they are learnable.
- » If you choose to cooperate with us, we expect that you will provide us with those facts, be they good or bad.
- » Importantly, that includes facts about individuals responsible for the misconduct, no matter how high their rank may be.
- » We expect timely provision of evidence. What does that mean? That doesn't mean you need to call us on day one. In most cases it is in everyone's interest for there to be an orderly internal investigation. Exact timing varies with the facts, but once companies know the facts, we do not expect them to delay providing them to us.

Source: Justice Department.

Conducting a Thorough Global Investigation

By Jaclyn Jaeger

Overseeing a global internal investigation can be one of the most difficult and perilous jobs that compliance officers do.

Part of the challenge that comes with that job is setting the scope of the investigation at the outset. Set the scope too narrow and it could damage the company's credibility with regulators down the road; too broad and it could waste time and money and create fears of a fishing expedition inside the organization.

At the Compliance Week 2014 conference, compliance executives shared their ideas for approaching an internal investigation and managing the risks that go along with them. Frank Lopez, vice president of compliance investigations for WellCare Health Plans, recommended that companies conduct a preliminary risk assessment. Specifically, that assessment should take into consideration the following factors:

- » Who is the source of the claim? (whistleblower, government agency, a grand jury subpoena)?
- » What is the nature of the allegation (accounting irregularities, bribery, a Title VII violation)?
- » Does the complaint involve a potential violation of law, or an internal policy?
- » Does the misconduct appear to involve senior-level executives?
- » Is the incident isolated or part of a broader systemic practice?

Once the company has answers to those questions, compliance officers on the panel recommended having some sort of investigation protocol in place. "A 50-page handbook on how to conduct an internal investigation is probably counter-productive, but you need to have something," said Stephen Donovan, chief ethics and compliance officer at International Paper. Lopez offered a list of factors to consider, including:

- » Who is going to lead the inquiry?
- » Who are the internal subject-matter experts? Are they objective and independent? If not, what external experts do you need to engage?
- » What documents, if any, need to be preserved?
- » What steps need to be taken to mitigate data leakage?
- » What duty does the company have to disclose?

Part of conducting a thorough internal investigation involves compliance collaborating early on in the investigation

with legal, HR, and IT. "Those are the three departments that have got the procedural information that you're going to need," said Karen Moore, former vice president of compliance at Phillip Morris International.

At International Paper, for example, Donovan said the IT department is typically notified in the first 24 hours of an internal investigation, "depending on the nature of the allegation." From there begins a deep dive into the records of the employee allegedly involved in the misconduct.

"We're going to grab e-mail and whatever other electronic documents we can get our hands on," said Donovan. "We're going to start getting plans in place, if we think this is serious enough, to figure out some way to get on that employee's hard drive. We're going to start gathering phone records, if the employee has a company-provided cell phone."

Working with other business units is also important to when it comes to "stopping the bleeding," Lopez said. "Don't wait until the end of the process." Get the right business owners in place to find and fix internal control weaknesses, working with internal audit to ensure those weaknesses have been fixed, he said.

Former Feds on Board?

Compliance officers also need to assess what kind of outside resources to bring in. "The absolute best asset you can acquire for yourself is a retired FBI agent," said Donovan. They're "worth their weight in gold," because they're highly skilled in not only conducting internal investigations and interviews, but also gathering documentation, he said.

Those resources may be invaluable, but companies also need to consider the message they send throughout the organization. Moore offered the example of Altria, the parent company of Philip Morris, which "had a great investigations team," made up of former FBI agents and former New York City police officers. "The only caveat is that when they got parachuted into a market to conduct an investigation, it struck fear in the entire organization to the point where they had difficulty getting people to speak honestly," she said.

Karen Moore, former vice president of compliance at Phillip Morris International, discussed the importance of compliance getting together early on with legal, HR, and IT.

It's also important to figure out at the outset of an investigation whether the incident is isolated or part of a broader systemic practice. "A lot of seemingly innocuous investigations can be the tip of an iceberg," Moore cautioned. "If you don't start taking a look at the root causes—how did that problem start and where else in my markets can it be occurring—you're going to miss the whole rest of the iceberg," she said.

"A quick judgment can result in error," Lopez agreed. So thinking more deliberately and staying aware of any new developments are essential factors to the overall success of an investigation, he said.

Cultural Nuances

Where in the world an investigation unfolds also plays a role in scoping it. "Cultural differences cannot be underestimated," Moore said. "It's not just the craft of the investigation; it's the art of getting the most out of the culture

you're operating in." In most countries outside the United States, for example, the rights of employees often overrule the rights of employers. In many European countries, in particular, "disciplining by means of termination for cause is nearly impossible," so you need to keep that in mind when deciding what disciplinary actions to take, Moore said.

Russia is an example of another country where the scales tip in favor of employees. If you want to terminate somebody for theft or fraud in that country, "you almost always have to catch the person on camera," Moore said.

In those types of cases, the audit committee often will want to know: "What have we done to recover lost proceeds? Have we filed a criminal complaint against the employee?" Moore said. So you'll need to be prepared to explain to the audit committee the reasons why you haven't recovered those assets, or taken those steps, she said.

Another area where cultural differences can play a role is in the mindset of the senior leadership, Donovan said. "The last thing they want is a bunch of people from corporate headquarters coming over and kicking tires and looking under rocks and telling them what they've done wrong," he said.

Language barriers must also be taken into consideration. "In what language are you going to conduct your interview?" Moore said. The same consideration should be given with documentation. Another consideration is how long it's going to take to translate them so that they are accessible to the

investigation team, she said. Law Enforcement Involvement.

"Involving local law enforcement I find to be the most tricky, disturbing area to navigate," Moore said. "In some areas you want to, or feel you must, involve local law enforcement at some point in your investigation. This may be particularly true if you'd like to seek criminal remedies after the conclusion of your investigation."

In order to decide whether to involve local law enforcement, "you've got to judge the market in which you're operating," Moore advised. "In Germany, I'd have no hesitation about inviting local enforcement to collaborate." In a country like Kazakhstan, on the other hand, "you end up with what look like twelve year olds with machine guns rifling through your office," she said.

Also complicating a global investigation is that certain enforcement agencies don't like you to share information with enforcement agencies in other jurisdictions. "They don't trust each other," said Alexander Juengling, chief compliance officer of Bilfinger. One way around that is to "get one lead agency," he said.

Another important consideration is the age-old question of whether to self-report potential misconduct. "Very few jurisdictions have a formal obligation to self-report," Juengling said. Thus, he said, it's up to the company to look into what kind of leniency program, if any, exists in each jurisdiction. ■

TIPS TO EFFECTIVE INVESTIGATIONS

Below, CW 2014 speaker Frank Lopez of WellCare Health Plans outlines the steps to an effective investigation.

Conduct a preliminary risk assessment which considers, among other things:

- » Source of allegation (e.g., regulatory inquiry, grand jury subpoena, lawsuit, Section 10A notice from auditor, whistleblower complaint)
- » Nature of alleged misconduct (e.g., accounting irregularity, bribe, Title VII)
- » Collateral consequences (e.g., reputational harm)
- » Company's history
- » Hot topics (e.g., data security, FCPA)
- » Duty to disclose (voluntary disclosure)

Develop a preliminary investigation plan:

- » Identify who will lead inquiry (e.g., Compliance, outside counsel, audit)
- » Identify source of authority at issue (Code of Conduct, GAAP, statutory)
- » Identify sources of information/evidence
- » Determine necessary steps to preserve data

- » Determine chronology of inquiry
- » Assess need to engage internal or external subject matter experts

Seaboard Report: When finished, can you answer the following questions:

- » Did misconduct arise due to management pressures or a tone of lawlessness?
- » Were appropriate procedures in place, and if so, why they failed to prevent misconduct?
- » Did senior personnel know of or participate in misconduct?
- » Was misconduct systemic or isolated?
- » Timing and duration of misconduct?
- » Harm inflicted upon others (including consumers, the government, and investors)?
- » How soon after discovery did company implement an effective response?
- » Were wrongdoers adequately disciplined?
- » Whether disclosure of the misconduct is required by contract, law or regulation?

Source: Frank Lopez CW 2014 Presentation.

Compliance Investigations

Technology Enablement of Best Practices

By John Verver, CPA CA, CISA, CMC, Strategic Advisor to ACL

Compliance processes and the compliance officer's role are becoming increasingly complex. A seemingly never-ending stream of new and amended regulations impact almost every organization in every industry—some, such as healthcare, finance, and pharmaceuticals, much more than others. Investigation processes are also becoming more complex as consideration must constantly be given to ensure that no significant aspects of applicable regulations are overlooked.

There are several key components to achieving best practices in performing investigations. Processes need to be formalized to establish standards for how to perform, manage, and document investigations and report findings. Roles and responsibilities including limits of activities for compliance officers and others need to be defined. Also, there are aspects of how investigations are performed that should not be overly prescribed, as the compliance officer or investigator needs to be able to respond to circumstances to make sure that full discovery of all related and relevant circumstances is achieved.

Many organizations are challenged in how to optimize people and process issues so that quality results can be achieved on a sustainable basis in order to minimize potential damages from fines and reputational loss, while also keeping compliance costs under control. As with so many core business processes, this is where technology can play a transformative role, not only in improving process efficiency but also in achieving a whole new level of quality compared to traditional ways of doing things.

Here are a few best practices of performing investigations that technology can enable:

» **Maintain whistleblower database**

All submissions to whistleblower systems need to be recorded in a standard format and stored along with relevant related information.

» **Library of regulations and standard investigation process forms**

The process for performing investigations may vary according to the nature of the issue and specific regulations involved. Standard forms and checklists help to ensure that no critical step is omitted. All regulatory requirements connected to

the investigation can be made immediately accessible.

» **Workflow management**

In some cases, investigations involve interaction of multiple individuals across various roles. Workflow rules can be established to automatically involve or notify others at specific stages of the process.

» **Documentation repository and management**

All information gathered during an investigation needs to be maintained in a well-organized and secure way to support efficient reference to materials.

» **Analytic-driven investigation and discovery**

Data analysis can play a powerful role in gathering information to support an investigation. For example, searches can be made across multiple systems to gather data on all activities and transactions connected to an individual, creating quantifiable evidence to be used in the investigation process. Data analysis can also provide ongoing monitoring of activities and identify compliance failures that require subsequent investigation.

If a major issue comes to light, a full investigation can take place. At this point, consideration should be given to the root cause of the problem and then control systems modified to reduce the chance of any future similar failure.

» **Review procedures management**

The compliance officer may need to review and sign-off the investigation of others, or have a third party, such as legal counsel, review the work of the compliance officer.

» **Secure sharing and communication of findings**



Findings resulting from an investigation, together with recommendations, need to be maintained in a secure, structured fashion accessible only to specific individuals or roles.

» **Status reporting**

Where multiple investigations take place concurrently and other significant time frames, it is important to be able to provide status reporting of the stages of all investigations in progress.

» **Time and expense budget and recording**

The compliance officer and others involved in investigations may need to record time spent and expenses incurred, not only on specific investigations but also on specific stages of investigations. Actual time and expenses can also be compared to budgets to help better manage processes overall.

» **Integration with risk management and compliance management programs**

More organizations are implementing specialized software systems to support multiple aspects of risk management, compliance and audit processes. In many cases it makes good sense to be able to relate specific investigations to the broader context of risk and compliance management.

While generic word processing and spreadsheet tools are frequently used to support compliance investigations, there are benefits to using technology that is specifically designed to provide all of the above capabilities, as well as broader compliance, risk management, and audit processes.

Investigations within a larger context: Improving compliance programs overall

Investigations are one important element of an overall compliance management system. No matter what type of compliance program is involved (whether you are meeting one of the thousands of potential external regulatory requirements that impact organizations across so many industries, or even achieving compliance with internal rules for control and risk management) many of the same technologies and techniques that improve the investigation process can also be applied to improving the effectiveness of compliance programs on an ongoing basis. This reduces the chance of compliance issues arising in the future.

Risk management systems are typically based on identification of a wide range of risks that could negatively impact the organization's ability to meet its objectives. Compliance failures are among the many potential risks that an organization faces. Investigations occur when there is a suspected compliance failure.

An important question to consider is what can your organization do to reduce the chance of a compliance failure in the first place, as well as to increase the probability that a problem is detected before it worsens. While whistleblower hotlines and audit

processes all have a role to play in helping to reduce risks, technology is a powerful tool to help maintain effective controls and provide timely and independent notification of any compliance failure. Ultimately this can reduce the need for compliance investigations.

Compliance monitoring software provides the ability to constantly examine transactions and other business activities to determine if they are in compliance with the regulations or control rules that are in place. If a suspect activity is identified, a red flag is raised. Depending on the severity of the issue, an immediate investigation can occur. In practice, the majority of compliance

An important question to consider is what can your organization do to reduce the chance of a compliance failure in the first place, as well as to increase the probability that a problem is detected before it worsens.

failures are often relatively low risk problems that do not require a major investigation. However, the ability to continually identify and assess indicators of compliance failures by type and area of responsibility means that a response can be made that is appropriate to the extent of risk involved.

If a major issue comes to light, a full investigation can take place. At this point, consideration should be given to the root cause of the problem and then control systems modified to reduce the chance of any future similar failure. Over time this approach leads to a constantly strengthening system of compliance that focuses on eliminating compliance failures while not being so restrictive that it interferes with the ability to run an efficient business.

While technology can't impact every aspect of the compliance officer role in investigations, such as the personal experience and professionalism that are essential to effective and high-quality compliance investigations, software is a powerful enabler that can transform and improve not only the investigation process, but compliance management overall.

About the author

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John Verver is an acknowledged thought leader, writer and speaker on the application of technology for audit, fraud detection, risk management and compliance. He is recognized internationally as a leading innovator in continuous controls monitoring and continuous auditing and as a contributor to professional publications. He is currently a strategic advisor to ACL, where he has also held vice president responsibilities for product strategy, as well as ACL's professional services organization. Previously, John was a principal with Deloitte in Canada. www.acl.com

A Compliance Officer's Role in Investigations

By Joe Mont

The compliance officer's role in the "front end" of investigations is generally understood: oversee employee hotlines, work with whistleblowers, and review allegations of misconduct. What about all the things that come next? How involved should a compliance officer be in fact gathering, determining culpability, and helping to decide upon (and impose) needed discipline? We spoke to Jim Zappa, associate general counsel and chief compliance officer at 3M Corp. about his approach. Zappa was a panelist on a session devoted to these issues at Compliance Week's 2015 annual conference in Washington D.C.

Before we can get to the result of an investigation, the facts need to be uncovered. To what degree is it safe to assume that compliance is involved with internal investigations?

There are different models and approaches to this. There are some organizations where the chief compliance office is not involved with an investigation; the legal organization may take charge, or perhaps corporate security or audit. That's not 3M's model; compliance is the investigation organization for a number of business conduct concerns.

My job is to make certain that the investigation proceeds in a fair and full manner. It's important that we do that well, and along the way communicate with the various stakeholders as we can, and as we should. When do you tell management, and who in management should be informed? What about other stakeholders, such as finance, security, or human resources? That's a dynamic situation that we are trying to manage to protect the integrity of the investigation and make sure operational issues are not compromised.

When it comes to post-investigation discipline, what role should compliance have?

One of the things the compliance organization needs to do is make sure that the sanctions for violations are consistent over time, both from an employee equitability standpoint, but also from an organizational standpoint. In our process, compliance plays a very specific role in making sure that information about past disciplinary outcomes is provided to the decision makers for the specific matter being decided. We don't want management to under-penalize someone, or over-penalize them. Bringing that calibration to the process is important.

The other role a chief compliance officer plays is in the communication of the "why." Why is a sanction appropriate here? It is important that stakeholders understand what happened, why something was wrong, and why the sanction was what it was.

Once a matter is resolved, your work is not done, I would assume.

The third piece where we play a role is building upon the lessons learned from the remediation. How do we figure out what the fixes are? If there a process, policy, or operational gap, what recommendations can we make? What is the lesson that can be shared with other units that may be in a similar situation, so they can get in and fix things before there is a bigger problem?

All too often, compliance officers have the reputation of being a "cop on the beat." How can you balance the role of an enforcer with the need to encourage open lines of communication with all units, and encourage hotline use?

At the end of the day most, if not all, compliance investigations are business operational problems. Everyone has to have a stake in trying to figure out how to navigate these waters.

If companies want to have an effective compliance program, you obviously have to respond to the people who raise issues. If you don't respond, then people think the company isn't going to do anything about it. On the other hand, if a company takes a very aggressive approach to an investigation, or makes people feel like they just want to make heads roll and set people up as an example, that can have a counter-effect as well.

In a lot of countries you may even be creating new legal risks for the company if you do investigations that way, from a privacy, defamation, or labor contract standpoint. Compliance has to be aware of, and attuned to, all of those nuances. At the end of the investigation process people may not like the outcome, but you want them to think the process was fair.

You stressed working with other business units on an investigation. Can that be a challenge?

It's important to try to figure out an approach that allows you to maintain collaboration. At the end of the day most, if not all, compliance investigations are business operational problems. Everyone has to have a stake in trying to figure out how to navigate these waters. Business leaders may have some disruption in their team, someone that they can't promote, or a customer they can't sell to. The longer something goes on, the more employee issues come up and people are distracted.

It's a challenge to maintain good coordination, but the chance for a successful outcome increases if everyone



Zappa

is working together and there is a core team that represents various functions. You want to keep them apprised of what is happening, and you may need to ask them for help with resources or clearing roadblocks. What is that core team and who is on it? That should be part of your investigation plan, so you can do a better job of trying to coordinate things.

As you bring other people and units within the company, is there a risk of compliance not having the independence it requires, especially as investigations can involve anyone from a dock worker, to an important sales manager, or even an executive?

There may be different models, but whoever does the investigation, there has to be a formal recognition that it is independent. You can achieve that independence in a number of ways, from the charter establishing an ethics or compliance committee, or having senior manage-

ment stress that independence. It's important that the investigators, and the people being investigated, know that this is being done with all the independence needed. ■

Jim Zappa is 3M Corp.'s vice president, associate general counsel, and chief compliance officer. In this role, he leads 3M's corporate compliance & business conduct department.

Zappa has been with 3M for more than 13 years. Prior to his current role, he spent three years as 3M's vice president, and associate general counsel, international operations. In that role, he led the team of 75 lawyers in more than 30 countries supporting 3M's operations outside the United States. Zappa's other 3M roles include: general counsel for the human resources organization; general counsel for the consumer business group; and business and employment counsel to multiple 3M business units.

Outside of 3M, Zappa was an associate at Dorsey & Whitney, an employee relations director at UnitedHealth Group, and law clerk to the Honorable Richard H. Kyle, United States District Court for the District of Minnesota.

ETHICAL BUSINESS CONDUCT PRINCIPLE

The following is an excerpt from 3M Corp.'s Code of Conduct Principles.

Be Good: Obey the law and 3M's Code of Conduct

The foundation of 3M's business conduct program is this: we will do business legally and ethically in all aspects of our global operations. The Business Conduct Principles aligned with our Be Good fundamental expectation describe the requirement that employees and others acting on 3M's behalf must abide by all laws and 3M Code of Conduct at all times. This section also provides some guidelines for making ethical decisions, to use in those situations, where neither law nor policy provides a clear answer. In order to advance our culture of compliance and ethical business conduct, this section also describes employees' obligations in respect of our Code of Conduct and legal compliance, as well as confirms 3M's commitment to non-retaliation.

Principle Statement:

3M employees and third parties to which this Principle applies must make good, ethical decisions based on 3M's fundamental values of honesty, integrity, promise keeping, fairness, respect, concern for others, and personal accountability. When the law and 3M's Code of Conduct are silent on an issue, employees must nevertheless make decisions that are legal, ethical, and consistent with the Code of Conduct.

Purpose:

3M's Code of Conduct cannot anticipate every situation that the company or an employee may encounter. In addition, there may be instances where there is no applicable law or the law does not set a standard high enough for 3M. This Principle helps ensure that in such situations, 3M conducts business in an ethical, compliant manner.

This Principle applies globally to all employees and may apply to those

acting on behalf of 3M. See the Compliance Principle for information on when a third party might be covered by the Code of Conduct Principles.

Additional Guidance:

Ethical decision-making requires using common sense and good judgment, considering and evaluating a course of conduct in light of the following guiding Principles:

- » Show uncompromising honesty and integrity in all of 3M activities and relationships.
- » Avoid all conflicts of interest between work and personal life.
- » Respect the dignity and worth of all individuals.
- » Encourage individual initiative and innovation in an atmosphere of flexibility, cooperation and trust.
- » Promote a culture where promise keeping, fairness, respect and personal accountability are valued, encouraged and recognized.
- » Create a safe workplace.
- » Protect the environment.

When faced with a decision about the right action to take, employees should be sure they can answer "yes" to the following questions:

- » Is this action consistent with 3M's corporate values of uncompromising honesty and integrity?
- » Will this action protect 3M's reputation as an ethical company?
- » Can this action withstand public scrutiny if it were reported in the news media?

Source: 3M.

Internal Probes Fall on Audit Committees' Plate

By Tammy Whitehouse

A growing number of audit committees are finding themselves in charge of overseeing internal investigations, and some may be ill-prepared to take on the duty.

A report from EY and law firm Squire Sanders says more than 70 percent of all public companies undertake some kind of internal investigation. "With the enactment of the Dodd-Frank Act, the increase in whistleblower claims filed in its wake, and the downturn in the world economy, few public companies will escape the need to conduct an occasional internal investigation, and companies in certain sectors will face such activity on a recurring basis," the report states.

With that growing number of investigations, companies have struggled with where in the organization they should originate and what departments should be involved in carrying them out, including legal, human resources, internal audit, compliance, and the audit committee. "We've seen an uptick in the frequency of internal investigations," says Jeff Ferguson, a partner with EY's fraud investigation and dispute services practice and a co-author of the paper. "The audit committee is made up of people who are somewhat part-time in their role and maybe not necessarily the best equipped to handle a pretty intense, full-time investigation."

Yet the movement to have the audit committee lead serious internal investigations has been gaining steam for several years, says Frank Placenti, a partner with Squire Sanders and also co-author of the report, based on a number of regulatory, legislative, and judicial actions.



Placenti

Federal sentencing guidelines, bribery and corruption crackdowns, case law, Dodd-Frank, and now some 3,000 or more whistleblower complaints taken to the Securities and Exchange Commission have given companies growing reason to conduct independent internal investigations, he says.

"One could debate whether a part-time committee of the board or the audit committee is the right body to undertake these kind of heavy investigations, but audit committees increasingly are being asked to do it," Placenti says. "So they ought to know more about what's expected of them, what an internal investigation looks like, and how to handle it."

Audit committees are certainly familiar with the investigation of financial misdeeds, whether focused on books and records problems, accounting issues, or allegations against management, says Dan Goelzer, a partner with Baker & McKenzie and a former member of the Public Company Accounting Oversight Board. "Today there's almost an expectation if a company has a reason to believe there's some kind of serious conduct involving material financial reporting or foreign corrupt practices that the audit committee will oversee the investigation," he says. It's possible in addition that audit committees might be asked to handle other investigations such as trade sanction issues, related-party

transactions, or perhaps product litigation.

Many times an investigation will end up in the hands of the audit committee because it might have an indirect effect on financials, Ferguson says. "A lot of investigations regardless of the subject matter have an impact on financials and disclosures," he says. "I don't think there's a bright line that says audit committees will deal with just these matters and not the others."

"A lot of investigations regardless of the subject matter have an impact on financials and disclosures. I don't think there's a bright line that says audit committees will deal with just these matters and not the others."

Jeff Ferguson, Partner, EY

Holding Audit Committees Responsible

A stark message for audit committees about their duty to oversee internal investigations came more recently from the SEC, says Goelzer, in the form of some recent enforcement actions against audit committee members who were aware of allegations but didn't adequately pursue them. The SEC has had big words lately about their intention to pursue enforcement actions against gatekeepers, "and that seems to include audit committees," he says.

In one case, the SEC says Ivan Gothner, audit committee chair for AgFeed, learned of an elaborate accounting fraud to report false revenues from China operations but failed to investigate. In another case, Shirley Kiang, audit committee chair for L&L Energy, learned the company's financial statements were certified in the name of a CFO who didn't work for the company and turned down a job offer, yet subsequently signed those same statements herself.

"People on audit committees have to be alert to situations where there should be an internal investigation, but not get half way through it and not follow through," he says. "That's a risk that people have to be really alert to."

Hoyt Stastney, a partner with law firm Quarles & Brady, says running internal investigations is not necessarily routine business for audit committees. "A lot of times they're not familiar with the process, and there's a lot of hand holding," he says. "Very few audit committees are up to speed on what needs to be done even before one of these things raises its head. These are issues that audit committees would like to do a very thorough investigation on but also put to bed in a reasonable time period. Audit committees hope to never be in this position."

Hatching a Plan

Still, with the reality of the growing need for internal investigations, audit committees would be wise to prepare

themselves, Stastney says. At the board level, there should be a plan for what rises to the level of requiring an internal investigation, and who should handle it, he says. Audit committees should also keep a short list of firms and forensic accountants they can turn to if needed, who are independent of the company, meaning they're not already established as a provider of legal services to the company on some other matters.

Audit committees should also have a process for securing evidence and assuring documents that might be needed in an investigation aren't purged in the routine course of business. "You have to put a stop to regular purges until you've got independent lawyers and forensic accountants on board," he says.

Jonathan Feld, an attorney with law firm Dykema, says audit committees need a good understanding of where their interaction with legal counsel, whether inside the company or outside, is covered by attorney-client privilege. Case law has held different views on the extent to which in-house attorneys are giving business advice or legal advice, leading to different privilege outcomes, he says. "Having an attorney CCed on something, whether it's internal or external, doesn't guarantee privilege," he says.

Ferguson says audit committees would be wise to take advantage of continuing education opportunities to gear up for the possibility of overseeing an internal probe. "Audit com-

"One could debate whether a part-time committee of the board or the audit committee is the right body to undertake these kind of heavy investigations, but audit committees increasingly are being asked to do it."

Frank Placenti, Partner, Squire Sanders

mittees are very finance and accounting focused," he says. "Investigation skills may not necessarily be something that is normally sought after when putting together an audit committee."

Many professional organizations that serve board members or audit committee members offer continuing professional or legal education that is focused on overseeing investigations, Ferguson says. "I know this is something audit committees hope they never have to face, but we're seeing many companies face it more and more," he says. "It's definitely something that should be on the radar." ■

WHAT TRIGGERS AN AC INVESTIGATION?

Below EY & Squire Sanders list common subjects and triggers for an audit committee investigation.

An internal investigation is sometimes initiated by the audit committee based upon its own concerns. More often, investigations are triggered by external factors, circumstances, or events. Common subjects of audit committee investigations include:

- » Improper accounting for business activities (e.g., manipulation of earnings), falsified books and records, stock option grant irregularities, etc.
- » Illegal payments to obtain business (e.g., government contracts, FCPA issues, and commercial bribery)
- » Occupational misconduct, such as embezzlement or employee theft
- » Conflict-of-interest or related-party transactions

Forensic accountants can also run specialized data analytics against the financial data (structured data) and/or unstructured data such as email to uncover trends, patterns or "red flags" that can indicate areas of suspicious activity. Data analytics can quickly and efficiently point the investigative team to relevant data, thereby limiting the population of information to be reviewed and analyzed by the investigators. Whether the allegations relate to bribery and corruption, earnings management or asset misappropriation, the combination of structured and unstructured data will typically contain signs of any misdeed. Review procedures can also be customized to generate a more robust and complete picture for the investigation team, while

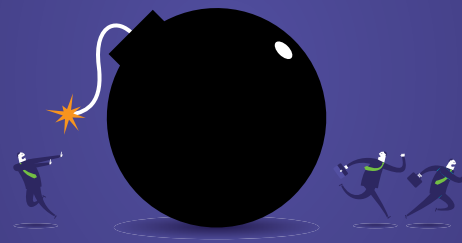
controlling costs and allowing the investigation to be concluded more promptly

By way of example, large charitable or social contributions in certain foreign locations can suggest bribery and corruption issues, while journal entries with large rounded currency amounts are a possible indication of earnings management. Large unspecified marketing expenses or unusually high commissions to sales agents can also be indicative of bribery activity. Given the availability of computer applications that facilitate the ready creation or alteration of documents, investigators will be on alert for documents of uncertain origin

Interviewing witnesses While each investigation is different, as a general matter it is often best to conduct interviews of lower-level employees and less important witnesses first to gain an understanding of the background and context for the allegations at issue, to be followed by interviews of the key or apex witnesses once a more clear understanding of the issues is achieved.

The interviews themselves should be conducted by an attorney with at least one other person present as a witness and note taker. Often, the forensic accountants assist with the interviews. The attorney investigator should take the lead asking questions and utilize the relevant documents obtained during the document review to question the witness regarding the facts at issue.

Sources: EY; Squire Sanders.



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