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PSA BRIEF:

Whistleblower Response Investigations

August 2019



Whistleblower Response Investigations

Over the past decade, whistleblower protection legislation has become an important part of the international good governance agenda. Following commitments made by the G20 in 2010, more than a dozen countries have added or revised whistleblower protection statutes, and dozens more have legislation planned. As whistleblower protection continues to grow as an integral part of the compliance landscape, companies must be prepared for the inevitable increase in incidents requiring investigation.

According to the largest dataset of whistleblower reports available, published by Navex Global, approximately one quarter of complaints relate to integrity issues like corruption and fraud, or misuse of company assets—cases which often require a response by external investigators. Of these integrity related allegations, just under one half are typically substantiated. Having whistleblower protocols in place that anticipate the possibility of an external investigation from the outset can help maintain the integrity of findings and minimize disruptions and potential reputational damage.

First Response

Having a preestablished company policy in place that determines the formation of a response team and describes the initial steps taken in response is invaluable. Having a policy in place can help avert critical mistakes from the outset and lay the groundwork for a successful investigation. It is important that a response team refrain from any overt inquiries or confrontations prior to a discreet initial assessment of the facts. In addition to making a preliminary assessment of the allegations, responders must also carefully evaluate additional reporting obligations presented by their regulatory environment. A careful review of the company's legal obligations is critical in the early stages of any response to a significant complaint and this should be taken prior to or as an early parallel to initiating either an internal or external investigation.

During this initial stage actions must be taken to ensure the preservation of relevant documents. This is to establish a paper trail that can be utilized in the course of future legal action and to anticipate local regulations likely to apply. Documenting allegations and associated information in a time-stamped and verifiable format such as email should be considered at a minimum.

Initial Assessments

Prior to engaging with external investigators or tasking an internal investigation, a basic assessment of the whistleblower's allegations must establish which matters can and should be subject to an investigation. Discretion is critical to any investigation, so identifying in advance which aspects of an allegation may be impossible to verify or which patently lack credibility will help establish the appropriate scope of an investigation and mitigate unnecessary collateral damage. Upon determining that the whistleblower allegations are minimally credible and potentially verifiable, a validation process must be established through use of investigative resources in the form of in-house audit functions, or

by external parties such as outside counsel or an investigations specialist. At times, all three may need to be engaged simultaneously.

Investigative Challenges in Whistleblower Cases

Engaging with an investigation firm that understands the unique challenges and special considerations associated with a whistleblower response is important to a positive outcome. Investigators with experience in whistleblower response will know to protect the integrity of the process by focusing the investigation on the validation of facts without compromising the anonymity of whistleblowers or raising concerns about retaliation.

Experienced investigators will also understand how to investigate from the outside in to maintain a maximum degree of discretion and limit disruptions or refrain from causing reputational damage. Investigative tasks that can be carried out least conspicuously should be done first, with potentially disruptive inquiries being conducted only if and when they are fully justified and absolutely necessary. Such discretion is particularly important when considering that in some cases whistleblowers may be acting in bad faith and have an agenda of intentionally inflicting reputational damage on particular individuals or the company as a whole.

Evidence Collection and Documentation

Given the possibility of future litigation or regulatory action in a whistleblower case, an outside investigator must have a strong focus on the clean collection of evidence and testimony. Investigators should always be knowledgeable about local laws regarding what kinds of evidence or testimony are admissible in court, and what steps for preservation and documentation of evidence are required.

Cross-border Investigations

Whistleblower allegations of supplier collusion, embezzlement, procurement fraud, and other fraudulent behavior present a high likelihood of an investigation ultimately becoming internationalized. Ill-gotten gains are frequently moved offshore, and many fraud conspiracies are formed specifically to take advantage of gaps in international law enforcement capabilities. Choosing an investigator with global capabilities from the outset can help ensure a seamless investigation from one jurisdiction to the next as well as ensure an effective pivot to next investigative steps such as extraterritorial asset tracing or litigation support, should the need arise.



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