CONDUCTING EFFECTIVE AML INVESTIGATIONS

Wednesday, 2 November

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INTRODUCTION

• Common theme - interplay between internal and external investigations
• Investigation considerations
• Use of litigation / legal advice privilege
• Preparation of internal investigation reports
• Reporting & implications
Interplay between internal and external investigations

- One set of facts may trigger multiple investigations by different agencies leading to separate proceedings
- Competing procedural and evidential frameworks
- Tensions arise as a result of varying interests
Interplay between internal and external investigations

• Criminal – high standard of proof and punitive sanction
• Civil – balance of probabilities and remedial outcome
• Regulatory – more inquisitorial but can still be punitive (see Financial Services and Markets Tribunal powers)
Interplay between internal and external investigations

• By contrast, internal disciplinary enquiries are almost entirely inquisitorial

• Understanding of differences and interplay of core principles essential to properly protect institution
Internal Investigations: external drivers

- Investigations by companies into suspected internal criminal misconduct are becoming more common.
- UK legislation places increased onus on companies to examine their involvement in criminal conduct, particularly in context of AML.
Internal Investigations: external drivers

• Part 7 of Proceeds of Crime Act 2002 (“POCA”)

• Defensive reporting

• Positive obligation to report suspicion of money laundering in the regulated sector – section 330
Internal Investigations: external drivers

- Second limb of first condition ("reasonable grounds for knowing or suspecting") introduced a negligence test
- The failure to disclose offence can be committed if a person had reasonable grounds for knowing or suspecting even if no actual knowledge or suspicion
Internal Investigations: external drivers

• Defences include reasonable excuse, legal privilege for legal adviser, lack of training from employer and knowledge or reasonable belief that overseas conduct not unlawful under criminal law applying in that country and territory

• Onus on corporates to have systems in place
Section 330 in action

• *Squirrel v Nat West Bank Plc* [2006] 1 WLR 637. S was a new business buying and selling mobile phones. Its bank account was frozen with no explanation or notice given to the company. When the managing director attempted to discuss the matter with the bank he was given no further information. £200,000 was frozen by the bank under POCA powers. It was not disputed between the parties that there was no suggestion that S or its associates had committed a criminal offence, nor was there a prima facie case that S or its associates had committed an offence. S suffered such financial hardship that it could not afford to instruct lawyers. Nevertheless the court found the bank’s conduct in disclosure ‘unimpeachable’ as regards the requirements of the legislation.
Internal Investigations: external drivers

• Section 331 POCA – creates an offence that may be committed when nominated officers in the regulated sector do not make required disclosures as soon as practicable after receiving relevant information.
Internal Investigations: external drivers

- Bribery Act 2010 (came into force on 1 July 2011)
- Failure of commercial organisation to prevent bribery (section 7)
- Defence to prove adequate procedures in place
Internal Investigations: external drivers

- Serious Fraud Office approach to corporate wrongdoing
- Financial Services Authority power to gather information and appoint investigators; production of a report by a “skilled person”
- Territorial reach of US Foreign Corrupt Practices Act & OFAC
Internal Investigations: external drivers

• Effective internal procedures essential to guard against criminal liability, let alone civil, regulatory and reputational risks

• Recent self-reporting cases in UK demonstrate benefits in being proactive
Internal Investigations: preliminary considerations

• No definitive rules on when or how to conduct an internal investigation

• Management’s goal must be obtain the facts in the most effective and reliable way possible

• What questions should the institution be asking?
Internal Investigations: preliminary considerations

- Immediate involvement of Compliance Department & Legal

- Structure – Problem; objectives; timetable; allocation of resources (internal and external); confidentiality; legal privilege; involvement of external agencies
Internal Investigations: preliminary considerations

• Internal working group; composition of working group; terms of reference; separate from disciplinary process

• Essential that any business representative has working knowledge of relevant part of business and relevant procedures

• Speed of response; containment and initiative
Internal Investigations: preliminary considerations

- Lawyers or management?
- Internal or external advice?
- Privilege considerations
- Cost / benefit analysis
Internal Investigations: major issues in UK

- Conduct and status of internal interviews
- Handling and dissemination of documentation
- Legal privilege
- Self-reporting
Internal interviews

- Purpose of interview?
- Ensure integrity of product
- Control confidentiality
- Clear interview plans
- Adequate notice and pre-interview disclosure
- Accurate record (approved?)
Internal interviews

• Is a caution required?
• Who should accompany the interviewee?
• Make sure the interviewee understands that the person conducting the interview acts for the company (especially if interview conducted by company lawyer)
Internal interviews

• Generally no privilege against self-incrimination in ordinary internal disciplinary proceedings

• Tension in employer / employee relationship

• Depends on facts of case; purpose of interview

• *R v Welcher* [2007] EWCA Crim 480
Handling and dissemination of internal documentation

- An effective internal investigation will collate, schedule and perhaps analyse the relevant facts and documentation

- Is an internal investigation report appropriate?
Handling and dissemination of internal documentation

- Financial Services Authority guidance
- Privilege
- Limited waiver?
- Underlying material
Legal Privilege

“In view of discovery issues, it is of the utmost importance that no unfortunate paper trails are created. Clients need to be instructed not to use e-mail on the issue during the course of the investigation and our reports are sometimes given orally”
Legal Privilege

- Constant theme through previous topics
- Institutions may wish to conduct internal investigations in such a way that litigation or legal advice attaches to the results of the internal investigation
Legal Privilege

- Subject to jurisdiction-specific rules on disclosure, privilege may minimise disclosure obligations to third parties and employees
- Involve Legal at the outset to determine whether the internal company investigation will be framed to attract privilege
Legal Privilege

- If seeking to attract privilege:
- Terms of Reference: to prepare a report to enable the company to take legal advice on its position
- Non-lawyers should not create documents or interview employees
- Frame any letter of engagement appropriately
Self-reporting

• Understand any obligatory reporting requirements
• Voluntary self-reporting a major topic in UK in last couple of years
• Effective means of using product of internal investigation to maintain some control over fallout from issue
• Attractive to prosecutors because of efficiencies and cost savings
Self-reporting

• 9 January 2009: AON fined £5.25m
• But for co-operation the penalty would have been £7.5m
• Despite concerns relating to bribery and corruption, AON was dealt with through the regulatory system for systems failings
Self-reporting

- Recent cases (*Innospec, Dougall* and *BAE Systems*) have cast significant uncertainty over the future of plea negotiations
- Favourable plea negotiations in *Innospec* and *Dougall* followed as a result of co-operation with Serious Fraud Office
- Court very critical of attempt to prescribe sentence
Conclusions

• Effective internal investigations are an essential risk management tool
• Need for clear strategy and structure with a sharp focus on scope and use of legal privilege during investigation
• Careful analysis of outcome and reporting issues also essential
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