Internal Investigations- 101

Corporate & Regulatory Compliance Boot Camp

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Stephanie Bustamante
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Meet the Faculty

Panelists

Braeden Anderson - Anderson P.C.

Stephanie Bustamante - ChampionX

Moderator

Daniel Cotter - Dickinson Wright

About This Webinar

Internal Investigations- 101

Compliance issues are at the front of every manager's and fiduciary's mind these days. It used to be that all the worry came from a creative plaintiffs' bar calling a business's conduct into question, but those days are long gone. Public and private companies are investigated by not only the United States federal government, but also local, state, and foreign governments. Self-regulating entities also add a layer of scrutiny. Under the insulation of the attorney-client privilege, an effective internal investigation can help marshal the facts to inform corporate decisions about past or existing violations and prevent potential future violations.

An internal investigation can protect management from the violation and records the company's response to an incident or violation. However, most importantly, it serves to send a clear message that the company is serious about compliance and that it sets transparency as a priority.

This webinar surveys recent compliance trends and discusses best practices regarding the attorney-client privilege, joint defense agreements, the use of experts, witness interviews, the consequences of self-disclosure and how to control the impact on the company.

Financial Poise Webinars

About This Series

Corporate & Regulatory Compliance Bootcamp

This webinar series covers corporate and regulatory compliance as it relates to procurement, government contracting, the Foreign Corrupt Practices Act, data privacy, and social media. The various episodes examine these topics from a company's perspective, delving into compliance issues that pertain to specific company practices across industries and borders and impact companies of all sizes and types.

As with every Financial Poise Webinar, each episode is delivered in plain English so that you do not have to be a Business Law specialist to understand and benefit from them. And, as with every Financial Poise Webinar, each episode brings you into engaging, sometimes humorous, conversations designed to entertain as it teaches. Each episode in the series is designed to be viewed independently of the other episodes so that participants will enhance their knowledge of this area whether they attend one, some, or all episodes.

Episodes In This Series

#1 Overview of General Corporate Law Compliance

Premiere Date: 3/26/2025

#2 Procurement & Government Contracting Compliance

Premiere Date: 5/28/2025

#3 Foreign Corrupt Practices Act Compliance

Premiere Date: 6/11/2025

#4 Data Privacy Compliance

Premiere Date: 7/2/2025

#5 Internal Investigations - 101

Premiere Date: 8/6/2025

#6 Securities Law Compliance

Premiere Date: 9/10/2025

#7 Executive Compensation

Premiere Date: 10/8/2025

Financial Poise Webinars

Episode #5

Internal Investigations- 101

Each Financial Poise Webinar is delivered in Plain English, understandable to investors, business owners, & executives without much background in these areas, yet is of primary value to attorneys, accountants, & other seasoned professionals. Each episode brings you into engaging, sometimes humorous, conversations designed to entertain as it teaches. Each episode in the series is designed to be viewed independently of the other episodes so that participants will enhance their knowledge of this area whether they attend one, some, or all episodes.

Primer on Internal Investigations

- Even the most diligent and vigilant companies are susceptible to business crimes, such as fraud. The need to perform an internal investigation often comes without warning, and the way in which the company conducts an investigation can be just as important as the misconduct itself.

- Topics covered will include:

  - ➢ What triggers an investigation?
  - ➢ What are best practices for investigative plans and protocols?
  - ➢ What's involved in executing and completing an internal investigation?

What May Trigger an Internal Investigation

- Investigative Activities by Law Enforcement or Regulatory Agencies
- Whistleblower Tips or Anonymous Letter
- An Employee Complaint
- An Audit Identifies Missing Assets
- Hacking of Proprietary Information Systems
- Exfiltration of Proprietary Data
- Receipt of a Threat of Litigation
- Adverse Media Reporting

The “Stick” Law Enforcement - The Yates Memo (Sept. 2015)

- To be eligible for any cooperation credit, corporations must provide to the DOJ all relevant facts about the individuals involved in corporate misconduct.
- Both DOJ criminal and civil corporate investigations should focus on individuals from the inception of the investigation.
- The DOJ’s criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

The "Stick" Law Enforcement - The Yates Memo (Sept. 2015) *(cont'd)*

- Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.
- DOJ attorneys should not resolve corporate cases without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.
- DOJ civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

Yates Memo Implications

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- Protecting the attorney-client privilege while demonstrating full cooperation.

- Gaining the cooperation of employees in internal investigations when such cooperation could subject the employee to criminal prosecution.

- Future implications for joint or common interest defense agreements.

- The Yates Memo is the latest in a string of memos which followed a 1999 Eric Holder memo entitled “Bringing Charges Against Corporations” and which was followed by various memos from Deputy Attorneys General which were condensed into the U.S. Attorney’s Manual ("USAM") as the Principles of Federal Prosecution of Business Organizations (USAM § 928.000).

The "Carrot" - Policy on Coordination of Corporate Resolution Penalties and New FCPA Enforcement

- DOJ policy now explicitly requires enforcement coordination to prevent duplication of enforcement efforts, or "piling on," by corporate regulators and DOJ prosecutors.
- The new coordination policy has four key features.
- It makes clear that the threat of criminal prosecution should not be used to increase greater civil penalties
- It requires coordination among DOJ components to ensure an equitable result and to avoid disproportionate punishment.

The "Carrot" - Policy on Coordination of Corporate Resolution Penalties and New FCPA Enforcement *(cont'd)*

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- It encourages similar coordination with other federal, state, and foreign enforcement authorities for the same misconduct.

- It sets forth factors used to assess whether multiple penalties are appropriate. These factors include: the egregiousness of a company's misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving final resolution; the adequacy and timeliness of a company's disclosures and its cooperation with the DOJ separate from any such disclosures and cooperation with other relevant enforcement authorities.

- These factors substantially overlap with DOJ's corporate leniency principles articulated in its FCPA enforcement policy.

Yates "All or Nothing" Revised

- The corporate leniency principles state that absent aggravating circumstances, the DOJ will presumptively decline to prosecute companies that:

  - ➢ Voluntarily self-disclose. Fully cooperate with DOJ investigation.
  - ➢ Remediate with internal compliance programs as necessary.
  - ➢ Disgorge ill-gotten gains.
  - ➢ Even if the DOJ prosecutes, the policy states that adherence to these factors should provide a substantial benefit at sentencing.

- The new policy is incorporated into the DOJ's revised Justice Manual (formerly US Attorneys' Manual) in the section on the DOJ's Principles of Federal Prosecution of Business Organizations, particularly 9-28.700 (The Value of Cooperation).

U. S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

May 9, 2018

TO: Heads of Department Components
United States Attorneys

CC: DOJ Working Group on Corporate Enforcement & Accountability

FROM: Rod J. Rosenstein
Deputy Attorney General

SUBJECT: **Policy on Coordination of Corporate Resolution Penalties**

Corporate enforcement, like other criminal and civil enforcement, must be guided by the rule of law. In reaching corporate resolutions, the Department should consider the totality of fines, penalties, and/or forfeiture imposed by all Department components as well as other law enforcement agencies and regulators in an effort to achieve an equitable result.

Attached for your attention are new provisions to be incorporated in the U.S. Attorneys' Manual. These provisions recognize the Department's commitment to fairness, as well as the strength of our partnerships with law enforcement agencies and regulators in the United States and abroad.

We are committed to rooting out and punishing corporate offenders, including through coordinated investigations and resolutions that fully vindicate the public interest. The Department also recognizes the value of corporate voluntary disclosures of misconduct and cooperation by responsible corporate actors. In appropriate cases, coordination and balancing of corporate resolution penalties furthers those aims.

Thank you for sharing your helpful suggestions on this matter, and for your dedicated work to serve the American people.

New Section in USAM Title 1

1-12.100 - Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct

In parallel and/or joint corporate investigations and proceedings involving multiple Department components and/or other federal, state, or local enforcement authorities, Department attorneys should remain mindful of their ethical obligation not to use criminal enforcement authority unfairly to extract, or to attempt to extract, additional civil or administrative monetary payments.

In addition, in resolving a case with a company that multiple Department components are investigating for the same misconduct, Department attorneys should coordinate with one another to avoid the unnecessary imposition of duplicative fines, penalties, and/or forfeiture against the company. Specifically, Department attorneys from each component should consider the amount and apportionment of fines, penalties, and/or forfeiture paid to the other components that are or will be resolving with the company for the same misconduct, with the goal of achieving an equitable result.

The Department should also endeavor, as appropriate, to coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct.

The Department should consider all relevant factors in determining whether coordination and apportionment between Department components and with other enforcement authorities allows the interests of justice to be fully vindicated. Relevant factors may include, for instance, the egregiousness of a company's misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving a final resolution; and the adequacy and timeliness of a company's disclosures and its cooperation with the Department, separate from any such disclosures and cooperation with other relevant enforcement authorities.

This provision does not prevent Department attorneys from considering additional remedies in appropriate circumstances, such as where those remedies are designed to recover the government's money lost due to the misconduct or to provide restitution to victims.

New Cross-Reference in USAM Title 9 [indicated in gray]

9-28.1200 - Civil or Regulatory Alternatives

A. General Principle: Prosecutors should consider whether non-criminal alternatives would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution—*e.g.*, civil or regulatory enforcement actions—the prosecutor should consider all relevant factors, including:

1. the sanctions available under the alternative means of disposition;
2. the likelihood that an effective sanction will be imposed; and
3. the effect of non-criminal disposition on federal law enforcement interests.

See also USAM 1-12.100 - Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct.

Hot Topics for Investigations

- Foreign Corrupt Practices Act
- Conflict minerals
- Anti-money laundering
- Data security
- False Claims Act
- Anti-kickback Statute
- Anti-trafficking
- Antitrust
- Economic espionage
- Fraud
- Sexual Misconduct

Fraud

- Misreporting financial statements to investors, the public, and/or lenders
- Insider trading
- False claims of product performance
- Breach of fiduciary duty

Objectives on an Internal Investigation

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- Ensure employees are complying with the law and internal policies
- Gather facts to determine what happened
- Promote ethical behavior and serve as a deterrent to employees
- Conduct a fair, legal, and thorough investigation that will withstand external scrutiny
- Protect management and the board from allegations of complicity
- Evaluate need to update existing policies in light of internal compliance efforts and for factual determinations

Develop an Investigative Plan

- What is the problem? Define the Scope of the investigation and limit parameters of inquiry
- Who needs to know? General Counsel, executive team, program personnel and compliance professionals
- Establish timeline for completion of investigation
- Protocols for communication of progress: assess progress and troubleshoot if critical issues arise
- Timeline for completion and status updates
- Collection and storage of evidence

Develop an Investigative Plan *(cont'd)*

- Who will have access to materials gathered
- Prepare an interview list
- Who will conduct the interviews?
- Anticipated methods of data collection
- Corporate retention policy of electronic data
- Attorney-client privilege
- Documentation/deliverables

Who Is In Charge of the Internal Investigation?

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- Chief audit executive
- Corporate security
- External counsel
- General counsel/Compliance
- Human resources

Attorney-Client Privilege and Work Product Doctrine

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Attorney-Client Privilege:
Encourages open dialogue between attorneys and their clients (e.g., the "Company") so that each can provide information to the other in an environment which protects the information from further disclosure.

Attorney Work Product Doctrine:
Protects materials prepared in anticipation of litigation from discovery by opposing counsel. Under the work product doctrine, "tangible material (or its intangible equivalent)" that is collected or prepared in anticipation of litigation is not discoverable, and may generally be shielded from discovery through use of a protective order.

What Information is Covered by the Attorney?

Attorney-Client Privilege:
Counsel's notes and memoranda reflecting responses to interview questions and written responses to questionnaires are usually considered privileged.
Other communications, such as reports of the results of procedures performed, as well as minutes from board meetings where such reports are discussed with counsel, may also be protected as long as they primarily reflect legal advice.

Attorney Work Product Doctrine:
More inclusive than attorney-client privilege. Work product includes materials prepared by persons other than the attorney with the realistic possibility of impending litigation. Materials may also include interrogatories, signed statements, other information acquired for the prosecution or defense of a case (i.e., memoranda, briefs, communications, mental impressions, conclusions, opinions, or legal theories, etc.).

Investigation Protocols

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- Review concern or complaint
- Understand your whistleblower policy (i.e., anonymity, confidentiality)
- Establish communication protocols
- Conduct informational discussions
- Secure data in whatever form; this may include changing locks
- Preserve originals (i.e., do not staple, hole punch, write on, mark or alter in any way)
- Review books and records, including information that may be maintained off-site in archives

Investigation Protocols *(cont'd)*

- Review office contents of relevant individuals
- Confirm balances with customers/vendors
- Perform background checks
- Review the work previously performed by Internal Audit, including any system or internal control narratives
- Review Board of Director and/or Audit Committee minutes
- Perform "undeletes" and review hard-drive contents
- Recover and review e-mail
- Interview relevant individuals

Requirements of an Internal Investigation

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- Gather relevant background information
- Search and review of documents
- Perform forensic examination of computers, hard drive, cell phones, external storage drives
- Ancillary investigations
- Asset searches
- Forensic accounting/tracing of funds and assets

Interviewing Employees

- Who will lead interview?
- Who will attend interview?
- Where will interview be conducted?
- Are any of the interviewees subject to a collective bargaining agreement?
- What policies are implicated?
- What time of day will interview be held?
- In what language will interview be conducted?
- Will Upjohn Warning be provided?
- What information/evidence will be shared during the interview?
- How will you document the results?

Corporate “Miranda” Warning, The Upjohn Warning

- Counsel represents only the company and not the employee as an individual.
- Must be told to the employee (preferably in writing, though sometimes under certain circumstances it may be more appropriate to provide the Upjohn Warning orally).
- Must allow the employee to get separate counsel even if that means rescheduling an interview.
- Counsel is conducting this interview to gather facts to provide legal advice to the company.
- The attorney-client privilege belongs to the company, and not the individual. The company may later waive this privilege and disclose what the employee said to a government agency, to a court, or to another third party.
- The employee must keep the interview and it’s substance confidential.

Checklist of Questions for Managers and Internal Compliance Professionals

- Could the allegation affect your financial statements?
- Are officers or senior executives potentially involved?
- Will the allegation damage your reputation/brand?
- Is it likely the allegation will be made public?
- Are regulators or law enforcement involved?
- Are you equipped to quickly preserve and collect data?

Best Practices

- Preemptively identify potential external service providers.
- Confirm these resources will be immediately available if an issue arises.

Outside Professionals

- Security professionals
- Forensic auditors
- Computer forensics
- PR/media consultants
- External legal counsel

- All Will Require:
  - Contacts
  - Credibility
  - Expertise
  - Objectivity

External Legal Counsel

Credibility:
It helps to have an outside organization involved in the meeting to assist in your credibility with outside parties such as the government or independent enforcement organizations. Even though lawyers (or accountants) serve a client, both have independent responsibilities to their profession and external ethical standards with which they must comply.

Protection of privileged information:
Establishes boundaries for when the privilege begins and ends, limits non-privilege communication, allows for protection of communication with other professionals if they are engaged by the outside legal counsel.

How to Report the Findings

- Who?
  - ➢ General Counsel
  - ➢ Executive Team
  - ➢ Program Personnel
- How?
  - ➢ Briefing
  - ➢ Internal Written Report

Written Reports

- Allegation and Background
- Methodology Utilized
- Observations and Discussion of Evidence
- Recommendations
- Ownership of Corrective Action Items

Prevention - Best Practices

- Review and Potentially Amend Document Retention Policies
- Identify Fraud and Corruption Investigative Resources in Advance
- Establish and Document Investigative Protocols, Including Confidentiality
- Implement a Case Management System
- Implement Automated Tools for Collection of Electronic Information
- Leverage Results of Other Investigations to Improve Processes and Controls

Questions or Comments?

If you have any questions about this webinar that you did not get to ask during the live premiere, or if you are watching this webinar On Demand, please do not hesitate to email us at info@financialpoise.com with any questions or comments you may have. Please include the name of the webinar in your email & we will do our best to provide a timely response.

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Meet The Faculty

Daniel Cotter - dcotter@agdglaw.com

A member in the firm's Chicago office, Daniel Cotter's practice encompasses a range of roles, including a pivotal tenure as general counsel for a major life insurance company and extensive private practice experience. His clientele spans insurance firms, financial institutions, IT/consulting enterprises, and nonprofits.

Since 1996, Dan has been deeply involved in privacy and cybersecurity matters, notably contributing to the formulation of terms and conditions as well as disclaimers for Fortune 500 websites in the late 1990s. His roles as a chief privacy officer across various companies and law firms underscore his depth in these evolving domains.

Dan's proficiency extends to navigating intricate insurance regulatory matters, overseeing substantial reorganizations within holding company systems, and negotiating a myriad of contracts, ranging from simple to elaborate, including outsourcing agreements. Read More.

Stephanie Bustamante - stephanie.bustamante@championx.com

Braeden Anderson - braeden@anderpc.com

Mr. Anderson, a distinguished alumnus of Kirkland & Ellis and Sidley Austin in New York City and Washington, D.C., is an impeccably well-trained attorney specializing in securities law, regulatory compliance, and enforcement. With a proven record of representing some of the world's largest corporations, leading Wall Street firms, and high-profile individuals, he has successfully guided clients through complex disputes, internal investigations, government inquiries, and enforcement actions.

In addition to his expertise in regulatory matters, Mr. Anderson brings invaluable insight into fast-evolving sectors such as fintech, start-ups, and cryptocurrency. Drawing on his experience as General Counsel to over a dozen start-ups and a private equity firm, he provides strategic counsel on corporate governance, capital-raising, tokenization, and innovative structuring. With a deep understanding of emerging technologies and capital markets, he empowers clients to navigate dynamic legal landscapes with confidence and precision. Read More

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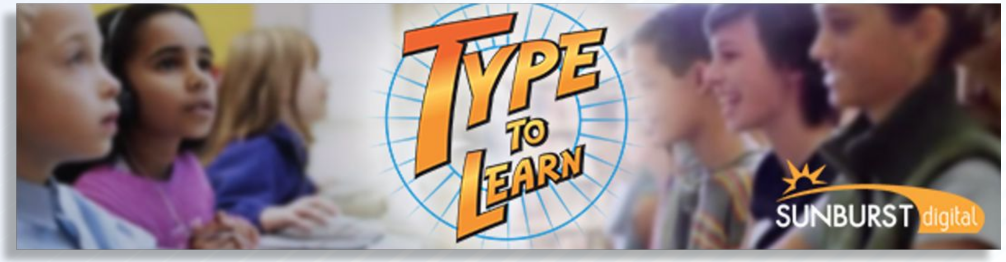

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