In this second briefing on corporate investigations, we summarise the first steps that organisations need to take when they become aware of an issue that needs to be investigated.

When an organisation discovers the sort of trigger event that can require an investigation (for which, see our first briefing) it is vital that it quickly takes control of the situation and takes action to mitigate risks and safeguard its business.

**Define the problem**

Albert Einstein has said, "If I had only one hour to save the world, I would spend fifty-five minutes defining the problem, and only five minutes finding the solution." It is only with an accurate understanding of the issue facing an organisation that it will be able to:

- Plan an effective investigation;
- Anticipate the potential consequences to the organisation;
- Receive guidance from its professional advisors; and
- Develop a proportionate response strategy.

We deal with the practical steps that an organisation will need to take to conduct an efficient and useful investigation in our third briefing. However, defining the problem will inform a number of the initial steps that should be taken when the organisation first learns of a serious issue to investigate.

**Stop any continuing misconduct**

Particularly where the misconduct is a criminal or regulatory offence, it should be stopped as soon as possible. Any delay in this regard may suggest that the organisation is complicit.

The exception to this general rule is where the organisation needs to allow the misconduct to continue in order to gather evidence and identify all of the parties involved. This is most often appropriate when working in conjunction with a regulator.

**Make formal notifications**

**Regulators**

Organisations should be aware of self-reporting obligations to, for example, the Financial Conduct Authority or the Prudential Regulation Authority. Even where self-reporting is not required, transparency and co-operation with relevant authorities is generally advantageous if regulatory involvement is subsequently needed. A positive first encounter can affect the regulator's approach to any subsequent enquiry. If the investigation focuses on illegal behaviour, from which the business has or will derive a benefit, it may be necessary to notify the National Crime Agency (the "NCA").

**The market**

Listed entities have stringent reporting requirements, even where full information is not yet available. Timing is crucial as a hasty and inaccurate disclosure may also mislead the market. Any such disclosure must be carefully managed to ensure that reporting obligations are met without providing too much detail at an early stage.

**Insurers**

Organisations should carefully review the terms of any relevant insurance policies. These might include, for example: directors' and officers' liability insurance; employee fidelity cover; environmental liability insurance; and legal expenses insurance.

It is important to avoid breaching the terms and voiding the policy. Such terms will usually include obligations of prompt notification to the insurers.

**Other parties**

Organisations should also consider whether they need to inform other parties, such as affected contractual counterparties. In addition, companies may need to contact their financiers, especially where the event has triggered an act of default.

Organisations should seek legal advice on what notifications to make if they know or suspect that a notification has been or should be made to the NCA under the Proceeds of Crime Act 2002.

**Secure assets**

Where an organisation suspects that it has been the victim of wrongdoing, one of its priorities should be to identify the wrongdoers and to locate their assets with a view to obtaining freezing injunctions over them. It is important to act quickly and to obtain a freezing injunction before the wrongdoer becomes aware that their conduct has been discovered. Otherwise, they may take steps to make it difficult and costly to enforce any judgment that is eventually obtained against them.
Preserve the evidence

Preservation of evidence is a vital step because the failure to preserve evidence could: make an internal investigation more difficult; damage an organisation's reputation with regulators; and even lead to civil and criminal penalties for the organisation and the directors or employees involved.

The collation and preservation of evidence should be carried out carefully and lawfully. Organisations must have due regard to the Data Protection Act 1998, the Computer Misuse Act 1990 and their own employee handbook. Where organisations choose to instruct investigators to obtain information on its behalf, they should ensure that the investigator is reputable and only uses legal means to obtain information. If data needs to be collected from other countries, specialist advice should be sought. Many jurisdictions, including a number in Europe, have particularly stringent rules.

It is prudent to involve IT and e-disclosure experts in the investigation team to make sure that information is collected and stored efficiently and cost effectively. All standard document destruction policies should be suspended, so that relevant evidence is not destroyed. It is best to err on the side of caution in gathering and preserving evidence. An organisation will not necessarily have to review all of the evidence that it gathers, but casting the net widely at the outset increases the likelihood of collecting any relevant information. This avoids having to conduct multiple rounds of evidence-gathering.

Where essential evidence might be held by people who would destroy it deliberately, organisations should consider applying for an urgent court order to permit a search of their documents.

Osborne Clarke’s range of briefings on corporate investigations

This is the second in a range of briefings that we have prepared on corporate investigations. The other briefings can be accessed via the links below:

- #1 - The rise of corporate investigations;
- #3 - Conducting the investigation;
- #4 - Retaining legal professional privilege; and
- #5 - Concluding the investigation and moving on.

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