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By Janine Armin

Across state lines

One of the most vexing problems a company can face is a multi-jurisdictional investigation. This was exactly the topic of the most recent installment of the *Corporate Secretary/Foley* webseries: 'What to do when your company becomes the subject of a multi-state investigation.' Lisa Tharpe, a partner in Foley & Lardner's white-collar defense and corporate compliance group as well as its securities litigation group, and Kathy Combs, vice president, corporate secretary and deputy general counsel with Exelon, spoke on the complexities that arise in dealing with multi-state investigations and ensuring effective cooperation across corporate departments.

Multi-state investigations are a new, but established fact and challenge of corporate life. Tharpe said she saw the source of it as being Eliot Spitzer, whose success in bringing cases as New York's attorney general emboldened other state attorney generals and regulators. She then discussed other developments currently driving multi-state investigations, namely, compliance, employee complaints, shareholder inquiries, class actions, customer and vendor complaints. Since investigations may be inevitable, Tharpe advised preparedness. 'Make sure your own corporate procedures are substantially robust and thorough ... so that when you do get an inquiry your procedures are in place to investigate that issue as quickly as possible and prepare a response to the state regulator.'

Multi-state investigations necessitate consistency in approach and response, the panelists said. Coordination is essential at an energy company like Exelon, where at any given time six to ten offices are conducting investigations, Combs said. The firm's own experience with two

cases prompted the company to 'standardize a process' by using 'a cross-functional team', she said. 'It wasn't an easy task. It's difficult to monitor consistency much less have a shot at maintaining it without some standardization.'

Tharpe, who has handled multi-state mutual fund investigations among others, highlighted the importance of making sure 'responses [are] consistent across the board.' This was true of webcast participants, too; the first live-polling question showed that 65 percent of companies had standardized internal investigations across all offices and departments.



Do it together

Gathering a team together is the first step in organizing an investigation, explained Combs, putting at the 'top of the chain for the process, the general counsel,' who must ensure the investigation is conducted in a timely manner. Tharpe said commitment

and support of senior management will help companies communicate and implement these strategies.

Combs noted the importance of the audit function in the post-Sox period in reinforcing values across the company. Audit 'oversee code of conduct violations,' she said, which helps set 'the tone at the top.' Tharpe concurred, stressing audit's early involvement in inquiries: 'Notify your audit committee immediately if you have received concern in regards to financial reporting.'

Exelon has gone to great lengths to ensure that people handling investigations are 'well aware of these reporting requirements,' by creating an investigation plan template and 'triggers to remind people.' With tip-sheets like these, the 'process is more likely to be followed,' she said. At Exelon, the lead investigator - often the general

counsel – fills out the investigation plan template, detailing ‘which documents pertain to each issue, and have them identify those documents first, before interviewing a witness ... to determine whether the conduct they’re talking about is permissible or impermissible.’

Tharpe emphasized moving quickly to set up a plan to retain documents and electronic information, for example, suspending email deletion programs. The record of these retention procedures continues to be important throughout the investigation, she said, suggesting preparing ‘a chronology of the facts’ in coordination with senior management.

Getting help

Deciding whether outside counsel is necessary is difficult. Some situations make it clear, however, such as when senior executives are involved. Tharpe stressed the value in having the representation of lawyers with a track record before the regulator in question. Retaining outside counsel and third-party document retention specialists can boost credibility, Tharpe said, showing regulators the company has ‘taken an extra step to ensure integrity.’ Combs concurred: ‘For independence, we want to make it clear that we will retain outside counsel at the outset.’ There should also be one ‘company liaison with outside counsel’ so ‘outside counsel is getting the same story.’

Multi-state investigations pose unique challenges, forcing companies to coordinate across many offices and regions. Several organizations have sprung up to help coordinate efforts among industries, like the North American Securities Administrators Association, which details the important issues in state investigations so that ‘state regulators can share the results for their investigations ... and strategies for pursuing them.’ Companies can thereby share tactics and industries can see what investigations may be foreseeable in different states.

Tharpe encourages formal or informal coordination with other industries in similar crises to help build a case ‘when the state may have initiated an investigation across a number of companies in a specific industry.’ It can educate state regulators who ‘might not be as sophisticated as the SEC in investigating issues in a specific industry.’

Ninety-four percent of companies listening in on the webcast had not sought participation in joint defense groups when responding to an investigation. Tharpe said fear of guilt by association might be a factor. By joining forces, companies may feel they are admitting guilt. In some situations, that impulse is a good one, said Tharpe,

advising coordination with other companies ‘only if you believe your company has substantial exposure.’

State investigations differ from federal investigations both in content and in style. States are more likely to seek publicity ‘to bring institutions to the settlement table,’ Tharpe said, commenting on Spitzer’s style as attorney general. It is therefore essential to hire ‘a press person to deal with responding to media inquiries,’ she added.

Tharpe discussed practice pointers for negotiating fines or restitution. She advised trying ‘to get as much [of

With empowered regulators, multi-state investigations are a new, but now established fact of corporate life

the fees] into the restitution category as opposed to the fine category,’ largely due to the tax benefits.

Perfect plan

After completing investigations, it’s important to consider what to do with the findings. At Exelon, ethics, audit and HR determine disciplinary action. ‘You want to ensure that someone has accountability for making sure the revisions to the procedures are made.’ Care must be taken that the case isn’t closed before changes are made.

Tharpe suggests making sure company employees don’t discuss investigations. Still, there needs to be an open explanation of what’s going on to get people over their reticence about cooperating with investigators. ‘We try to improve the comfort level employees have with the process,’ said Combs. Tharpe also says it can foster a strong tone of cooperation with the investigation ‘if a company can avoid the appearance of a witch hunt and can make it more of a team approach.’

Often, when a company is engaged in a high-profile case, it tells employees not to speak to the government. But instead of helping, it ‘almost guarantees your company will be put on the non-cooperative list,’ said Tharpe. Foremost in investigatory protocol, she added, is that companies need to conduct thorough and complete investigations, because if they don’t, they risk ‘loss of all credibility with the government.’

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