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STEPS TO TAKE WHEN YOUR BUSINESS IS VICTIMIZED

Privilege Can be Compromised

By Nathan Fishbach

A **RECURRING NIGHTMARE** for business officials is confronting allegations that their organization was victimized by white collar fraud, whether caused by its own employees or by outside parties. The impact could be cataclysmic –

or it could be a minor speed bump.

Regardless of the type of fraud or the amount of harm, it is imperative that the organization confront the issue immediately. Here are ten initial steps to take:

- **Adopt the right mind set.** Recognize that yours is not the first organization to be victimized by this kind of misconduct. Just about every entity will ultimately face a similar crisis. Recognizing this fact will help confront the problem objectively. See it as an opportunity to demonstrate strength by successfully tackling a tough issue.

- **Start analyzing the problem immediately.** Contact counsel to ensure the review occurs within a privileged setting. The should encourage frank discussions. Assess the role of in-house counsel.

If the consultations are solely with in-house counsel, the question that often arises is whether the focus of the discussions was legal matters as opposed to business issues, where privilege might not apply. If the line between business and legal considerations becomes blurred, an adversary might later claim that the conversations with in-house counsel were not privileged.

- **Assemble the crisis team.** Remember that responding is frequently a front-loaded process, utilizing substantial organization personnel at the start. Depending upon the problem, the initial analysis might bring in executives at the highest levels of the company. This is unlike responding to routine civil litigation, where there is an evolving phased review through the investigative and discovery process.

The crisis team should include counsel, but it also

will likely need officials responsible for compliance, finance, human resources, marketing and communications, and information technology.

Consider whether outside experts need to be retained. Regardless of the team's composition, identify who among the officers and board need to be alerted.

- **Develop a plan.** Establish deadlines. Set goals and outline the steps necessary to reach them. Recognize that the plan must be flexible enough to adapt to events or new information.
- **Take steps to avoid allegations of obstruction of justice or spoliation of evidence.** IT personnel should immediately ensure that all documents are retained. If there is concern about the integrity or quality of the organization's IT function, consider retaining an outside IT consultant. Routine document destruction policies should be suspended until the matter is resolved. A mirror image of the electronic documents may need to be made to preserve evidence.
- **Consider conducting an internal investigation.** Available data is frequently scant and unreliable. Determine the inquiry's parameters. Initially, the scope might be to determine what happened, its causes, and the resultant harm.
- **Determine whether the matter is an isolated incident or reflects a systemic corporate problem.** Has the company faced similar difficulties in the past? Are there detectable patterns? Does the organization have controls in place

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that should have prevented this problem? Were those controls responsible for uncovering the problem? If not, why did the controls fail? Does the company maintain and follow a compliance plan? The answer to these questions might dictate the future strategy.

Evidence should be gathered to analyze the company's legal remedies and assess whether criminal, civil and administrative problems exist.

Identify the personnel who will conduct the investigation. It's often advantageous to retain outsiders. They may provide greater objectivity. With external investigators there is generally less concern that they might be tied to employees who are possibly linked to the underlying problems. Frequently, former law enforcement agents are selected to play a major role. They are likely

to be proficient at assessing the legal landscape, gathering relevant facts and testifying if the need arises.

To permit the privileged evaluation of the problem, it is important that the external personnel be retained by counsel. Decisions to waive the privilege and disclose the investigation's findings might come later. However, at this stage, the option of asserting privilege should be maintained. Counsel should be closely involved in establishing the protocols for the inquiry and the manner in which its findings are prepared.

- **Determine whether mandatory reporting requirements apply.** If so, contact should be made with the proper government agency. The crisis team should ensure the accuracy of the organization's report to the government. Even if such a disclosure is not required, you might want to consider the benefits of voluntarily reporting the matter to law enforcement.
- **Get the news out.** The organization's stakeholders should learn about the problem from the company as opposed to rumor and innuendo from other sources. Prepare a draft standby response to deliver in the event of media inquiries. In some instances, the business might decide to contact the media.
The message might be limited by lack of data and the need for confidentiality, but it should be accurate and not misleading. You must strike the appropriate balance between providing information and not jeopardizing a legal position.

- **Evaluate for notification and documentation requirements to third parties.** Insurance policies should be analyzed for notice requirements. Assess whether any financial, accounting, or banking documents as well as tax filings need to be restated and/or amended.

- **Consider immediate steps to ensure that such an event does not recur.** Dramatic measures may be in order. Besides addressing the issue at hand, such measures can display the strength of the business and win back the confidence of the organization's stakeholders.

Confronting white collar fraud is not a pleasant task. However, it does provide an opportunity to assess operations and make needed changes. A systematic approach to the problem could enable the company to emerge as a stronger organization.



Nathan A. Fishbach is a shareholder at the Wisconsin law firm of Whyte Hirschboeck Dudek S.C. He served in the U.S. Attorney's Office for the Eastern District of Wisconsin for over 13 years, holding such posts as Interim U.S. Attorney and Deputy U.S. Attorney, before to joining the firm in 1993.