Investigations Article for PA Bankers Association

Picture this: You are meeting with a junior employee who tells you that she is concerned that a group within the organization is failing to comply with certain banking regulations. Or imagine this: You are sitting at your desk and you receive an email from a regulator asking questions and for documents related to a specific transaction or customer. What should you do in either scenario? Entities of all sizes may find themselves facing a government or regulatory inquiry, a subpoena, a whistleblower complaint, a complaint from a customer or competitor, an adverse media report or an internal escalation from their Compliance, Legal, Audit, or Risk teams. When such issues arise, entities must quickly assess the credibility and severity of the matter through internal fact-finding and, if the concerns are deemed credible and serious, the entity could benefit from engaging an independent professional firm to investigate the issue(s) and recommend next steps. Independent investigations can be performed by law firms, financial consulting firms, forensic accounting firms or similar professional firms, or a combination of these specialties depending on the nature and scope of the investigation.

Whomever conducts the investigation, it is paramount that the investigation be:

- **Well-defined**. The purpose and scope of the investigation must be clearly identified and memorialized from the beginning, keeping in mind that the scope of the investigation may be expanded or contracted based on facts learned during the investigation. Any change in scope should also be memorialized.
- **Independent**. Whether conducted by internal or external professionals, an investigation must be independent from units of the entity potentially involved in the issue(s) being investigated, and the investigator must be allowed to proceed without outside pressure. In circumstances where an internal investigator cannot be independent, investigation by an outside party may be required.
- **Objective**. An investigation should approach the matter from a neutral position and not be undertaken from the position of an advocate seeking to defend the entity or individuals within the entity.
- **Timely**. Investigations must be initiated as quickly as possible to stop potential wrongdoing from continuing, mitigate any damages caused and to ensure that the actions in question are fresh in peoples' (i.e., witnesses') memories and any documentary evidence is preserved.
- **Verifiable**. The conclusions of the investigation must be documented and independently verifiable to the extent possible. In other words, the investigative report needs to contain enough information to "speak for itself."

While an entity can conduct its own internal investigation, an investigation led by experienced professionals can provide:

- **Credibility.** Findings are more persuasive when conducted by a neutral third party, particularly in government inquiries, litigation, or Board reports.
- **Attorney-Client Privilege.** If a law firm leads the investigation, the privilege can attach to working papers and findings.

- **Objectivity.** Internal investigations can be compromised if the investigator has personal or professional ties to the subject of the inquiry or feels pressure from entity management.
- **Thoroughness.** Experienced investigators can ensure a comprehensive and well-documented process, culminating in clear findings and actionable recommendations.

How does an investigation proceed?

While all investigations are different in their size and scope, there are a few common steps that you can expect from any investigation.

Scoping

The entity and the investigator should create a document, sometimes referred to as a "work plan," that defines the investigation's scope and procedures in detail. This will include, but not be limited to, defining the subject matter of the investigation, identifying the universe of people who may have relevant information and the potential audience of any final report (the Board, a regulator, etc.). The scope of the work plan is likely to evolve during the investigation, and any changes should also be documented.

Preserving and Collecting Documents

After drafting the work plan, it is essential to identify and preserve documents (this includes all paper and electronic data, including emails, text messages, IMs, etc.) and other relevant information. The investigator will work with in-house counsel, the business operations team, IT and HR to determine custodians who may have, or have access to, relevant documents. Once identified, the investigator will work with in-house counsel and IT to pull/extract relevant documents from internal systems and to formalize a preservation plan for inactive, archived, residual, and legacy data.

Reviewing and Analyzing the Documents

Once collected, the investigator will process the documents, usually with the help of an external document vendor, and develop a review protocol to understand the subject matter of the investigation and to identify relevant documents, responsive documents, "hot documents" and privileged documents. This review will both enable the investigator to understand the issue and timeline and to identify documents that may need to be produced to a regulator or in a potential litigation.

Interviewing Witnesses

Once the investigator has a good grasp of the issues from its review of the documents, the investigator will determine who needs to be interviewed to ascertain what key individuals know about the issue(s). Interviews should be in person, if possible, to enable the investigator to better assess the credibility of the witness, and if possible, should be conducted by an attorney so that the interview and its contents are privileged. Before an attorney interviews a witness, it is essential that the attorney make the interviewee aware that the interview is subject to the attorney-client privilege, but that the attorney represents, and the privilege belongs to, the entity

and not the employee/witness. As such, the entity can choose to waive the privilege and disclose the contents of the interview. Finally, all interviews should be memorialized in an interview memo which, if prepared by an attorney, will be privileged.

Finally, if an investigation concludes that improper conduct occurred, an entity, in consultation with counsel, should:

- Immediately halt any improper conduct discovered.
- Consider disciplining wrongdoers.
- Draft a formal remediation plan with timelines and milestones.
- Undertake remedial measures, such as conducting training, enhancing compliance controls and procedures, etc. and memorialize such measures in a document.

Whether to Self-Report

Once an investigation is complete, the entity needs to determine what to do with the results, especially if legal or regulatory violations are discovered. For regulated entities such as banks, broker-dealers, investment advisers, etc., experienced counsel can help determine whether the entity should self-report the discovered violations of laws, rules and/or regulations to a regulator, and can use their knowledge of how government agencies work and think to help frame the issues in a manner most likely to resonate with the agency in question. All financial regulators, federal and state, encourage the voluntary self-reporting of violations, with some going as far as to say that self-reporting is the most important factor in determining both cooperation credit and, ultimately, whether a firm should face a penalty.

In deciding whether to self-report the results of an investigation to a regulator, certain factors for an entity to weigh are:

- The likelihood that a regulator will learn about the issue on its own, whether through a whistleblower, a competitor, or otherwise, versus the risk that the disclosure will prompt the government to investigate conduct that was not otherwise on its radar screen.
- The severity of the conduct and the nature of the remedial action undertaken.
- The likelihood that self-reporting would help to obtain a non-prosecution decision, a reduced penalty, or other favorable outcome versus the risk that disclosure could prompt related civil litigation.
- The positive reputational benefit self-reporting will garner with the regulator versus the potential negative publicity of such disclosure.

Conclusion

All entities are likely to experience suspected or actual violations of laws, regulations and/or entity policies by members of management or its employees which may subject the entity to criminal, regulatory and/or civil liability and harmful publicity. When presented with such a possibility, entities need to investigate the potential wrongdoing and respond accordingly and should have an investigation process in place so that they can respond in a consistent and timely manner. To gain legitimacy, such process must be guided by a commitment to uncover the

relevant facts in an objective and thorough manner, without the pull of external or internal forces, and to promptly ameliorate the conditions that led to the actual or potential violation.

About the Authors

Mark D. Shaffer, Partner
Mark D. Shaffer has over 20 years of experience advising U.S. and foreign financial institutions, broker-dealers, investment advisers, cryptocurrency businesses, and fintech companies on a broad range of regulatory and compliance matters relating to SEC and FINRA rules and regulations, Federal Reserve and other banking regulations, and Bank Secrecy Act (BSA)/anti-money laundering (AML) laws and regulations. He frequently helps clients understand how such laws and regulations apply to new technologies and innovative products.

Mark also represents financial institutions and their employees, officers, and directors in government and internal investigations and regulatory proceedings before federal and state authorities. Investigations and enforcement matters have included issues relating to alleged bribery and corruption, the sale of unregistered securities, currency and equities market manipulation, collusion, insider trading, money laundering, OFAC sanctions violations, false statements, and accounting fraud.

Mark assists financial institutions in developing and implementing compliance programs and regulatory remediation plans. He helps them stay current on significant changes to laws, rules, and regulations and works on developing or amending policies, procedures, controls, compliance manuals, and related training.

Prior to joining the firm, Mark practiced at a top-rated commercial law firm in New York and at two large law firms in Washington, D.C. He also served as in-house counsel and compliance officer at various global financial institutions.

Matthew Faranda-Diedrich, Partner
Matthew Faranda-Diedrich is a partner in the Litigation and Corporate & Business Groups. Renowned for transforming challenges into opportunities, he provides strategic counsel that empowers business leaders at every level, whether advising boards of directors, publicly traded companies, CEOs, or privately held founders.

Matthew’s ability to inspire trust and build lifelong relationships positions him as more than just an advisor– he becomes an extension of their team. By prioritizing a comprehensive understanding of each client’s business operations and both near and long-term goals, Matthew ensures his strategies are aligned with their objectives, delivering tailored solutions that drive success and foster lasting partnerships.