



Key takeaways from The Exchange

People Risk in Regulatory Investigations

Managing HR risk and people-related issues in the context of a regulatory investigation can often be a complex task. The risks associated with an investigation can be multifaceted – criminal, legal, regulatory, financial and reputational to name a few. The potential for sky-high fines and public censure means the stakes are high.

Effective internal and external management of these risks is critical to safeguarding a business and demonstrating to a regulator a consistent and defensible position. From the set-up of appropriate governance controls and aligning internal stakeholders, to adjustments to standard HR procedures and the application of legal privilege, we outline below some of the key people-related considerations in navigating the significant risks associated with a regulatory investigation.

- **Adjust standard procedures and adopt a collaborative approach.** Where regulatory investigations are concerned, broader considerations, such as cooperating with the regulator, taking proactive remediation action to reduce the level of potential fines and managing PR risk, come into play. Often these considerations feature higher up on the corporate risk register than employment law risk. As such it's imperative that the internal response and longer term strategy is joined up, with HR working collaboratively with legal and other control functions such as risk, compliance and internal audit. This can mean that standard HR procedures and best practice from an employee relations perspective need to be adjusted to align with those considerations. Such adjustments might range from questions around the length of suspension, how (and whether) to invoke disciplinary proceedings, how to frame any disciplinary allegations and providing for an employee's access to confidential documentation in the context of an internal disciplinary procedure.
- The internal HR strategy will often be centred around **avoidance of employment-related litigation**. Whilst the monetary value of most employment claims (even relatively large ones) may be de minimis vis-à-vis the broader regulatory risk, businesses need to be mindful that issues playing out in a public forum such as the UK Employment Tribunal (and having an Employment Tribunal make publicly accessible determinations in relation to sensitive issues) can be extremely damaging. As such it will be important to carefully consider the litigation strategy, including whether settlement is preferable or whether it might be possible to have the employment litigation stayed (i.e. put on a temporary hold) until such time as the broader regulatory issues (and/or any related collateral litigation) have been resolved.
- While **settling out suspected wrongdoers** may be more palatable than disciplinary action or fighting employment claims, organisations will need to be sensitive to the internal cultural ramifications and also the external optics of doing so. Where settlement terms are agreed, great care should be taken not to give the impression of having "paid off" a wrongdoer, or

"gagged" a whistleblower. Regulators will be very concerned in either case. Seek to preserve mechanisms for clawing back any bonuses or other payments made to the employee concerned (for example in situations where new evidence of wrongdoing subsequently comes to light), and avoid terms that fetter the employer's ability to comply with its regulatory obligations. It may also be prudent to include robust continuing cooperation terms in respect of senior employees who will have vital knowledge in relation to ongoing matters.

— **Tread very carefully where a protected disclosure or reportable concern has or may have been made (whether internally or to a regulator).**

Firms must not take any steps to identify suspected whistleblowers and should take proactive steps to safeguard their identity, so as to reduce the risk of retaliatory treatment. On no account should Senior Managers take any steps that could be interpreted as an attempt to unmask a whistleblower – the regulators take a very dim view of such behaviour, and the personal ramifications of doing so in terms of enforcement action against individuals has the potential to be severe.

In the context of a regulatory or internal investigation, taking steps to manage the expectations of senior stakeholders is, therefore, vital - managers should be clearly briefed on what to expect from the investigatory process, but also advised on the limits of their role in respect of it. This should help avoid, or manage, any conflicts of interest that may arise, and prevent unhelpful behaviours that could give rise to a risk of further regulatory action against the employer or the individual concerned.

— **Report to the Authorities.** Certain situations give rise to a positive reporting obligation (e.g. suspected money laundering or serious breaches of health and safety legislation). Reports should only be made where the evidence justifies it, although note that the "suspicion" test for money-laundering is quite low. Particular care should be taken where the criminal act is said to have been committed against another employee. Where a report is made, the inference is that the matter was sufficiently serious to justify it and a regulator will expect to see that steps have been taken to ameliorate the consequences. This might include concluding disciplinary investigations even where a suspected wrongdoer has left the firm. However, this brings its own practical challenges, and the police in particular sometimes discourage internal investigations while their own investigations are outstanding.

— **Beware of the bear traps around legal privilege.**

It is essential to carefully consider the application of legal privilege upfront. Is privilege intended to apply to initial investigative steps? Who is in the 'client group' for

the purposes of legal advice privilege, and who is giving the advice? Is litigation reasonably contemplated yet, such that litigation privilege may apply? Documents and notes created, particularly at the early stages of a matter before privilege has been properly considered, can sometimes be the critical triggers for external regulatory or other third party scrutiny. Where the investigation is intended to be truly independent and impartial, the optics of being seen to 'hide behind' legal privilege can be problematic and could undermine confidence in the impartiality of the process. Careful consideration needs to be given to all of these factors.

Failing to consider these matters at the outset of a regulatory investigation can significantly increase risk, whereas a proactive and joined-up investigation strategy is likely to lead to considerably better outcomes from a risk and stakeholder management perspective.

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