Kingsley Napley

Client Guide

Crisis management and internal investigations – your 10 point guide

It may be a dawn raid by the Serious Fraud Office, or it may be a whistle-blower's letter landing on your desk. However it comes to your attention, suddenly you are aware that something has gone seriously wrong in your organisation - perhaps fraud, corruption or false accounting - ***and it is your responsibility to deal with it.***

You and your organisation will be judged by the speed of your response. But when you are in the eye of the storm, where do you begin? This guide outlines the key steps that you may need to take during the first days of the crisis.

There is no standard guidance to apply in all scenarios. Every crisis is different and every response has to be carefully thought through from the outset and adequately documented throughout the investigation.

1. Get in first

Very often the best response – and the one increasingly expected by the authorities – is for the company to conduct its own internal investigation into what has gone wrong. This will allow the company to re-establish some degree of control over proceedings and to discharge its responsibilities as a matter of good corporate governance. If the authorities are already involved, you may be able to persuade them that it is in everyone's interests for the company to carry out the investigation and to report to the authority with its findings. If the authorities are not already involved, it may be that an internal investigation is the best way to reach a decision about whether a self-report should be made and, if so, to which authority.

The key to an effective investigation is having a clear understanding, from the outset, of what it is trying to achieve and the parameters of the investigation. Careful and strategic planning is crucial as every investigation is different.

An investigation is normally a fact-finding exercise aimed at assessing what has happened, the parties involved and the nature/extent of the damage. It is important to establish the scope of the investigation in advance – for example, the date range and the geographical scope of enquiries. Too narrow and the investigation will not carry much weight; too wide and it will lose focus.

2. Setting up your team

Who should be charged with responsibility for conducting the investigation? Ideally, a small strategic team should be established from the outset which will comprise internal and external members with the appropriate expertise, independence and time. The team may include for instance:

A member of the Board

Board-level involvement has the benefit of indicating, both internally and externally, that the company is taking the problem seriously and is devoting the appropriate level of resources to the investigation. However, care must be taken to ensure that the individual is truly independent from the matters under investigation: ideally, they should be a non-executive director or a director with responsibility for a completely separate part of the business.

HR Director and other senior employees

It is important to involve the HR Director from the outset and the company ensures relevant employment contracts and policies are reviewed. A number of employer/employee issues are likely to arise during the investigation. Depending on the nature and extent of the investigation, senior managers from the operational side of the business may also need to be involved, provided that there is no suspicion whatsoever of their potential direct or indirect involvement in the matter under investigation.

Compliance/legal

Naturally, a senior member of your compliance function or in-house counsel should be involved, providing there is no risk of a future conflict of interest; for example, it may be that the compliance or legal function is itself subject to criticism for its own acts or failure to act. In any case, the in-house legal team may wish to instruct external lawyers from the outset to assist them with the strategic planning and management of the internal investigation.

External lawyers

External lawyers have the benefit of offering complete independence and the expertise needed from the outset to get the investigation underway as soon as possible. They will have the necessary skills in forensic investigation, evidence preservation, interviewing witnesses and report drafting, as well as being able to advise on the myriad legal issues which will arise, such as data protection, powers of compulsion and disclosure. Documents produced for the purpose of giving or receiving legal advice may also attract legal privilege.

Depending on the context of the internal investigation (for example, cross-border activity and information sharing requirements), foreign lawyers may need to be involved. In such a case, external lawyers, no matter where they are located, will need to work closely together.

Forensic investigators/accountants/IT experts

Many investigations require the analysis of a large volume of digital material and/or accounts. Serious consideration should be given to bringing specialist forensic, accountancy or IT expertise into the team. Again, such experts offer the independence and expertise which is often needed in an investigation and their involvement will add credibility to the process.

It is crucial to realise the importance of involving internal senior IT managers from the outset. They have the most comprehensive knowledge of the company's technology systems and will be able to advise on the implications of internal policies and assist with the identification, preservation and collection of potentially relevant evidence.

3. Overt/covert investigation
It will be important to decide from the outset whether the investigation should be carried out in an overt or covert manner, and for this decision to be kept under review throughout the investigation depending on the risks identified.

4. Internal and external communications
Communication is critical and needs to be carefully managed throughout the investigation. If the problem is not already public knowledge, you should assume that it may become so at any time, and it is vital to brief your senior communications team and have clear press statements ready to manage the flow of internal and external communications as far as possible.

Equally important is what is said to employees. Never underestimate how quickly information spreads and assume that any communication made to employees will find its way into the public domain.

Social media can cause substantial reputational damage and it is vital that there is a policy to pro-actively monitor and manage activity across all social media channels.

A clear communications plan should be agreed and implemented as a matter of urgency. Issues of privilege and confidentiality should be considered within the context of this strategy. Legal advice should be sought and the relevant people briefed on this as soon as possible.

5. Evidence preservation
Preserving and collating evidence in accordance with applicable standards is absolutely fundamental to achieving a credible and robust investigation that a company may wish to carry out for civil and/or criminal litigation purposes. Evidence may not otherwise be admissible for subsequent civil and/or criminal litigation.

In the context of a regulatory investigation, if you are trying to persuade an investigating authority to allow the company to conduct the investigation itself under its general supervision, the single most important reassurance that can be given is that the integrity of potential evidence has been safeguarded. If the authority has any reason to believe that potentially relevant material may be allowed to disappear, it is very unlikely to allow the company to manage the investigation on its behalf and will instead seek to seize the material by itself, with the obvious commercial disruption and reputational damage that may cause. It is therefore essential that you can demonstrate that the company has taken all appropriate action to secure evidence.

Appropriate steps may include:

- Identifying the location of relevant data and its format/medium so as to ensure that no potentially relevant evidence is missed or destroyed. This is an initial crucial step which must be carefully documented;
- Reviewing internal policies such as document retention/destruction and back up, so that no potentially relevant evidence is altered and/or destroyed;
- Seizing and/or copying all relevant hard copy material;
- Seizing computer devices which may contain relevant material and/or imaging/cloning hard drives;
- Seizing mobile telephones which may contain relevant material;
- Securing or cloning the company's central hard drives;
- Securing relevant centrally-held material including personnel records, compliance material, risk reports, CCTV footage and any centrally-maintained recording of telephone calls.

Of equal importance is ensuring the full documentation of these steps and being in a position to justify what has been done and, if appropriate, what has not been done.

The manner and location in which potentially relevant evidence is stored is also a very important consideration which should not be underestimated.

Particular consideration must be given to the way data will be accessed to ensure compliance with data protection laws. For example, if the data is on an employee's computer which is located in civil law countries such as Germany, it maybe that the consent of both the employee and the Works Council will be required. Local legal knowledge will be vital as it may not be legally possible or practical to transfer information from a jurisdiction to another.

6. Self-report?
If a regulator has not yet been informed of the matters subject to investigation, the company will require legal advice as to whether it is appropriate to self-report and the timescale in which this will be done. Several regulators may need to be notified depending on the nature/extent of the crisis and the nature of the company's business.

If the company is publicly listed, market disclosure obligations and timings will also need to be considered. In the context of an internal fraud, it will be for the company, depending on the nature/extent of the fraud, to decide whether and when to report the matter to the Police or other authority. In such a case, the company may have a claim against the individuals involved internally and/or externally.

The option of reporting the matter to the Police may be a useful strategic option to maintain the pressure on the suspected fraudsters so as to maximise the chances of reaching a financial settlement as part of an asset recovery strategy.

Where one or more authority is already aware of the problem, it is likely that they will require periodic updates and/or disclosure of certain material. Constant consideration needs to be given as to whether notifications need to be made from the outset to any other agencies - for example, if there is any possibility that there has been or may be potential laundering of funds, a Suspicious Activity Report (SAR) to the National Crime Agency (NCA) may be required.

7. Whistle-blowers and employee interviews
It is vital to establish the contractual terms and conditions of the employees involved, and policies and procedures such as Anti-Bribery and Corruption, Whistleblowing and relevant disciplinary processes. Entities regulated by the Financial Conduct Authority (FCA) may have particular requirements to which they must adhere. This is particularly important when deciding whether to suspend and/or dismiss an employee and if so, for what motives and at what stage.

The order in which employees and/or whistleblowers are interviewed should be carefully considered and reviewed throughout the process of the investigation. A key issue will be the manner in which the interviews should be conducted. For example, should they be recorded or carried out under caution? This will depend on the nature/extent of their potential involvement in the matters under investigation. In the context of an internal fraud, this decision may also be taken in the context of an asset recovery strategy.

Whistleblowers generally enjoy robust legal protection and ought to be rewarded (where internal policies so permits) and protected in relation to the disclosure that they may make. While the investigation itself may have been triggered by the disclosure of information by one or more, it is possible that in the course of the investigation, other employees may also acquire whistleblower protection.

Under domestic law, whistleblowers are protected against detriment or dismissal. There is no cap on the amount of compensation that can be claimed in the Employment Tribunal in a whistleblowing claim. As a result, you will need to understand the scope of the rights and protection of whistleblowers and the potential for high awards of compensation in the event of a successful whistleblowing claim, not to mention the inevitable wasted management time, legal costs and adverse publicity in that event.

It will be important to consider the credibility and potential motives of any whistleblower, whether to involve him/her in the investigation and whether he/she may be under threat in relation to his/her potential disclosure.

8. Are third parties involved?
It is crucial to assess as early as possible whether any third party (individuals and/or companies) may have been involved in the actions which led to the crisis. In the context of an internal fraud, it may be appropriate to approach these third parties during the investigation process to obtain further evidence and/or as part of an asset recovery strategy.

In a regulatory investigation, it is important to ensure that there is no tip off by any employee and/or third parties.

9. Insurance & liability
Depending on the nature and extent of the action which led to the crisis, the insurance position should be reviewed. It is highly likely that insurers will need to be notified. There may be several types of policies in place, the terms of which will need to be carefully considered to assess whether there is an obligation to notify and whether it will be possible for the company and/or its directors to benefit from them. For example, it may be that a directors and officers liability insurance (D&O) policy will exclude cover in the case of an internal fraud.

If the company has been the victim of an internal fraud, it may have civil remedies against the wrongdoers. The decision making process should be informed by a clear asset recovery strategy and consideration of whether there is a risk of dissipation of assets.

If wrongdoing and/or malpractice by the company (or its employees or agents) is suspected and a loss has potentially been suffered by a third party, there is risk of a civil claim against it. Your priorities will include preserving a commercial relationship with the third party, avoiding adverse PR and appeasing unhappy shareholders and/or investors.

By identifying the risk and potential financial exposure from a civil claim, you will be able to plan tactics and strategy accordingly. The key challenge will be to balance the cost of fighting litigation, against cooperating with a potential claimant in reaching a financial settlement and limiting the bad press which will often result from such cases.

If there is any risk of a civil claim being lodged against the company, advice from civil litigation specialists should be sought as a matter of urgency.

10. Post-investigation
Post-investigation, it is important for the company to undertake a 'lessons learned' exercise and, if appropriate, publish the relevant outcome on its website. It may also review its internal procedures and controls in order to mitigate the risk of a similar issue arising in the future.

Jill Lorimer
Associate

E jlorimer@kingsleynapley.co.uk
T +44 (0)20 7814 1295

Meet the team

STEPHEN PARKINSON
Partner, Criminal Litigation
E sparkinson@kingsleynapley.co.uk
T +44 (0)20 7814 1204
M +44 (0)7899 890 316

MICHAEL CAPLAN QC
Partner, Criminal Litigation
E mcaplan@kingsleynapley.co.uk
T +44 (0)20 7814 1240
M +44 (0)7798 684 793

MICHELLE CHANCE
Partner, Employment
E mchance@kingsleynapley.co.uk
T +44 (0)20 7566 2925
M +44 (0)7971 880 654

ADAM CHAPMAN
Partner, Public Law
E achapman@kingsleynapley.co.uk
T +44 (0)20 7814 1205
M +44 (0)7825 706 548

RICHARD FOSS
Partner, Dispute Resolution
E rfoss@kingsleynapley.co.uk
T +44 (0)20 7814 1292
M +44 (0)7747 776 086

EVE GILES
Partner, Criminal Litigation
E egiles@kingsleynapley.co.uk
T +44 (0)20 7814 1270
M +44 (0)7789 691 097

JONATHAN GRIMES
Partner, Criminal Litigation
E jgrimes@kingsleynapley.co.uk
T +44 (0)20 7814 1234
M +44 (0)7766 250 314

JOHN HARDING
Partner, Criminal Litigation
E jharding@kingsleynapley.co.uk
T +44 (0)20 7814 1219
M +44 (0)7778 929 201

LOUISE HODGES
Partner, Criminal Litigation
E lhodges@kingsleynapley.co.uk
T +44 (0)20 7814 1236
M +44 (0)7867 786 674

RYAN MOWAT
Partner, Dispute Resolution
E rmowat@kingsleynapley.co.uk
T +44 (0)20 7814 1238
M +44 (0)7901 335 603

ILDA DE SOUSA
Partner, Immigration
E idesousa@kingsleynapley.co.uk
T +44 (0)20 7566 2921
M +44 (0)7818 038 799

CAROLINE DAY
Partner, Criminal Litigation
E cday@kingsleynapley.co.uk
T +44 (0)20 7814 1278
M +44 (0)7825 215 381

For more information go to
kingsleynapley.co.uk/internalinvestigations or call us 24/7 on **+44 (0)20 7814 1200**

Kingsley Napley LLP
Knights Quarter
14 St John's Lane
London
EC1M 4AJ

T +44 (0)20 7814 1200
F +44 (0)20 7490 2288
DX 22 Chancery Lane
W www.kingsleynapley.co.uk
E info@kingsleynapley.co.uk

Kingsley Napley LLP is authorised and regulated by the Solicitors Regulation Authority.

This publication is printed on paper from a sustainable source.

Kingsley Napley is an internationally recognised law firm based in central London. Our wide range of expertise means that we can provide support for our clients in all areas of their business and private life. Many of our lawyers are leaders in their field and our practice areas are highly ranked by the legal directories.

We are known for combining creative solutions with pragmatism and a friendly, sensitive approach. The relationship between lawyer and client is key. We work hard to match clients with lawyers who have the right mix of skills, experience and approach in order to achieve the best possible outcome.

Kingsley Napley