

Developing a strategy for settling multistate AG investigations

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In two previous articles, we discussed how regulators have developed more sophisticated investigation techniques (<https://reut.rs/3EfYofZ>) and increased coordination, and the process for both responding to (<http://bit.ly/3WAeJTJ>) regulators' Civil Investigative Demands and determining whether a demand contains red flags that suggest the recipient should prepare for battle. But what happens when an organization determines that overlapping multistate, multi-regulator actions against it are imminent?

At that point, a business must start developing a strategy around formulating resolution options that will win over regulators but that are also mutually beneficial to its impacted business units. We cover that topic in this article.

Why develop a strategy for resolution with regulators but not fight them?

As a threshold matter, some readers might find it curious that we are jumping right into developing strategies for resolving multistate investigations instead of first discussing strategies for reflexively developing litigation defenses. The reason for prioritizing resolution strategies over traditional litigation strategies is that defending regulatory investigations differs from defending lawsuits filed by private parties.

Public litigation against a government regulator is typically a last resort. Regulators' investigations often begin under a cloak of confidentiality — which is where most targets of those investigations want them to stay. If an investigation is publicized before it has been resolved, it will resemble the sword of Damocles, hanging by a thread and casting a shadow over the company's business prospects, recruiting efforts, overall reputation, and if publicly held, its stock price.

Unfortunately for targets of regulators' investigations, the price for keeping those investigations confidential is steady movement toward resolution of them. The big sticks regulators wield in the forms of fines, civil penalties, criminal penalties, and political pressure often motivate targets to come to the table early with a plan for resolving an investigation. These big sticks also typically prevent targets from engaging in the scorched earth litigation tactics commonly seen in private litigation. Indeed, scorched earth

tactics can backfire in the regulatory investigation context often resulting in long-term damage to the business and a higher price paid for resolution.

Developing a settlement strategy begins with assembling the legal team

News of pending multistate regulatory investigations will often cause a target's general counsel to bring in outside counsel promptly to prepare for responding to and resolving the investigations.

Scorched earth tactics can backfire in the regulatory investigation context often resulting in long-term damage to the business and a higher price paid for resolution.

As soon as outside counsel are on board, they must gain an understanding of exactly what regulators are investigating, why the regulators have decided to devote the government's finite and limited resources to the case, and what their clients (both in the legal department and in the target's business units) will bear to resolve the investigation. This information must be ascertained early on in the process to ensure outside counsel's settlement strategy and goals for resolution are aligned with their clients' strategy and goals.

When dealing with pending multistate regulatory investigations, it may be tempting for a target's general counsel to bring in several different law firms to handle the investigations and provide their different perspectives. But when too many cooks arrive in the kitchen, they can become counterproductive, lack coordination, and chase competing incentives. That is why we recommend one of two approaches for assembling the legal team.

One approach is to allow one law firm to manage all the parallel investigations. If the firm is large and sophisticated enough,

operates in the corresponding jurisdictions, and has experience resolving parallel investigations, it should be capable of coordinating the many teams and workstreams necessary to resolve the investigations. Even though the lawyers will be from one firm, the various teams working on the investigations will be drawn from different practice areas of the firm and should allow for diverse perspectives and creative strategies for resolving them in ways consistent with the target's goals.

The attorneys will coordinate a dialogue with the business units to develop settlement options that balance addressing the concerns raised by regulators with the business's interests and need to remain a going concern.

The second approach is for one law firm to quarterback the process while coordinating with other firms that are tasked with handling jurisdiction-specific or business-unit-specific matters. This can be done through a "collaborative law firm" model where a target's general counsel and business unit leaders engage with a team of lawyers from different firms assigned to particular matters, with one firm taking the lead in coordinating the strategy to be followed by the others. This mix of lawyers guarantees diverse perspectives and creative strategies and gives a general counsel more resources to deploy as they see fit if they need to ramp up outside counsel's efforts.

To develop a settlement strategy, the legal team must work closely with business units to vet options

Once the legal team is in place, team members should begin working with the business units whose alleged conduct are at the center of the regulators' investigations and whose operations could be altered by the terms of a settlement agreement. The attorneys will coordinate a dialogue with the business units to develop settlement options that balance addressing the concerns raised by regulators with the business's interests and need to remain a going concern.

The legal team's job is to determine the kinds of compliance changes the affected business units can make to bring them, in the eyes of regulators, in line with the law. This includes determining what employees and contractors can do to implement injunctive relief insisted upon by regulators without the business units and target taking an existential hit to their bottom lines and reputations.

This process will resemble a miniature internal investigation. Members of the legal team should interview prominent players within the affected business units and review relevant documents to determine the scale of wrongdoing (if any) and the universe of acceptable settlement options. With this knowledge underneath their belts relatively early on, the legal team can have informed —

and hopefully fruitful — discussions with regulators about what the resolution of their investigations could look like.

Resolution of any sort, including, but not limited to, a formal settlement will require securing board buy-in

As the legal team makes progress with the business units, it also must start working toward securing buy-in for a settlement from the target's board of directors. To secure buy-in, general counsel will need to provide updates to the board on the status of the investigation, the settlement process, settlement options, the ramifications of those options and their impact on the implicated business units, and how those options compare to past settlements. Any comparisons to past settlements should focus on similarities to the alleged misconduct being investigated as well as to the size and type of the targets.

To ensure the right information needed to secure the board's buy-in is routed to the general counsel and eventually the board, the legal team must pull data from several different streams. We advise that, when possible, members of the in-house litigation and regulatory teams, along with the heads of the legal divisions advising the implicated business units, collaborate with outside counsel to generate the factual findings and other information that will eventually flow into the materials the board will review. Outside counsel's role is to synthesize this information and report it back to the general counsel.

The targets of multistate regulators' investigations have little margin for error when they are in those regulators' sights. The regulators will have a great deal of leverage and will not hesitate to wield it.

Once legal team members have gathered, synthesized, and reported this information to the general counsel, it must be further refined for a presentation to the board. Team members should work with the target's general counsel to build the presentation. Their key task will be creating a presentation that conveys to the board what it needs to know to make an informed decision about settlement without getting too far into the weeds.

A sound resolution strategy must include a plan for internal and external corporate messaging

When news of the resolution of regulators' investigations becomes public, there is likely to be a torrent of media attention, as well as questions from a target's customers/clients, employees, shareholders, and other stakeholders. That is why members of the legal team should work with the target's internal and external public relations teams before the announcement of a resolution to develop a plan for responding.

That plan should include messaging that is consistent with the legal team's overall messaging and arguments, but tailored to

particular stakeholders. What employees need to hear regarding the resolution might not be the same as what clients or customers need to hear, what investors and analysts need to hear, or what the media needs to hear. Corporate messaging that is inconsistent with the legal messaging might cast the target in a negative light and possibly rankle regulators.

Trust the process

The targets of multistate regulators' investigations have little margin for error when they are in those regulators' sights. The regulators will have a great deal of leverage and will not hesitate to wield it. That is why it is important that targets come to the settlement table early with realistic options for a resolution.

But knowing what resolutions to propose is the outcome of a structured process. Throughout the process, a target's in-house

and outside counsel should work together to (i) determine which resolutions will allow the target's business units to continue to be profitable and the target to continue to operate as a going concern; (ii) how to most effectively present those proposed resolutions to the board for approval; and (iii) how to develop internal and external messaging around those resolutions to preserve the target's reputation in the eyes of its stakeholders.

The earlier a target and its outside counsel start this process, the more likely it is to proceed smoothly and achieve the best result possible for the company.

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