

From Cradle to Grave: Regulatory Investigations Which Beget Complex Business Litigation

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Regulatory Investigations - Basics

- Federal Government Agencies (FTC)
- State Attorneys General and Other State Agencies
- The Obama Administration



Congressional Action: Dual Federal and State Attorney General Enforcement Authority

- SB 500 - Protecting consumers from unreasonable Credit Rates Act
- Representative Barney Frank's proposal to allow State Attorneys General to prosecute national banks
- Consumer Product Safety Commission – empowering State Attorneys General to enforce new standards for consumer products
- HR 1214 – Payday Loan Reform Act
- S 139 – Data Breach Notification Act

Most Common Mistake

- Regulatory investigations are fundamentally different than:
 - Pure Litigation
 - Traditional Government Relations



COMMON LESSONS FROM
REGULATORY
INVESTIGATIONS THAT TURN
INTO MAJOR CRIMINAL OR
CIVIL LITIGATION



LESSON NO. 1:
PROTECT AND DO NOT
WAIVE THE ATTORNEY-
CLIENT PRIVILEGE

Attorney-Client Privilege

- Tension between:
 - Need and desire to fully cooperate with and disclose all necessary information to regulatory investigators and
 - Preservation of the attorney-client privilege
- Two Paths to Waiver
 - Express waiver
 - Implied waiver




LESSON NO. 2:

A COMPANY MAY FACE AN
INVESTIGATION AND
EXPOSURE TO CIVIL
LITIGATION EVEN THOUGH
THE BUSINESS PRACTICE IS
CONSISTENT WITH
INDUSTRY STANDARDS



But . . . it is within Industry Standards

- A regulator may have a stake in policy



LESSON NO. 3:
MINOR REGULATORY
ISSUES CAN QUICKLY GROW
INTO MAJOR LITIGATION
PROBLEMS

Minor Investigation to Major Litigation . . . Fast

- Companies should be look for common red flags that enhance the possibility that a minor investigation will turn into major criminal or civil litigation.
- A number of competing interests exist between politics, government agencies and officials, the modern media, reporting requirements for companies, voters, shareholders and plaintiff's attorneys.



LESSON NO. 4:
APPRECIATE THE
INTERPLAY BETWEEN
REGULATORY
INVESTIGATIONS AND
LITIGATION

Investigations and Litigation Interplay

- A company should be mindful of the possibility that litigation may arise out of a regulatory investigation.
- Many companies place regulatory investigations and civil litigation into separate silos when they are, in fact, intertwined and significantly impact each other.
- Not all regulatory officials or lawyers think like trial lawyers, judges or juries and vice versa.



LESSON NO. 5:
BEWARE OF THE MEDIA

Pitfalls of Public Discussion

- Companies should closely monitor statements made by employees and spokespersons during a regulatory investigation. Statements made be binding or create exposure for litigation.
- Comments on ongoing investigations are no longer limited to traditional media.
 - Compliance filings with governmental agencies
 - Whistleblowers
 - Company's website
 - Comments by competitors
 - Employee social networking sites
 - Blogs



CONCLUSION AND CLOSING COMMENTS