Critical Issues in Compliance Investigations

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Today's Agenda

1. Initial phase of an investigation
   • Scoping and risk assessment
   • Key steps in commencing an investigation
2. Collection and use of data and other digital evidence
   • Types of digital evidence
   • Methods and tools used for collection
   • Use of forensic analytics
3. Avoiding Common Investigation Pitfalls

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PART 1

The Initial Stages of an Investigation

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Scope Considerations

- How specific/vague is the allegation or concern/red flag?
- Could additional individuals be involved?
  - Internal
  - Third parties (individuals or organizations)
- What other acts could the subject(s) have perpetrated?
  - Very common that if someone is engaged in wrongdoing, there are multiple schemes/acts
  - Perform role-based risk assessment
- How far back might the activity have been occurring?
- Are violations/losses potentially still occurring?
- How likely is it that other individuals may have witnessed the alleged wrongdoing?

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What Triggered the Investigation?

- Allegation/tip
  - Anonymous v. known
  - Internal v. third party
  - Level of specificity
- Internal audit
- Other auditing/monitoring activity
- External process (government auditors, etc)
- How serious is the alleged or possible act?
  - Escalation issues?

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Allegations

- Perform preliminary assessment to determine whether an investigation is warranted
- Consider whether it is necessary to perform without subject's knowledge Covert v Overt
- Data analytics
  - Consider this – If the allegation is true, what impact would the act have on electronic data? How would the digital trail of the act differ from that of a valid transaction or act?
  - Data analytics is often the most practical method of establishing credibility of an allegation
- Document analysis
  - Look for red flags, characteristics that support or refute the allegation

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What Next?

- What type of compliance issue?
  - Employee theft, fraud, bribery, privacy, data breach, environmental, etc

- What level within the organization is implicated?
- Possible next steps:
  - If there is an allegation, assess credibility
  - Notify/engage legal counsel
  - Assemble team; Determine who investigates
  - Is subject currently employed with us?
    - Consider whether it is necessary to investigate without subject's knowledge

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Identifying Records and Data Needed

- Develop process map of the transaction/activity cycle(s) involved in the target of the investigation
  - MUST understand how the transaction cycle operates in order to identify relevant records/people needed
- Based on this process map, identify:
  - People involved in each step
  - Internal controls
    - Preventive
    - Detective
  - Documents and forms
    - Received
    - Created
  - Electronic records
  - Systems and databases affected

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Identifying Records and Data Needed

- **Example** – For corruption in the purchasing cycle:
  - Identification and documentation of need
  - Development of specifications, if necessary
  - Solicitation of bids or negotiation with alternative vendors
  - Selection of vendor
  - Contract, statement(s) of work, etc
  - Purchase orders
  - Change orders, subcontracts, etc
  - Receipt of goods or services
  - Submission, review and approval of invoice
  - Payment
- In addition, what other internal records would we expect along the way? E-mails, electronic approvals, etc.

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PART 2

Use of Digital Evidence
And Data Analytics

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Preserving/Collecting Electronic Evidence

- If internal investigation prompted by regulatory agency or whistleblower complaint, legal counsel should assist organization to issue a document hold notice
  - identify relevant records
  - identify relevant record custodians
- Negative implications of information being lost/altered
- ESI (electronically stored information):
  - What ESI is relevant?
  - What format is it in?
  - Where is relevant ESI stored?
  - How do we ensure we collect it all?
  - Proper collection (use forensically recognized technologies)

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Uses of Data Analytics & Forensic Tools

- To assess credibility of an allegation or concern
- To determine which documents and records should be inspected
- To identify additional individuals who may have been involved
- To prioritize or identify suspect transactions
- To determine where internal controls broke down or were intentionally violated
- To assess whether noncompliance was intentional or accidental
- To estimate the full extent of the problem

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Data Analytics to Assess the Allegation

- Data analytics can be used to assess the credibility of an allegation, helping to determine whether to launch an investigation
- If the allegation is true:
  - What data would be created or touched in the processes involved
  - How would characteristics of the data associated with noncompliant activities differ from data involved with compliant activities
  - Perform data analytics to se if these characteristics are present, consistent with noncompliant activity
  - Data analytics does not prove fraud, corruption, noncompliance, etc; But it can provide evidence of characteristics that are consistent with such improper activity

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Framework for Using Data Analytics

- Which data is affected, and how, in each stage of a compliance issue:
  - Preventive control that should have prevented the act
  - Perpetration/violation - the act itself
  - Concealment – often separate step(s) from the act itself
  - Detective control that should have detected the act
  - Effects of the act (if any)

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Forensic tools

- What forensic tools should I or my investigator use ?

- Can we recover deleted documents ?

- Now that we have all the data how do I search through all those IM/Chat/Webmail ?

- How do I take this to court ?

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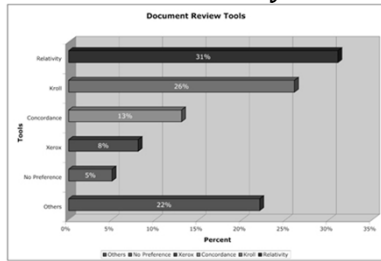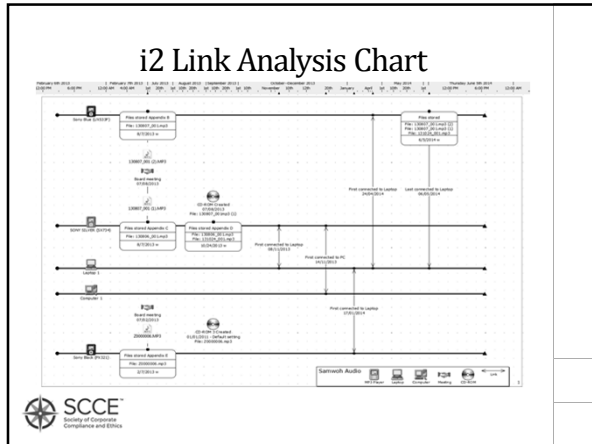Society of Corporate
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Forensic tools

- Forensic imaging:
  - EnCase – Guidance software
  - Forensic Took Kit – Access Data
  - X Ways Forensics – X Ways
  - BlackBox Software – Mac applications
  - Harvester – Cloud based investigations

- Hand Held Device seizure:
  - XRY – Mobile Forensics Tools
  - Oxygen – Oxygen Forensics Inc
  - Paraben – Paraben Forensics

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Document Review Platform eDiscovery

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i2 Link Analysis Chart

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PART 3

Common Investigation Pitfalls

(With a focus on overcoming bias)

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Most Common Investigation Pitfalls

- Vague scope of investigation
- Unclear goals
- Working beyond our expertise
- Improper supervision of others involved in investigation
  - Esp. third party service providers
- Lack of technical skills
- Improper interviewing
- Lack of understanding of legal rights
- Independence impairments
- Poor project management
- Improper handling of evidence
- Good investigation –bad report
- Unconscious bias

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Bias

- The inclination or tendency to present or hold a partial perspective that is preconceived or unreasoned.
  - Conscious or
  - Unconscious

Can lead to unfair treatment of people and inaccurate interpretations of information in an investigation
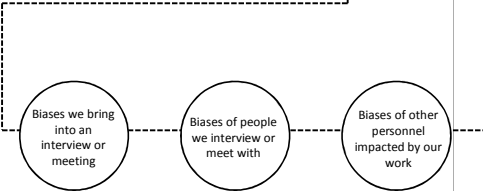
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Unconscious (Implicit) Bias

- Unconscious (implicit) biases are those that we are not aware of at the time they are impacting us (we might become aware of them later)

- Science says we have more of these unconscious biases than we'd care to admit

- And numerous real-life cases provide further evidence of the existence and effects of implicit bias

- Unconscious bias is just one category of numerous unconscious behaviors we experience

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Where Bias Impacts Investigations

Biases we bring into an interview or meeting

Biases of people we interview or meet with

Biases of other personnel impacted by our work

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How Bias Impacts Investigations

- Mistakes in planning or designing our procedures
- Improperly performing procedures
- Reaching incorrect conclusions
- Improper review of our own work by supervisors
- Failures in applying professional scepticism

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Example
Impact of Bias on an Investigation

- Biases regarding the guilt or innocence of someone alleged to have committed an offense
- Bias regarding acceptance of representations made by management or personnel
- Biases impacting our determination regarding scope of work
- Bias with respect to our initial hypothesis of what happened and how
- Biases in how we perform interviews and in how we interpret results of interviews
- Bias in how we interpret data

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Categories of Bias

- Affinity bias
- Priming
- Confirmation bias
- Bounded awareness
- Anchoring
- Incrementalism
- Availability bias
- Groupthink

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Becoming Unbiased

- It is virtually impossible to start out unbiased, let alone maintain an unbiased mindset throughout an engagement
- Instead, professionals must take actions to *become unbiased*—to identify and counter the effects of their own biases:
  - Acknowledge that all individuals bring implicit biases with them every day and are susceptible to the effects of priming
  - Take specific actions to eliminate (or at least minimize the effects of) their inherent biases, including priming.

  - Use of outside legal counsel as a component of monitoring bias

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Avoid Jumping to Conclusions

- This is the most obvious step, but one of the most difficult
- Attempt not to focus on a single theory/conclusion – but how?
- Two methods for professionals to avoid becoming fixated on a single hypothesis are:
  1. Actively challenge the existing hypothesis.
  2. Develop alternative hypotheses.

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Actively Challenging the Hypothesis

When actively challenging their own hypotheses, investigators should
1. Force themselves to:
   a. Identify other explanations for the suspicious behavior
   b. Consider different suspects
   c. Develop alternate hypotheses
2. Consider writing down these alternatives and challenges.
3. Use a devil's advocate
4. Consult someone not previously involved in the investigation (much like the quality-review process for an audit)
5. Take a fresh look—essentially start over with some of the very first pieces of information
6. Consider what the absence of information could mean (e.g., if this really is fraud or noncompliance, what trail or clues should be present that are not?)

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Overcoming Bias in Interviews

- Focus on gathering facts or on the other goals of the interview, and on establishing rapport with the person being interviewed.
- All people want to be treated with respect, and most people genuinely want to help other people.
- Make a conscious effort to identify things about the interviewee that he can relate to.
- Be aware of cultural differences.
- Half the battle is the interviewer reminding himself of the necessity of overcoming these differences to establish an effective interview process.

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Additional Steps to Minimizing Bias

1. Consider all relevant records and information, not just ones that support an assertion or would most quickly close out a case. Always think "what else should I look at?"
2. In an investigation, consider all possible non-violation-related explanations for suspicious evidence and data anomalies. Write them down—this really does help.
3. Extend the scope of interviews beyond those who can corroborate facts that support the hypothesis. Include others who might have useful information that fits a different hypothesis.
4. Include all relevant findings in the report, including information that counters the hypothesis

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Additional Steps to Minimizing Bias

5. Use an independent quality-review process.
6. Beware of affinity and other implicit biases in conducting interviews (on the part of both parties) and actively attempt to counter it (e.g., the interviewer can force himself to spend sufficient time interviewing someone who has the potential for triggering a bias).
7. Avoid group interview of multiple employees (GroupThink)
8. Get sufficient sleep.

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Slide 32

A3   Stairstep interaction
          Author, 2/16/2015

Slide 33

A4   Stairstep interaction
          Author, 2/10/2015

QUESTIONS ??

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