

HFW



GLOBAL INVESTIGATIONS AND
WHITE COLLAR DEFENCE BULLETIN



OUR PICK OF THE TOP TRENDS AND BUSINESS TIPS AROUND THE WORLD, JANUARY 2023

As the new year gets underway we take a closer look at some global themes we expect to see in 2023, a year where compliance is truly in the spotlight.

In this bulletin we highlight our top picks for 2023, offer tips to help you to deal with them (including a guide on how to conduct an internal investigation and free training). For more information on the training and services we provide please [click here](#).

AUDITORS REQUIRING INTERNAL INVESTIGATIONS IF MISCONDUCT SUSPECTED

We are seeing auditors increase scrutiny around concerns revealed during the course of their audit work for clients. This is especially the case where there is a worry of financial/ethical misconduct which may cause auditors to become concerned about the effectiveness of internal systems and controls which may, in turn, impact their audit.

Auditors' increasingly intrusive approach is driven by recent examples where businesses have collapsed shortly after a clean audit opinion was given and which has resulted in litigation against the auditor, for example the recent litigation launched against the former auditors of NMC, the Dubai based healthcare provider, for a reported US\$2 Billion and regulatory investigations into auditors themselves including the auditors of Greensill Capital and Carillion.

Importantly, while auditors may not mandate that an internal investigation be undertaken, or indeed undertaken in a particular way, we have seen examples where auditors have refused to sign off audits until an investigation is undertaken, in line with a process which meets their approval and by lawyers experienced in conducting internal investigations.

TIPS

Be proactive in dealing with matters which could give your auditors pause. If whistleblower allegations are received or arise during the process of litigation, or otherwise, **we recommend businesses respond and investigate appropriately.** Be prepared to explain the process for dealing with whistleblower claims, and how they have been dealt with, to your auditor. This will instil confidence and will in many cases be enough to satisfy the auditors.

Conversely, a head in the sand approach, or worse, will do the opposite and may create suspicion on the part of your auditors which can result in their escalation of the matter (and audit) and entrenchment of their position as to how to deal with it.

Please contact us if your auditor is raising questions about areas of concern and you would like help. We have advised numerous clients in dealing with these questions and liaising/working with auditors on behalf of clients up to and including undertaking a legally privileged investigation on behalf of clients and reporting to auditors on the process undertaken and the findings. Happily, these have resulted in client audits being signed off.

Compliance in the spotlight: How we got here

The 2022 Russian invasion of Ukraine heralded a spike in energy and other commodity prices fuelling global inflation. This is being met with increased interest rates and the imposition of unprecedented sanctions packages against Russia. These have triggered recessionary fears, increased interest rates and economic headwinds.

There have already been some notable corporate casualties.

Sloppy or non-existent due diligence has embarrassed investors and high-profile backers in two huge corporate failures. Rudimentary due diligence would have uncovered that Theranos technology simply did not exist and that Sam Bankman-Fried's FTX had no corporate controls. Both cases have resulted in convictions and/or guilty pleas for fraud and the multibillion US\$ collapse of each business.

This cocktail of war, tightening economies and high-profile corporate failures resulting from frauds will drive increasing scrutiny of businesses by stakeholders and commercial counterparties as focus returns to due diligence and compliance.

Read on for our pick of compliance trends this year.



WHISTLEBLOWING CLAIMS EXPECTED TO INCREASE

Against a backdrop of harsher economic conditions driving layoffs, we are already seeing an uptick in whistleblowing allegations.

Whistleblowing reports can also arise through various channels; employment/labour disputes and whistleblower hotlines often produce claims of ethical misconduct. We also see such claims being made against businesses in the context of commercial disputes.

Our experience is that some whistleblowers may also take their claims to regulators, law enforcement and/or the media.

Sometimes whistleblowing can be done tactically to increase pressure on the business in a concurrent commercial dispute. We have seen numerous examples where commercial counterparties have filed criminal complaints alleging ethical misconduct, including bribery, fraud and money laundering against a business.

Other times a frustrated whistleblower who perceives that their allegations are being ignored may tell their story to a regulator, law enforcement and/or the media as a last resort to try to ensure that their claims are investigated and dealt with. The recent example of a DWS investment management business is a textbook example. The DWS Group Sustainability Officer exposed greenwashing after being ignored by management and was subsequently fired and blew the whistle to the media sparking a process of investigations

We have helped clients in all these scenarios investigating underlying claims, helping to fix any problems revealed and resolving disputes including the withdrawal of criminal complaints filed in various jurisdictions against clients.

TIPS

Whistleblower processes and claims are an important part of any company compliance program and can act as a safety valve allowing a company the first opportunity to assess allegations, get to the bottom of issues and fix problems internally. **Businesses should audit their whistleblowing procedures and conduct a review to ensure that they are operating properly and that cases are being triaged and dealt with appropriately.**

We recommend businesses investigate the claims of misconduct appropriately and fix problems (if any) revealed through investigation.

Importantly it should be noted that it is unlikely that investigations undertaken by HR will attract legal privilege.

We recommend that if claims of ethical misconduct are made in an HR/labour context that they be hived off and investigated by the legal department or external counsel. In such investigations, the priority should be to set up the investigations in a way best designed to assert and maintain legal privilege and confidentiality. This means ensuring the commencement of any internal investigation is properly documented and a process followed which provides the strongest basis for asserting privilege that is possible.

It is undesirable for findings in relation to ethical misconduct allegations to be susceptible to disclosure to third parties whether in an employment or commercial dispute or to regulators and/or law enforcement.

We routinely advise clients and assist them by conducting a legally privileged investigation into alleged misconduct on their behalf and reporting our findings and any recommendations to them.





MEDIA EXPOSÉS

The media is anticipated to publish more investigations into alleged corporate misconduct.

After a few years where politics dominated the news, 2023 is expected to see a more balanced news agenda. Recent examples of corporate misconduct exposed by the media include Wirecard (fraud) and Deutsche's DWS investment funds unit (after the whistleblowers concerns around overblown ESG claims were ignored by management).

Investigative journalism is alive and well-fuelled by whistleblowers, non-profit groups, including **International Consortium of Investigative Journalists (ICIJ)**, among others.

Arising from the huge public interest (and hardship) resulting from the consequences of the war in Ukraine, the press is actively seeking out stories of sanctions circumvention and violations on top of their normal diet of alleged corporate misconduct.

TIPS

No company is immune from learning that it has fallen victim to employee misconduct and become the subject of media interest.

We strongly recommend businesses consider how they would respond if contacted by the media seeking comment on an adverse media story relating to the business.

We offer free training sessions on how to deal with media when approached about an adverse media story. If you would like the free training, please **click here**.



A FOCUS ON INTERNAL INVESTIGATIONS

We are experiencing an uptick in clients conducting internal investigations, notably more recently from whistleblowing reports, and expect this trend to continue throughout 2023.

Recent examples include whistleblowing reports concerning sanctions evasion, fraud, bribery and sexual harassment.

TIPS

We have produced a note on how best to set up and conduct an internal investigation.

Please check the box at the foot of this bulletin if you would like a copy.

We offer free training to companies on how to conduct internal investigations. Please **click here** if you are interested in the free training.

ANTI-BRIBERY & SANCTIONS

Bribery remains a significant problem and the cooperation among international agencies when investigating it continues to increase. Examples are too numerous to mention, and international law enforcement agencies continue to emphasise their efforts to tackle the problem; most recently the Biden administration affirmed its enforcement focus in this area. 2022 saw resolutions for Glencore, Honeywell and ABB among others.

Sanctions are also now an area of focus. Traditionally sanctions have been the poor relation to anti-corruption enforcement. However, in the wake of the Russian invasion of Ukraine, numerous government agencies have increased their efforts and added significant resources on enforcing the sanctions packages imposed in the wake of the Russian invasion. This, combined with the likelihood of whistleblowers and media coverage, increases the risk to businesses.

TIPS

Third parties and intermediaries remain the biggest risk for businesses. We recommend businesses ensure that their onboarding and ongoing relationship management of third parties is suitable to understand the services they are actually performing and that (in a sanctions context) they are not being used as a pass through to disguise the ultimate recipient of products and services in breach of sanctions.

We recommend businesses ensure their controls are geared to detect false invoices and sham contracts (typical vehicles used to document the transfer of bribes or evade sanctions). An inability to detect sham documentation will be viewed as a control failure by regulators.

If you would like us to review existing third-party diligence screening processes or conduct third party reviews, either in respect of specific high-risk vendors or a general review of existing third parties please let us know.

We also offer free training on how to spot sham contracts and false invoices. If this is of interest please [click here](#).



ESG

ESG continues to get more than its fair share of newspaper column inches and creates significant legal risk for business. Many businesses through their marketing departments have claimed ESG credentials in circumstances where “ESG” itself is extremely ill-defined. This is a recipe for disaster when the underlying problems ESG programs are aimed at mitigating, are in fact accelerating (rather than disappearing), and civil society and the public interest in them is high.

Greenwashing litigation is already being brought for failure to live up to ESG claims (for example the KLM litigation in the Netherlands following its ‘Fly Responsibly’ campaign). The UK Advertising Standards Authority recently sanctioned a retailer for making overblown environmental claims in relation to a vegetarian

burger as well as a bank for its ESG claims against a backdrop of its financing for the energy industry.

Elsewhere, in the US and Germany regulatory investigations have been triggered of the back of ESG claims and in the UK the Financial Conduct Authority (FCA) has signalled it is closely monitoring what firms are saying about their ESG credentials. The FCA recently hired an ESG whistleblower, Desiree Fixler, to join its six person ESG advisory committee in a move which is sure to bolster the FCA’s ability to tackle ESG issues. Ms. Fixler’s whistleblowing triggered the ongoing external investigation into a Deutsche Bank subsidiary, DWS, by BaFin and the US SEC for alleged overblown ESG claims. The German police recently raided DWS in the same investigation.

TIPS

Legal input on ESG claims and other compliance matters is strongly recommended; at a minimum **ESG credentials should be reviewed and verified before being made by businesses and in-house legal teams.** This will temper overblown claims and importantly enable businesses to defend claims that businesses are not living up to the standards and promises they are setting themselves in the absence of global standards.

We are helping clients in preparing contractual documentation including conditions and warranties relating to ESG as well as conducting due diligence and verifying ESG claims made. Please let us know if you would like to learn more.

THE USE OF THIRD-PARTY DEVICES AND MESSAGING APPS

The use of personal devices (for example Bring Your Own – BYO mobile telephones) and third-party messaging apps (such as WhatsApp) is problematic because communications on them are not automatically (and may never be) backed up onto corporate IT. This creates the risk, and increasingly the reality, that businesses do not have possession of material business books and records. This is undesirable for obvious reasons.

Commercial risks of not possessing business books and records are compounded by regulatory and enforcement risks. After approaching nearly US\$2 Billion in fines levied by US regulators in 2022 for the use by employees of financial institutions, including of third-party messaging apps like WhatsApp and personal devices, regulators and prosecutors globally are now focussing on the issue of their use.

There are in many cases prescriptive rules about the requirement to record telephone calls and keep books and records for regulated financial institutions globally. More broadly law enforcement agencies expect all businesses (regulated or not) to maintain accurate books and records and maintain effective policies around the use of third-party messaging apps and devices. New guidance from prosecutors in the US is expected shortly.

We have seen examples in recent months of businesses who have been faced with questions from third parties and stakeholders about business transactions discover that they do not possess relevant records because those working for them have not used corporate IT or messaging platforms which creates obvious problems; in some cases forcing businesses to ask third parties for copies of communications to understand what has been going on.

We are helping a number of clients get to grips with their policies and procedures around the use of third-party messaging apps and devices.

TIPS

We recommend all businesses review their policies and procedures as well as working practices to ensure they are maintaining books and records of their business.

Importantly, in addition to complying with any mandatory requirements prescribing the recording of business (for example tape recording of calls for regulated businesses) businesses should ensure that policies and procedures are realistic. We have seen several examples where a mandatory prohibition set out in a policy but not followed in practice still results in businesses who are unable to recover key records to understand what has taken place. In some cases, clients have to ask counterparties for copies of their records to confirm dealings and transactions. For obvious reasons this is undesirable.

For this reason, some businesses are allowing the use of such technology but requiring key communications to be retained on business systems.

If you would like help on the subject of third-party messaging apps and personal devices or free training around their use and how various businesses are dealing with this issue please [click here](#).



We hope that you have found the January edition of our Bulletin helpful. We welcome all feedback and if there is something you would like to see us include in the next update please let us know.

If you would like to discuss any of the matters raised in this update please contact a member of our team:



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