



MAYER | BROWN

14<sup>TH</sup> ANNUAL

# Investment Management Regulatory University

WEBINAR SERIES

September 30, 2020

Stephanie Monaco  
(202) 263-3379  
[SMonaco@mayerbrown.com](mailto:SMonaco@mayerbrown.com)

Michele Cerezo-Natal  
(212) 506-2143  
[MNatal@mayerbrown.com](mailto:MNatal@mayerbrown.com)

Andrew Olmem  
(202) 263-3006  
[AOlmen@mayerbrown.com](mailto:AOlmen@mayerbrown.com)

Lee Rubin  
(650)-331-2037  
[LRubin@mayerbrown.com](mailto:LRubin@mayerbrown.com)



# Compliance Review or Internal Investigation

What Difference Does it Make?



# Hypothetical: The Well-Intentioned Compliance Officer

- Quarterly Compliance Review in connection with certain accounts that have a third-party investment advisor to confirm that appropriate client documentation is on file.
- The Compliance Officer (CO) notices that the fees look high for one of the accounts.
- CO is diligent and reviews fees for the past 12 months. She notices that fees do not match the fee agreements on file between the third-party adviser and the client.

# The Well-Intentioned Compliance Officer (*cont'd*)

- CO is concerned about the discrepancy.
- CO emails the RM to understand how fees are paid.
- CO calls the firm's back office folks about the fees. She takes copious notes of all of her calls.
- CO asks the business to do an analysis of the fees.
- In the meanwhile, the firm receives a SEC subpoena for all documents relating to fees paid to the adviser.



# Possible Pitfalls of Well-Intentioned Compliance-Led Investigation

- Non-Privileged Internal Investigation/Waiver of Privilege
- Creation of Negative Record
- Spoilation/Failure to Retain Documents
- Delay in Self-Reporting
- Potential Conflict of Interest



# When Should Compliance Involve Legal?

- Risk Assessment vs. Internal Investigation
- Discovery of Possible Non-Compliance
- Data Analysis or Fact-finding
- Internal Escalation
- Self-Report to Regulators

## Best Practices

*No “one-size-fits-all” approach and each firm must make decisions based on the best way for it to achieve effective regulatory and ethical compliance*

- **Effective Compliance Program** – “best defense is a good offense.”
- **Separate Functions of Compliance and Legal** – where separation is not feasible or desirable, officer must be clear about which hat she is wearing for each situation.
- **Clear Policies and Procedures** – establish investigative protocol for when to involve legal and delineation of responsibilities.
- **Routine Communication** – consider monthly meetings between compliance and legal (perhaps, also audit and HR) to discuss arising issues (caution that where compliance becomes aware of a potential violation of law it should be reported immediately and not docketed on next meeting agenda).
- **Hotlines & Whistleblowers** – triage and oversight by compliance but investigation of misconduct (i.e., possible violations of law/regulations) directed by lawyers.



# Congressional Investigations

What Corporate Counsels Need to Know





# Congressional Investigations

- “The Power of Congress to conduct investigations is inherent in the legislative process.” Chief Justice Earl Warren, *Watkins v. United States* (1957).
- Congressional investigations often focus on financial institutions.
  - 1929 Stock Market Crash
  - 2008 Financial Crisis
  - MF Global Failure
  - 2002 Accounting Scandals
  - S&L Crisis



# Congressional Investigations are Different

- Prosecutorial Purpose vs. Legislative Purpose.
- Broader Scope but Broader Negotiations.
- Indefinite Time Frames vs. Congressional Cycle Time Frame.
- Confidentiality of Information Requests and Replies.
- No Judge, Adjudication of Constitutional Privileges.
- Similarity: Consequences of Lying (Even Without Subpoenas).



# Congressional Investigations – Recent Cases

- Trump v. Mazars USA, U.S. Supreme Court, July 9, 2020.
  - *“[R]ecipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation. . . And recipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney client communications and governmental communications protected by executive privilege.”*
- Committee on the Judiciary of the U.S. House of Representatives v. McGahn, D.C. Circuit Court, August 31, 2020.
  - *“Because the Committee lacks a cause of action to enforce its subpoena, this lawsuit must be dismissed. We note that this decision does not preclude Congress (or one of its chambers) from ever enforcing a subpoena in federal court; it simply precludes it from doing so without first enacting a statute authorizing such a suit.”*



[Americas](#) | [Asia](#) | [Europe](#) | [Middle East](#)

[mayerbrown.com](https://mayerbrown.com)

Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England), Mayer Brown (a Hong Kong partnership) and Tauil & Chequer Advogados (a Brazilian law partnership) (collectively the "Mayer Brown Practices") and non-legal service providers, which provide consultancy services (the "Mayer Brown Consultancies"). The Mayer Brown Practices and Mayer Brown Consultancies are established in various jurisdictions and may be a legal person or a partnership. Details of the individual Mayer Brown Practices and Mayer Brown Consultancies can be found in the Legal Notices section of our website. "Mayer Brown" and the Mayer Brown logo are the trademarks of Mayer Brown. © Mayer Brown. All rights reserved.