TORYS LLP

Guide to Canadian White Collar Defence and Investigations

What organizations need to know about white collar defence and investigations in Canada and best practices for managing them.

A Business Law Guide

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The Purpose and Scope of this Guide

Organizations and individuals face ever-increasing government oversight and regulatory power to investigate alleged infractions and secure serious sanctions, which can lead to follow-on litigation and reputational damage. The purpose of this guide is to equip organizations and individuals with knowledge and perspective to help address Canadian white collar risk effectively.

This guide provides information on the principal regulators that may be engaged in investigating and prosecuting white collar matters in Canada and is intended to orient those dealing with possible exposure to white collar regulatory or litigation proceedings in Canada. The primary purpose of the guide is to help corporate parties outside of Canada understand the legal landscape in which these proceedings may be investigated, litigated or resolved, though Canadian parties may find the information helpful as well. Our guide also highlights issues and common practices that a party may encounter in Canada and outlines mitigation strategies to help minimize exposure.

We define white collar defence and investigations practice to broadly encompass matters where there is exposure to governmental regulatory investigations and proceedings, and accompanying reputational and civil litigation risks. We address which Canadian regulators are most active and prominent and describe their powers to investigate and prosecute. We also focus on how potential or actual regulatory breaches give rise to reputational and litigation risks in the Canadian market and how to mitigate them.

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Principal Canadian Regulators

Federal and Provincial Regulators

Canada is a federal parliamentary constitutional monarchy, with a division of powers between the federal and provincial governments. For example, federal Parliament has authority over banking, criminal law and competition (antitrust) law, whereas the provincial legislatures have authority over securities laws and most employment standards.

Consequently, Canada's various regulatory agencies may be either creatures of federal statutes, such as the Competition Bureau, or provincial statutes, such as the Ontario Securities Commission. Collectively, these regulatory agencies are responsible for monitoring, licensing and controlling a wide variety of business activities in Canada.

Business entities operating in Canada may be regulated at both the provincial and federal levels.

Federal Regulators

There are several key federal regulators with authority over seven distinct areas: tax, banking, privacy, employment (in some industries), competition, criminal law and the environment.

1. Tax

Tax is regulated at a federal level by the Canada Revenue Agency (CRA). The CRA is responsible for administering corporate and individual tax, social benefits and related programs, and ensuring compliance with related legislation[1] and programs. In particular, the CRA Criminal Investigations Program is responsible for investigating tax evasion and fraud, which can lead to criminal convictions.

2. Banking

Banking is regulated at a federal level by the Office of the Superintendent of Financial Institution (OFSI), the Financial Consumer Agency of Canada (FCAC), and the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC).

OFSI's mandate is to regulate and supervise federally regulated financial institutions and pension plans operating in Canada. It is responsible for ensuring that financial institutions and pension plans remain in sound financial condition and protect themselves against threats to their integrity and security, as well as monitoring and evaluating risks with a view to reducing or preventing loss. It has oversight over the *Bank Act* and several other pieces of legislation governing financial institutions[2].

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[1] For example, the *Income Tax Act*, *Excise Tax Act*, *Employment Insurance Act* and *Canada Pension Plan*.

[2] For example, *Trust and Loan Companies Act*, *Cooperative Credit Associations Act*, *Insurance Companies Act*, *Pension Benefits Standards Act* and *Pooled Registered Pension Plans Act*.

FCAC's mandate is to protect the rights and interests of consumers of financial products and services. It supervises the compliance of federally regulated financial institutions with consumer protection measures set out in legislation, public commitments and codes of conduct, with a view to promoting access to basic banking services and preventing and addressing unfair, deceptive or abusive practices.

FINTRAC's mandate is to prevent money laundering and terrorist financing, and to provide financial intelligence on these and related activities to facilitate financial crime prevention and protect personal information.

3. Privacy

Privacy is regulated at a federal level by the Office of the Privacy Commissioner of Canada (OPC). The OPC is responsible for protecting and promoting the privacy rights of individuals by overseeing compliance with the (public sector) *Privacy Act* and (private sector) *Personal Information Protection and Electronic Documents Act* (PIPEDA).

4. Employment

While employment is primarily regulated at a provincial level, there are some federally regulated industries pursuant to the division of powers in Canada's Constitution. For example, banking, shipping, air transportation and postal services fall within the purview of the federal government. Employees working in federally regulated industries (and their employers) are regulated under federal employment legislation, including the *Canada Labour Code*[3].

Federal employment standards under the *Canada Labour Code* are regulated by Employment and Social Development Canada (ESDC). The mandate of the Labour Program of ESDC is to promote safe, healthy, fair and inclusive work conditions and cooperative workplace relations, including by ensuring compliance with federal employment standards legislation. The Canadian Human Rights Commission oversees compliance with employment-related legislation relating to human rights, accessibility, employment equity and pay equity.

5. Competition

Competition is regulated at a federal level by the Competition Bureau under the leadership of the Commissioner of Competition. The mandate of the Competition Bureau is to protect and promote competition for the benefit of Canadian consumers and businesses, and ensure compliance with the *Competition Act*. Criminal investigations and prosecutions are jointly pursued by the Competition Bureau and the Public Prosecution Service of Canada (PPSC).

6. Criminal Law

In Canada, only federal Parliament has the authority to enact criminal laws. Criminal laws are codified in the *Criminal Code of Canada* (the *Criminal Code*), and the *Competition Act* for certain white collar crimes. However, both federal and provincial authorities are involved in investigating and prosecuting white collar offences. At a federal level, the Royal Canadian Mounted Police (RCMP) may be involved in investigating white collar criminal offences. At the provincial level, *Criminal Code* violations are prosecuted by Crown attorneys. Some of the key provisions pertaining to corporate criminal liability include criminal negligence, theft, bribery, fraud, corruption, money laundering, insider trading, insider tipping, etc.

[3] Other federal employment legislation includes the *Canadian Human Rights Act*, *Pay Equity Act*, *Accessible Canada Act* and the *Employment Equity Act*.

7. Environment

Environmental issues are regulated both provincially and federally. A number of statutes provide for significant fines and potential imprisonment including for officers and directors. At the federal level, environmental issues are regulated by Environment and Climate Change Canada (Environment Canada), as well as the *Competition Act* for certain conduct. Environment Canada's mandate includes the preservation and enhancement of the quality of the natural environment, including water, air and soil quality, and it is responsible for the enforcement of Canada's federal environmental legislation.

Provincial Regulators

There are several key provincial regulators with authority over six distinct areas: securities, environment, privacy, energy, employment, financial services and tax.

1. Securities Commissions and Securities Self-Regulatory Organization

Capital markets and trading in securities are regulated at a provincial level by securities commissions in each province and territory. The commissions in each province or territory are responsible for overseeing compliance with securities legislation in their jurisdiction. For example, the British Columbia Securities Commission regulates how securities, such as stocks, bonds and mutual funds, are bought and sold in that province, in accordance with the British Columbia *Securities Act*.

The provincial and territorial securities commissions strive to harmonize securities regulations (and enforcement) across Canada through an umbrella collective of representatives of each commission called the Canadian Securities Administrators (CSA). The CSA promulgates quasi-legislation called National Instruments (sometimes Multilateral Instruments), which gain the force of law when they are adopted in the provinces and territories by their respective commissions. Provincial and territorial securities commissions are also responsible for enforcement of the National Instruments adopted in their jurisdiction. Each issuer of securities is principally regulated by a commission based on its primary or head office.

An important organization with oversight over aspects of Canada's capital markets is the Canadian Investment Regulatory Organization (CIRO). CIRO, has received delegated authority from the securities commissions to be the primary regulator for equity and debt trading, as well as full-service investment dealers and mutual fund dealers. In addition, stock exchanges in Canada have certain regulatory functions in respect of the markets they operate; a stock exchange must be recognized by a commission.

2. Environment

Environmental issues are regulated at a provincial level by various ministries in each province and territory who are responsible for overseeing enforcement of provincial environmental legislation. For example, the Ontario Ministry of the Environment, Conservation and Parks protects the province's air, land, water, species at risk and their habitats, as well as enforces compliance with Ontario's environmental laws.

3. Privacy

In addition to being federally regulated by the OPC, every province and territory has its own laws that apply to provincial government agencies and their handling of personal information. Correspondingly, each province and territory has a provincial regulatory body that is responsible for overseeing and enforcing that province's respective provincial access to information and privacy laws. In addition, Alberta, British Columbia and Québec have private-sector privacy laws that may apply instead of PIPEDA (and which are enforced by their provincial regulators).

4. Energy

The development and use of energy is regulated at a provincial level by various regulatory agencies in each province and territory, which are responsible for overseeing enforcement with provincial legislation. For example, the Alberta Energy Regulator regulates the development of oil, oil sands, natural gas, coal resources, geothermal and brine-hosted mineral resources in Alberta.

5. Employment

Employment is primarily regulated at a provincial level (with the exception of a small number of federally regulated industries). Provincially regulated workplaces are subject to provincial or territorial employment legislation, including employment standards legislation, human rights legislation and other employment-related legislation which varies by jurisdiction. Each province and territory has its own employment regulator(s) which enforce the provincial or territorial employment legislation.

6. Financial Services

Financial services (other than banking) are regulated at a provincial level by various regulatory agencies. For example, the Financial Services Regulatory Authority of Ontario (FSRA) regulates, among other things, property and casualty insurance, loan and trust companies, pension plan administrators, and financial planners and advisors in Ontario. The FSRA does this by regulating and supervising the regulated sectors, promoting transparency and disclosure of information, and deterring deceptive or fraudulent conduct through sanctions including fines and imprisonment.

7. Tax

While Canadian provinces have the authority to raise direct taxation within the province, most do not have their own tax administration (they rely on CRA) and have harmonized income and sales tax laws with equivalent federal laws. The notable exception is the Province of Québec, which has its own tax authority (Revenu Québec) that, among other things, carries our tax audits and criminal investigations in the tax area. Other Canadian provinces administer certain specific provincial tax regimes—for example, the Province of Alberta administers its corporate income tax.

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Key Powers of Regulators

Key Powers of Canadian White Collar Regulators

All Canadian white collar regulators derive their powers from specific federal or provincial legislation. Broadly speaking, regulators in Canada have the power to audit or inspect, initiate an investigation, compel evidence, utilize search warrants, issue interim remedies, and secure sanctions, including significant fines and, in rare cases, imprisonment.

Inspections and Investigations

Most regulators have the power to audit and inspect in addition to the power to formally investigate.

Inspections and audits typically focus on ongoing compliance with regulatory obligations. In carrying out inspections, regulators may examine substances, books, records and packages, take samples, and conduct tests.

Investigations are typically focused on assessing whether conduct breaches regulatory requirements and whether a fine or other sanction prescribed by legislation is warranted (including to achieve policy goals, such as deterrence of future wrongdoing). Where investigations may result in quasi-criminal or criminal proceedings and sanctions, the *Canadian Charter of Rights and Freedoms* (the *Charter*) may be invoked. The *Charter* limits these regulatory investigative powers by affording witnesses and potential respondents a host of procedural and substantive rights aimed at balancing legislative objectives with the rights of those who are being investigated and prosecuted. For more information on this, please see the “Applicability of the *Charter*” section of this guide.

A regulator must have jurisdiction in order to commence an inspection or investigation. A regulator’s jurisdiction is set out in their enabling legislation. Jurisdiction has both subject matter and procedural aspects. Inspections or investigations undertaken by a regulator must be within the bounds of the objects of the enabling statute (e.g., securities, environmental protection), and any inspection or investigative powers a regulator exercises must be authorized by statute.

Once jurisdiction is established, certain additional requirements may need to be met in order to initiate an investigation (typically, there are no additional requirements to conduct a more general compliance inspection, provided the inspection is done in good faith). For example, in some regimes, an order may be required to commence an investigation. In other regimes, the statute may provide that a complaint or information received is sufficient to begin the investigative process.

Just because a regulatory body can commence an investigation does not necessarily mean that it will. Some legislative schemes require the regulatory body to investigate when it receives a complaint. Other regimes allow the regulatory body discretion regarding whether to commence the investigation, including in circumstances where the complaint should be, or has already been, investigated by another entity.

Regulatory bodies often have the discretion to refuse an investigation, including where the complaint (if applicable) is frivolous or vexatious.

Investigative Powers

Regulatory bodies in Canada have a broad range of investigative powers. Investigative powers are typically derived by legislation but may also be judicially authorized (e.g., in the case of search warrants). Investigative powers may include entering dwelling and non-dwelling premises, accessing and compelling documents, seizing evidence, obtaining materials in possession of third parties, conducting interviews, and compelling testimony.

Search Warrants

Under some circumstances, a search warrant may be necessary for a regulatory authority to enter dwellings and/or non-dwellings or to access an individual's devices (including those supplied by their employer) for the purpose of carrying out an investigation. Judicial authorization to grant search warrants is limited by section 8 of the *Charter*, which provides a right to be secure against unreasonable search and seizure. Determining whether a search or seizure is unreasonable involves balancing the privacy rights of an individual or business with the public interest in effective law enforcement. In light of this balancing, there are circumstances where a search warrant may be appropriate. For example, it may be necessary in a regulatory investigation where, because of urgency, the exercise of other investigative powers would not be possible or they would be ineffective.

Interim Remedies

In this context, "interim" means a remedy that is imposed prior to a hearing or trial on the merits of whether or not a regulatory breach has occurred. Examples of interim remedies include "freeze orders" to preserve funds, securities and property, pending a regulatory proceeding under securities legislation and interim orders available under the *Competition Act* prohibiting the completion of a proposed merger pending review. As with investigative powers, the power of a regulator to impose interim remedies or to seek them from a court is circumscribed by legislation.

Power to Sanction

Regulatory bodies (or, in some instances, courts) have the authority to impose a broad range of sanctions on individuals and companies. Typically, sanctions may only be imposed after a trial or hearing to determine if there has been a regulatory breach, though some regulators have the power to impose fines and other administrative penalties absent a full hearing. The types of sanctions available will be dictated by the governing statute. Examples of sanctions include compliance orders, conduct orders (e.g., trading bans), fines, imprisonment, disgorgement orders under securities legislation, and garnishment orders if tax debts are not paid. Under some legislation, certain sanctions may only be imposed by a court.

Reporting

Under some regulatory regimes, there are mandatory or discretionary reporting requirements following an investigation and/or the imposition of a sanction. For example, the FCAC is required to disclose findings of an investigation to the public.

Penal and Criminal Liability (Individual Officer and Director Exposure)

In some cases, a regulatory investigation may turn into an investigation to determine penal liability. While officers and directors of corporations cannot be convicted of a crime for acts of the corporation based solely on their status as officers and directors, if they are directing the corporation to commit crimes or participating in criminal activities within the corporate context, such as fraud, they may be held criminally responsible. We note that there are some statutory regimes where individuals can be convicted of offences under other legislation (e.g., privacy legislation). It is also worth noting that, in some circumstances, directors can be held personally liable for unpaid taxes of a corporation.

What Are the Basic Rights of Parties Subject to Regulatory Investigations and Proceedings?

Applicability of the *Charter*

The *Charter* may apply to some regulatory processes, especially if there is a prospect of penal sanctions. When and if the *Charter* applies, it guarantees certain rights to individuals subject to regulatory proceedings, including freedom of expression; the right to liberty and security of the person; the right to be secure against unreasonable search or seizure; rights that arise on detention (i.e., the right to be informed of the reason for detention, etc.); the right not to be subjected to cruel and unusual punishment; and the right against self-incrimination.

Evidence

There are federal and provincial statutes that stipulate rules of evidence applicable to regulatory and court proceedings. There is significant overlap and commonality between these statutes. This evidence-related legislation may affect regulatory investigations by creating protections against self-incrimination, which is also protected in some instances under the *Charter*. While there is a right to remain silent (and not provide evidence) in Canadian criminal proceedings, in many regulatory investigations, including compelled examinations, the legislation requires parties to answer questions even if their evidence may be self-incriminating—but doing so may be under a reservation or rights and protections under applicable legislation. For example, self-incriminating evidence may be admissible against a respondent in securities administrative proceedings, but it may not be used in quasi-criminal proceedings.

The Right to Counsel

Procedural fairness in the context of a regulatory investigation usually includes the right to be represented by counsel. Some of the applicable legislation expressly includes the right to counsel.

Legal Privilege

A right of all those who are subject to regulatory investigations or proceedings in Canada is the right to maintain the confidence of legally privileged information and the right to disclose it only voluntarily. The categories of privilege include solicitor-client and litigation privilege. Solicitor-client privilege covers communications with a lawyer that are intended to be confidential and in which legal advice is sought or given. Litigation privilege covers documents and communications for which the dominant purpose is preparation for litigation (including regulatory proceedings and investigations). Privileged information

acquired in an investigation without the consent of the privilege holder cannot generally be used. We note, however, that there are some statues (e.g., the *Privacy Act*) which allow a regulator to access privileged information without a waiver of privilege.

The Right to Be Heard

A party who is being investigated usually has the right to be heard and respond to the imposition of a purported restriction of rights by a regulator. The extent of the right to be heard depends, in part, on the context of the regulatory investigation and the severity of the restricted rights or other imposed regulatory requirements. Some legislation expressly includes the right to be heard.

Basic Responsibilities of Parties Subject to Regulatory Investigations and Proceedings

The Duty to Cooperate

Natural persons and corporations expressly subject to the jurisdiction of a regulator are required, when summoned by the regulator, to be responsive, truthful and reasonably cooperative within the bounds of that jurisdiction. Parties not within a regulator's jurisdiction but voluntarily responding should act in a truthful manner. Not doing so could give rise to liability for perjury or to regulatory sanctions for misleading a regulator.

Confidentiality

In some regulatory investigations, parties are statutorily bound by confidentiality and may not disclose the fact of the investigation and/or evidence disclosed during an investigation. Where there is no statutory confidentiality obligation, regulatory staff may ask or purport to require a person to treat the investigated matters and process as confidential. Even though the investigation process may be confidential, evidence gathered by a regulator may, at the regulator's choosing, be used in a public hearing into the merits of a case the regulator chooses to prosecute. Also, some regulators may be subject to legislation allowing third parties to access government information, which may include evidence gathered by regulators through investigations.

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Common Issues with White Collar Investigations and Proceedings

1. Civil Litigation Risk

At the heart of all regulatory investigations and proceedings is the risk of findings of fact and regulatory breaches. Such findings may be admissible in civil proceedings as admissions against interest, making it easier for an opposing party in such litigation to prove their civil case. It is not uncommon for plaintiffs' counsel to submit access to information requests to the regulator who conducted the investigation. There are legal restrictions on parties to certain proceedings from sharing or using records from another proceeding.

2. Legal Representation and Conflict Issues

If the decision is made by a corporate target of an investigation to retain a lawyer, issues usually arise regarding the advisability or ability of that lawyer to also represent employees of the corporation, such as senior officers, who were involved in the impugned acts. Canadian law societies (regulators of the legal profession) permit joint retainers, provided there is no conflict in the legal positions of the joint

clients. However, if it is foreseeable that a legal conflict may arise in the future, then it may be prudent for employees to have independent legal counsel, and in any event, an employee may opt to have their own lawyer.

3. Employment Issues

There are a multitude of potential employment issues that arise in connection with white collar investigations and proceedings.

Internal investigations: Conducting an internal investigation can be an effective way to achieve an early assessment of potential exposure. However, rules of natural justice generally apply to internal investigations in Canada. Among other things, employees who are subject to investigations should be notified of the allegations against them and have an opportunity to respond. In addition, confidentiality should be maintained to the extent possible so as not to unnecessarily prejudice the employee target.

Interim employment measures: Organizations should obtain advice with respect to how (and if) employees will work while an investigation (whether internal or regulatory) or regulatory proceeding is ongoing. Suspension with or without pay may be appropriate in some circumstances; however, such suspensions could constitute constructive dismissal. In other cases, it may be appropriate to continue employment but with curtailed duties or other restrictions.

Termination of employment: Where an investigation (whether internal or regulatory) or subsequent proceeding leads to findings of wrongdoing on the part of an employee, this may give rise to disciplinary measures, up to and including termination of employment for cause. An employee who is terminated may bring a wrongful dismissal claim against the employer, depending on the relevant circumstances. A poorly handled investigation by an employer may also give rise to "bad faith" and "moral damages" awards (typically, in connection with the employee's wrongful dismissal claim). For these reasons, any internal investigation should be handled diligently, carefully and in compliance with the principles of procedural fairness.

4. Whistleblower Issues

There is no overarching whistleblower legislative framework in Canada; however, both the *Criminal Code* and provincial legislation provide some protections. For example:

- the *Criminal Code* protects employees from retaliation for reporting illegal activities within their workplace;
- securities legislation in Ontario, Alberta, Manitoba, Saskatchewan and New Brunswick provides formal protections against retaliation for whistleblowers and may also incentivize whistleblowers with potential financial rewards;
- the *Anti-Corruption Act* in Québec lists penalties for retaliations against whistleblowers;
- individuals who report an offence, acting in good faith on reasonable belief, to the Competition Bureau of Canada may request confidentiality and are given some protections under the *Competition Act*;
- the *Bank Act* has protections for individuals who make whistleblower complaints to the FCAC (or to their employer); and

- The *Canadian Environmental Protection Act* provides whistleblower protection for federal government employees. Ontario's *Environmental Bill of Rights* provides similar protection to a broader range of whistleblowers.

If the identity of a whistleblower is known (or is later uncovered), under no circumstances should that whistleblower be retaliated against through dismissal, demotion, discipline, harassment or other punishment (provided the complaint was made in good faith). The *Criminal Code* imposes penalties of up to five years of jail time and unlimited fines for retaliation against whistleblowers.

If a whistleblower has submitted an anonymous complaint, that anonymity should be protected. An internal investigation should not attempt to uncover the whistleblower's identity.

5. Cross-Border Issues and Liability

Due to unprecedented international and cross-border cooperation between regulators and the globalization of business and marketplaces, Canadian regulatory investigations and proceedings often entail cross-border elements. This can lead to a multiplicity of proceedings and challenging issues, such as differing rules of evidence and rights regimes. For example, a typical conundrum in joint or overlapping U.S.-Canada cross-border investigations is the right to remain silent under U.S. law and the obligation under Canadian law to answer potentially self-incriminatory questions under oath in certain administrative contexts. International agreements between regulators and law enforcement agencies may allow Canadian regulators to use its investigative powers to assist a foreign regulator or law enforcement agency.

6. Settlement of Regulatory Proceedings

A significant number of regulatory matters in Canada result in a settlement agreement between the targeted entities and regulatory staff. Such settlement agreements take differing forms depending on the requirements of each regulator as they apply to settlements, and some settlements may require approval by a regulator at a public hearing. In some cases, regulatory settlements must include admissions of wrongdoing, agreed sanctions and a public settlement approval process. Prevailing case law in most provinces suggests that such settlement agreements will be admitted into evidence in civil proceedings, and may therefore be used to help plaintiffs prove their cases against the settled parties.

7. Potential for Immunity for Leniency

In many cases, where potential criminal conduct is discovered, corporations and individuals can seek immunity and leniency from prosecution for such conduct. For example, the Competition Bureau and the Public Prosecution Service of Canada, jointly administer an immunity and leniency program under the *Competition Act*.

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Strategies to Mitigate Exposure

Foster a Compliance Culture

Developing and fostering a culture of compliance is critical to avoiding any white collar incidents (and ensuring that any such incidents are reported promptly). To develop a culture of compliance, tone from the top is important. Tone from the top may be developed by, among other things, ensuring the executive team communicates the importance of compliance with employees and leads by example, incorporating compliance into an organization's overall corporate strategy, etc. Organizations should also be diligent about continually enhancing policies and procedures to ensure compliance with relevant regulatory schemes. This may include establishing a company-wide whistleblower hotline, fostering greater transparency at all levels of the organization, and conducting audits more regularly. Similarly, it is advisable to put in place formal procedures to be invoked to design and manage investigations, should they occur. These steps heighten the likelihood that misconduct will be prevented or detected at an early stage, as well as managed efficiently and effectively, should it occur.

Conducting Internal Investigations

As indicated above, an internal investigation can be an effective way to achieve an early assessment (before a regulatory investigation or proceeding) of white-collar-related exposure. Early exposure assessment can facilitate effective mitigation of exposure to regulatory and related proceedings, as well as exposure to business loss due to ongoing employee misconduct. Conducting an effective internal investigation requires determining the scope and oversight of the investigation, ensuring that evidence is properly preserved and privilege is maintained, and that the rights of all investigation participants are respected.

Self-Reporting to Regulators

Another way to mitigate exposure to a white collar incident is to enhance self-reporting to regulators. For example, the Ontario Securities Commission has put in place a "credit for cooperation" policy . The purpose of this policy is to encourage market participants to "self-police, self-report and self-correct matters that may involve breaches of Ontario securities law or other types of misconduct". The policy does this by creating incentives, such as reduced sanctions for self-reporting conduct that is non-compliant with the Ontario *Securities Act*. Many regulatory agencies make self-reporting easy and accessible. For example, the Competition Bureau has a complaint form online that is accessible to any member of the public.

Settle Civil Proceedings Prior to Settlement of Regulatory Proceedings

In the context of parallel civil and regulatory proceedings in which the respondent assesses there to be material exposure to both civil and regulatory liability and seeks settlements, it is generally advisable that the civil proceedings be resolved prior to settlement of the related regulatory matter. The rationale for this

strategy focuses on the likelihood of public admissions in the settlement of most regulatory proceedings. Since such admissions can exacerbate the related civil exposure, it is frequently best to settle the civil claim before plaintiffs have access to and can benefit from admissions made before the regulator.

Proactively Protect Solicitor-Client Privilege

Canadian law accords robust protection of information and communications that are subject to valid solicitor-client privilege claims. Unlike some non-Canadian jurisdictions in which solicitor-client privilege claims may not apply to legal advice from in-house lawyers, generally Canadian law does not differentiate between in-house and external legal counsel for the purpose of assessing solicitor-client privilege claims, provided that in-house counsel is acting in a legal capacity. However, waiver of privilege can occur by disclosure of privileged communications to third parties. It is therefore critically important to establish protocols to protect privileged information in the context of any white collar investigation or proceeding.

Cross-Border and Cross-Regulatory Coordination

Often Canadian white collar matters involve concurrent non-Canadian investigations and proceedings, as well as the involvement of different domestic regulatory regimes and agencies. In these circumstances it is advisable to establish and ensure coordination amongst a team which is comprised of subject matter and legal experts across each jurisdiction and subject matter. Coordination is necessary to establish and prioritize the areas of greatest exposure to the subject entities.

Disclosure and Public Relations

Public companies in Canada may be required to disclose a white collar incident if it constitutes a material change to their affairs. Even if such disclosure is not necessary, it may nonetheless be advisable to ensure that internal and external messaging concerning the incident is being properly managed. However, the subjects of some regulatory investigations may be subject to statutory obligations of confidence with respect to the investigatory proceeding and subject matter, which may impose limits on what an organization (or individual) can say—both publicly and privately—about the incident.

About Torys LLP

Torys LLP is an international business law firm with offices in Toronto, New York, Calgary, Montréal and Halifax. Torys is known for its client-focused legal excellence, providing services in a range of areas, including capital markets, mergers and acquisitions; corporate governance; proxy contests and other contest for corporate control; litigation and dispute resolution; restructuring and insolvency; taxation; competition and antitrust; environmental, health and safety; debt finance and lending; project development and finance; private equity and venture capital; managed assets; financial institutions; pension and employment; intellectual property; technology, media and telecom; life sciences; real estate; infrastructure and energy; climate change and emissions trading; and personal client services.

Torys regularly assists clients through investigations to identify, assess and mitigate exposure to alleged or potential breach of statutes and regulations. Our experience extends to investigatory matters, including large-scale forensic investigations and independent inquiries. We also interact with regulators on our clients' behalf or guide them closely through those interactions. We also have deep experience defending regulatory investigations and litigation that may follow a breach.

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